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1977

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Bombay High Court

AIR 1977 BOMBAY 1
VAIDYA AND MRIDUL, JJ.

The Maharashtra State Road Transport Corporation, Appellant v. Raoji Hari Lad, Respondent.

First Appeals Nos. 381 of 1967 and 617 of 1969, D/- 23-4-1976*.

(A) Limitation Act (1963), Section 3 — Exemption from limitation — Court has no inherent power to grant exemption except on grounds specified in Sections 4 to 24. AIR 1947 All 256 Dissented from.

Thus where the suit for arrears of pay was filed on basis of decree of the first appellate court and the plaintiff was seeking exemption from limitation on ground of pendency of second appeal preferred by the defendant, but there was no stay of operation of the decree of the first appellate court, the plaintiff was not entitled to exemption on ground of general principle of suspension of limitation or right of action. (Paras 12, 13)

No Court is entitled to invoke any principle for holding a claim as not barred by Law of Limitation if such a principle is not to be found expressly or by necessary implication in the provisions of the Limitation Act. No separate or independent principle can be invoked to add to or supplement, much less abrogate or nullify the provisions of the Limitation Act which is conclusive in what it provides and what it forbids. AIR 1935 PC 85 and AIR 1971 SC 2313, Relied on; AIR 1947 All 256, Dissented from. (Para 8)

(B) Payment of Wages Act (1936), S. 22 — Bar of suits — Suit for recovery of arrears of pay, provident fund, gratuity, bonus, etc.

*(Against order of N. M. Kothari, Civil J. Sr. Divn., Nasik in S. C. S. No. 48 of 1964).

JT/JT/E397/76/MBR

— Application under the Act pending — Held, jurisdiction of civil court is not barred.

(Para 4)

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C. J. Sawant, for Appellant in F. A. No. 381 of 1967 and for Respondent in F. A. No. 617 of 1969; N. G. Gandhi with N. D. Hombalkar, for Appellant in F. A. No. 617 of 1969 and for Respondent in F. A. No. 381 of 1967.

MRIDUL, J.— These two companion appeals arise out of the judgment and decree dated 30th November 1966, rendered in Special Civil Suit No. 48 of 1964, filed in the Court of the Civil Judge, Sr. Dn., at Nasik. By the said judgment and decree, the claim of the plaintiff was partially allowed against the defendant.

2. The plaintiff was an employee of the Maharashtra State Road Transport Corporation, (hereinafter referred to as "the said corporation"), and was working as a cashier-cum-reservation clerk. The date of birth of the plaintiff being 24th October 1905, under the rules of the corporation, the plaintiff was liable to retire on 24th October 1963. The plaintiff, however, was dismissed by the Corporation on 15th July 1953. Aggrieved by the dismissal, the plaintiff filed a Regular Civil Suit No. 257 of 1957 on 14th March 1957, inter alia claiming a declaration that the order of dismissal was wrong and for consequential reliefs. The said suit was dismissed by the learned trial Judge on 26th August 1959. In appeal preferred therefrom, the appellate Court by its judgment and decree dated 12th December 1961, decreed the plaintiff's suit. It

gave a declaration in favour of the plaintiff that he continued to be in service till the date of the filing of the said suit i. e. till 14th March 1957. The appellate Court also granted a decree in favour of the plaintiff for arrears of salary and certain other incidental charges and costs of the suit. The matter did not rest there. The unsuccessful Corporation sought to have the appellate decree reviewed in appeal by this Court by preferring a Second Appeal being Appeal No. 440 of 1962. This Court, however, by its judgment and decree dated 9th January 1964, dismissed the said Second Appeal, subject to a variation in the decree of the appellate Court as to the amount of arrears of pay. The said variation, however, is not material for the purposes of the present appeal.

3. The plaintiff filed the present suit being Special Suit No. 48 of 1964, inter alia for recovering a sum of Rs. 24,324-02 ps., being the amount payable to him as arrears of pay, provident fund, gratuity, bonus and other benefits as an employee of the Corporation. In the alternative, the plaintiff prayed for accounts in respect of the said claims. Several issues were raised before the learned Judge. Having regard to the limited controversy that is raised before us, it is unnecessary to notice all the issues or the findings relating thereto. Suffice it to observe, that the learned Judge passed a decree in favour of the plaintiff for a sum of Rs. 5,963-13 ps. being the emoluments for the period of 3 years prior to the date of the suit. The learned Judge did not grant to the plaintiff arrears prior to the three years from the date of the suit. Aggrieved by the said judgment and decree, the Corporation filed the abovementioned First Appeal No. 381 of 1967. The plaintiff also preferred an appeal being the abovementioned First Appeal No. 617 of 1969, challenging the refusal of the learned Judge to grant him his claim over and above the one which was decreed in his favour.

4. Shri C. J. Sawant, the learned counsel for the Corporation, assails the decree on the ground that the suit was barred under the provisions of the Payment of Wages Act and the Rules framed thereunder. This challenge is based upon fact that the plaintiff had preferred an application under the said Act and the said application was pending in the Court of the Joint Civil Judge, Sr. Dn., Nasik. The learned Judge has in paragraph 24 of his judgment dealt with the said contention exhaustively. After noticing the relevant provisions of law, the learned Judge answered the issues against the Corporation. We have carefully analysed the discussion of the learned Judge and we do not find any infir-

mity in the reasoning of the learned Judge. We are also of the opinion that having regard to the provisions of the Payment of Wages Act and the facts and circumstances of the instant case, it must be held that the present suit was not barred by any of the provisions of the Payment of Wages Act or the Rules framed thereunder or under the provisions of the Minimum Wages Act or the rules framed thereunder. No other point having been urged by the learned counsel for the Corporation we take the view that the appeal preferred by the Corporation is liable to be dismissed.

5. Shri N. G. Gandhi, the learned counsel for the plaintiff, in support of the claims of the plaintiff for a period prior to three years from the date of the suit, fairly concedes that the plaintiff's case for exemption from the rigours of law of limitation is not based either on Section 13 or 15 of the Limitation Act. However, the learned counsel urges that the plaintiff, in the facts and circumstances of the case is entitled to "general principles of suspension of limitation or right of action." The learned counsel emphasises that in view of the second appeal preferred by the Corporation, the plaintiff should not be denied his claims if he awaited the decision of this Court in the said second appeal. He asserts that the period which was taken for the disposal of the said Second appeal must be excluded from consideration and arrears of salary should be decreed upon the said footing. It is the submission of the learned counsel that in cases where a party is prevented by reason of certain valid circumstances from taking any action and enforcement of his right, the Courts relax the rigour of the bar of limitation on the principle of suspension of limitation or right of action.

6. Reliance is placed upon a Division Bench judgment of the Allahabad High Court in Murlidhar v. Ram Saran Das reported in AIR 1947 All 256. In that case after holding that the plaintiff therein was not entitled to the benefit of Section 15 of the Limitation Act, 1908, the Division Bench of the said High Court nevertheless took a view beneficial to the plaintiff therein on the basis of general principles of suspension of limitation or right of action in cases where a party is prevented under certain circumstances from taking action in enforcement of his rights. The learned counsel fairly concedes that there is cleavage of judicial opinion in regard to the said question. He is fair enough to draw attention to a judgment of the same High Court where a contra view was taken. The learned counsel also draws attention to the fact that the said judgment of the Allahabad High Court has been noticed by the Supreme Court in

Bachan Singh v. Dhian Dass reported in AIR 1974 SC 708. After noticing the said decision of the Allahabad High Court, the Supreme Court, however, left the said question open.

7. We are unable to accept the submission of the learned counsel for the plaintiff that it is open to a Court of law to obviate the bar of limitation upon a general principle of suspension of limitation or right of action.

8. The Limitation Act is founded on public policy. The Limitation Act of 1963 is not only a codifying Act but also an amending Act. The provisions of the Limitation Act are a Code complete in themselves. Section 3 of the Limitation Act enjoins a Court to dismiss every suit, appeal or application which is not within the prescribed period. Gateways from the peremptory provisions of Section 3 are provided by Sections 4 to 24. It follows from the provisions of the Limitation Act and the principles enshrined therein that no Court is entitled to invoke any principle for holding a claim as not barred by Law of Limitation if such a principle is not to be found expressly or by necessary implication in the provisions of the Limitation Act. No separate or independent principle can be invoked to add to or supplement, much less abrogate or nullify the provisions of the Limitation Act. In our opinion, the Limitation Act is conclusive in what it provides and what it forbids. The Act does not confer any inherent powers in a Court to relieve a litigant from its rigour except in cases covered by Sections 4 to 24 thereof.

9. We are fortified in our view by the observations of the Privy Council in Maqbul Ahmad v. Onkar Pratap Narain Singh reported in AIR 1935 PC 85. It was a case where the provisions of Section 14 of the Limitation Act 1908 were invoked. The invocation proved futile. The argument then was that there was a discretion in the Court to relieve litigants in cases of the hardship, from the operation of the Limitation Act. In repelling the said argument it was observed by the Privy Council at page 88 as follows:—

“In their Lordships’ opinion it is impossible to hold that in a matter which is governed by Act, an Act which in some limited respects gives the Court a statutory discretion, there can be implied in the Court, outside the limits of the Act, a general discretion to dispense with its provisions. It is to be noted that this view is supported by the fact that Section 3 of the Act is peremptory and that the duty of the Court is to notice the Act and give effect to it, even though it is not referred to in the pleadings.”

10. In a similar vein is the observation made by the Supreme Court in India

Electric Works Ltd. v. James Mantosh reported in AIR 1971 SC 2313. The Supreme Court at page 2317 observed:

“x x x all questions of limitation must be decided by the provisions of the Act and the Courts cannot travel beyond them”.

11. It is not disputed before us that the article which is applicable to the plaintiff's claim in suit is Article 7 of the Limitation Act, 1963. The said Article corresponds to Articles 7 and 102 of the Act of 1908. A claim for recovery of salary under Art. 102 came up for consideration before the Supreme Court in Sakal Deep Sahai Srivastava v. Union of India reported in AIR 1974 SC 338. In that case the question that was posed before the Court was whether Article 102 or 120 of the Limitation Act, 1908 applied to a claim for arrears of salary. The Supreme Court referred its earlier decision in Madhav Laxman Vaikunthe v. State of Mysore, reported in AIR 1962 SC 8, and held that Article 102 of the Limitation Act applied to such a case.

12. Under Article 7, the period prescribed is 3 years. Consequently, the plaintiff was entitled to the arrears of salary for 3 years only from the date of the suit. The plaintiff seeks exemption on the ground of pendency of the said second appeal in this Court between 12th December 1961 and 9th January 1964. It is true that the plaintiff cannot be denied his salary for the earlier period if the pendency of the said Second Appeal in this Court can be a relevant consideration. Since there was no stay of the operation of the decree of the First Appellate Court passed in his favour there is no reason why he could not file the instant suit immediately thereafter. At the highest it might have been more prudent on his part not to have enforced his claims based on the said decree when it was under appeal in this Court, but it cannot furnish a ground for exemption from the lethal limitational bar.

13. It is difficult for us to follow the decision of the Allahabad High Court in Murlidhar's case (AIR 1947 All 256) (supra) having regard to the provisions of the Limitation Act and the scheme thereof as also dicta of the Privy Council in Maqbul Ahmad's case (AIR 1935 PC 85) (supra) and of the Supreme Court in India Electric Works Ltd.'s case (AIR 1971 SC 2313) (supra). We respectfully dissent from the view taken by the Allahabad High Court. We have no hesitation in rejecting the contention that the plaintiff is entitled to relaxation of the rule of limitation by reason of any hardship or special cir-

circumstances of the case. In our opinion, there can be no obviolation of the bar of limitation on the ground of general suspension of limitation or right of action.

14. In the result, both the First Appeals are dismissed. The Judgment and decree of the trial Court are confirmed. There will be no order as to costs in both the appeals.

15. As the plaintiff is unsuccessful on a technical plea of limitation, we think, that the proper order to be made is that the court fees payable on the appeal should be borne by the Corporation. Accordingly, the court-fees payable on appeal should be recovered from the Corporation, and a certificate should be issued to the Collector accordingly.

Appeals dismissed.

AIR 1977 BOMBAY 4

DESHMUKH AND DIGHE, JJ.

Mrs. Jamna Mahadeo Patil and another, Petitioners v. Devarat Mehta and others, Opponents.

Special Civil Appln. No. 1952 of 1975, D/- 16-10-1975.*

(A) High Court Rules and Orders — Bombay High Court Appellate Side Rules (1960), Chapters XVII, XXVIII — Petition challenging breach of statutory conditions of detention — Petition would lie under Chapter XXVIII as Criminal Application and not under Chapter XVII as Special Civil Application. (Constitution of India, Article 226).

Where detention itself is challenged on the ground that it is unlawful, here is a challenge to the deprivation of liberty in its entirety. When a person is detained and is required to be detained under the statutory provisions in a certain manner, not to detain him as such or to put conditions not validly enacted but to interfere with the statutory conditions under which he must be detained also amounts in principle and in law to an interference with his personal liberty. It may be that this interference is of a partial character, when the action touches only a part of the liberty, in the sense, the manner of detention. It cannot be said that unless detention itself is challenged or the legality of the conditions of detention are challenged, there is no challenge to any part of the personal liberty at all. If the action of the State Govern-

ment is in clear breach of the provisions of the Maintenance of Internal Security (Maharashtra Conditions of Detention) Order, and that alone is challenged to the extent of the conditions under which the detenu should have been restrained, there is undoubtedly a challenge to a part of the deprivation of personal liberty of the detenu. When there is such partial interference with the personal liberty of a person, a writ of habeas corpus seems to be available. (Para 8)

In view of this, a petition challenging breach of statutory conditions of detention is properly an application for habeas corpus or application of that nature and would be within the ambit of Chapter XXVIII of the Bombay High Court Appellate Side Rules, 1960, as Criminal Application and not under Chapter XVII as Special Civil Application. 1923 AC 603 and AIR 1966 SC 424, Relied on.

(Para 10)

Cases Referred: Chronological Paras
(1975) 77 Bom LR 506 = 1975 Mah LJ 650

6

AIR 1966 SC 424 = 68 Bom LR 481 =
1966 Cri LJ 311

8

1923 AC 603 = 92 LJ KB 830

8

Porus Mehta with Sethna and K. D. Shah, for Petitioners; H. G. Advani with V. P. Tipnis, Asst. Govt. Pleader, for Opponents.

DESHMUKH, J.:— This is a petition where the petitioner has been detained under the Maintenance of Internal Security Act, 1971, subject to the conditions of the Maintenance of Internal Security (Maharashtra Conditions of Detention) Order, 1971. These Rules were amended later by the addition of Rule 38, which vests in the State Government power to withdraw any concessions or facilities laid down by the order. Some of the facilities like supplementing diet with the help of food from outside have been withdrawn by the State Government in view of certain orders passed under the added Rule 38. Most of the petitioners filed applications where detention order itself is not being challenged nor the validity or legality of the conditions incorporated in the said order of 1971 are concerned. The only complaint that is being made is that the conditions of detention, which were available under the said Order of 1971 are also not permitted to be availed of by the petitioner, and as such he merely wants a writ of mandamus to be issued directing the State Government or the Authorities detaining the petitioner to follow the provisions of the

*(To set aside order of Dist. Magistrate, Kolaba, D/- 26-7-1975).

Maintenance of Internal Security (Maharashtra Conditions of Detention) Order, 1971 (hereinafter referred to as 'the Order of 1971').

2. Several such applications, including the present petition, have been presented in this Court as Special Civil Applications. A question arose whether these petitions should be filed under Chapter XXVIII of the Bombay High Court Appellate Side Rules, 1960, before a Division Bench doing criminal business on the Appellate Side or they should be Special Civil Applications under Article 226 before a Division Bench doing constitutional work. Since such a question arose, the learned Chief Justice by his order dated 4th October, 1975, as amended later, referred this matter to the present Bench for hearing the advocates concerned on this subject and give a decision whether such applications should be directed to be registered as Criminal Applications under Chapter XXVIII or Special Civil Applications under Chapter XVII of the Bombay High Court Appellate Side Rules, 1960.

3. There was an earlier reference when Special Civil Applications Nos. 2212 and 2213 of 1975 were referred for the specific decision as to whether applications challenging the detention and in the nature of habeas corpus would lie under Chapter XXVIII or under Chapter XVII of the Bombay High Court Appellate Side Rules, 1960. The question raised was that after the repeal of Section 491 of the Criminal Procedure Code, 1898, the provisions of Chapter XXVIII have become ineffective and do not apply to writ petitions challenging the detention and claiming a writ of habeas corpus. That reference was decided on 1st and 2nd October, 1975, and on the construction of the Rules it has been held that all such applications, where the subject-matter is the writ of habeas corpus, would appropriately lie under Chapter XXVIII of the Bombay High Court Appellate Side Rules, 1960.

4. Before we consider the classification of such petitions let us analyse the prayers that are made and find out the real nature of the petition. What is being stated before us is that the detenu is not challenging the order of detention at all. He is also not challenging the validity and legality of the order of 1971 dealing with the conditions of detention. The detenu is willing to stay behind the bars but under the condition of the Order of 1971 and in conformity thereof. Since he is not being so detained but some of the

rights available to him under that Order are also being deprived, he is merely requiring the Court's assistance for a writ or order in the nature of mandamus requiring the statutory authorities connected with the detention of the petitioner to observe the law and the rules that are laid down in that Order of 1971. So viewed, there is nothing in the contents of the petition nor the prayer of relief which smacks of any claim or relief of the nature of habeas corpus. That being the real nature of the petition, the proper classification would be a Special Civil Application under Chapter XVII of the Bombay High Court Appellate Side Rules, 1960.

5. For the purpose of making such an argument it is stated that the earlier order passed by this Court in Special Civil Applications Nos. 2212 and 2213 of 1975 may be accepted as basis for classifying the applications. If the present petitions could also be described as applications for habeas corpus or applications falling in that category of matters, a direction may be given to treat them as criminal applications falling under Chapter XXVIII of the Bombay High Court Appellate Side Rules. However, that order has analysed the provisions of Rule 622 of the Original Side Rules, Chapters XVII, XXVI and XXVIII of the Appellate Side Rules, and has concluded that for all applications under Article 226 for issue of writ of habeas corpus the Court made available is the Division Bench taking criminal business on the Appellate Side as per Rule 1 of Chapter XXVIII of the Bombay High Court Appellate Side Rules, 1960. Barring this kind of application under Article 226, all other applications falling under Article 226 of the Constitution are held to lie properly under Chapter XVII. Accepting that classification it is stated that an application of the present type would on that classification itself fall under Chapter XVII.

6. There is an obvious fallacy in the argument that is addressed to us. If there is a rule like Rule 38 in the Order of 1971, the State Government is purporting to act under that rule and deprived the detenus of certain conditions comprising the Order of 1971. It was brought to our notice that a rule in similar terms contained in the conditions of detention order under COFEPOSA have been struck down by the judgment of this Court in *Ramesh Ram Lal Narang v. C. T. A. Pillai*, (1975) 77 Bom LR 506. However, this does not mean that Rule 38 of the Order

of 1971 automatically gets struck or becomes ineffective unless there is a judicial pronouncement. We were further told that the detenus are not yet informed by the Government as to how they are deprived of the facilities which were earlier available under the conditions incorporated in the Order of 1971. They are merely told that they will get orders in due course. Whether the deprivation is after passing an order under Rule 38 or without acting under that rule is not known to the litigants. So far as they are concerned and on the basis of the information supplied by the Government or, in fact, not supplied by the Government, they treat the deprivation of certain conditions as a stark illegal act and, therefore, want a writ of mandamus to be issued by this Court.

7. What really is the nature of the petition even on the basis of all that is stated before us? There may be an order under Rule 38 which is responsible for depriving the facilities earlier available. In that case the Government is seeking to act under Rule 38. If there is no such order either individually against each detenu or collectively against a class, the action is clearly contrary to the provisions of the Order of 1971. Whatever the real manner in which interference with the conditions of detention is being brought about, the fact remains that there is a complaint against the legality thereof and, therefore, some relief is asked for from this Court.

8. It is here that the real nature of the writ of habeas corpus and the manner in which this important writ can be utilised by the citizen, falls for consideration. Historically speaking this is being considered in England as one of the most important writs and practically the main writ in the field for obtaining a swift and imperative remedy in all cases of illegal restraint or confinement. These observations are made by Lord Birkenhead in *Secretary of State for Home Affairs v. O'Brien*, 1923 AC 603. Mr. Seervai in his learned treatise *Constitutional Law of India*, 1967 Edition has traced the history of the writ jurisdiction in England and particularly relating to the habeas corpus writ in Section 1 of Chapter XVI. After quoting an extract from the judgment of Lord Birkenhead, the learned author observed that the brief historical account of the writ of habeas corpus shows that the writ is available in all cases of wrongful deprivation of personal liberty and is available against the

Crown, its ministers and its servants. In our view, where detention itself is challenged on the ground that it is unlawful, here is a challenge to the deprivation of liberty in its entirety. When a person is detained and is required to be detained under the statutory provisions in a certain manner, not to detain him as such but to interfere with the statutory conditions under which he must be detained also amounts in principle and in law to an interference with his personal liberty. It may be that this interference is of a partial character, when the action touches only a part of the liberty, in the sense, the manner of detention. This approach is historically well founded and it is not possible to accept the argument that unless detention itself is challenged or the legality of the conditions of detention are challenged, there is no challenge to any part of the personal liberty at all. If the action of the State Government is in clear breach of the provisions of the Order of 1971, and that alone is challenged to the extent of the conditions under which the detenu should have been restrained, there is undoubtedly a challenge to a part of the deprivation of personal liberty of the detenu. When there is such partial interference with the personal liberty of a person, a writ of habeas corpus seems to be available. That inference can be drawn from the observations in the *Halsbury's Laws of England*, Third Edition, Volume II, in paragraph 41 on page 24. The learned author observed that the writ is applicable as a remedy in all cases of wrongful deprivation of personal liberty. If the detention itself is not challenged, but the manner of detention is challenged, it amounts to throwing the challenge to a partial deprivation of personal liberty and in essence the remedy is nothing but a writ of habeas corpus. It appears that general observations are made by the Supreme Court in relation to the conditions of detention, when the detenu is not being permitted to transfer his manuscript to his wife for its ultimate publication. It was admittedly a book on scientific subject and the question was whether the detenu could be prevented from publishing such a book simply because he was under detention. The Supreme Court observed in *State of Maharashtra v. Prabhakar Pandurang Sanzgiri*, 68 Bom LR 481 at page 483 = (AIR 1966 SC 424 at pages 426, 427) that if the appropriate authority seeks to impose on a detenu a restriction not so prescribed, the said authority will be

interfering with the personal liberty of the detenu in derogation of the law whereunder he is detained. If that happens, the High Court, in terms of Article 226 of the Constitution, can issue an appropriate writ or direction to the authority concerned to act in accordance with law. No direct judgment has been cited before us, but observations of this type, which are made from time to time by the Supreme Court, have been relied on to point out that the deprivation of personal liberty can arise in several ways. Not to detain a detenu in terms of the conditions validly enacted or to put restrictions or conditions not validly enacted, to disregard the conditions which are valid and to act in derogation thereof would be very much a shade of the deprivation of the liberty. There is, therefore, no doubt that as and when the question of personal liberty arises and the allegation is that the detention is unlawful, in any of the ways including the partial challenge to conditions only, as we have discussed above, the petition seems to be either a petition for claiming habeas corpus or a petition of that nature falling under Article 226 of the Constitution.

9. If this is the real nature of the petition that is before us, could it be said that such a petition would not fall under the provisions of Chapter XXVIII of the Bombay High Court Appellate Side Rules, 1960, as interpreted by this Court in Special Civil Applications Nos. 2212 and 2213 of 1975. For applications of habeas corpus or applications in the nature of habeas corpus under Article 226, the only provisions made by the Bombay High Court are those contained in Chapter XXVIII. If those rules apply, the applications for seeking any relief of the nature contemplated by that Chapter in relation to Article 226 of the Constitution must always be marked as Criminal Applications falling under that Chapter. This is purely a procedural provision and this Court has pointed out in the earlier judgment that the real nature of the dispute with reference to the right of appeal can always be raised and point out to the Court when the question of leave arises.

10. One of the arguments that was addressed to us was what the petitioner is seeking is a writ of mandamus to the authorities to observe law. That may be the form in which the prayer has been drafted. However, if the State Government seeks to detain the detenu under some orders by which the facilities earlier

given are not made available, the new pattern of detention represents the conditions of detention. Unless this action is struck down, a further direction to detain the detenu in a certain manner or under certain rules may not be possible. In spite of the manner of drafting, we are satisfied that the present petition as also similar other several petitions of that type are properly applications for habeas corpus or applications of that nature and properly lie within the ambit of Chapter XXVIII of the Bombay High Court Appellate Side Rules. This being our view, we direct that the present application as also all similar applications should be registered as Criminal Applications under Chapter XXVIII of the Bombay High Court Appellate Side Rules, 1960, and they should be processed and dealt with accordingly.

11. Any interim relief granted in this and similar other Applications marked as Special Civil Applications to continue as an interim relief under their new designations as Criminal Applications.

Order accordingly.

AIR 1977 BOMBAY 7

VAIDYA, J.

Keshavji Ramji Sanghavi, Petitioner v. Smt. Sulochanabai Ramkrishna Mirwanekar, Opponent.

Special Civil Appln. No. 431 of 1972, D/- 20-11-1975.*

(A) Bombay Rents, Hotel and Lodging House Rates Control Act (1947), Section 13 (1) (a) — Transfer of Property Act (1882), Section 108 (o) — Removal of termite affected old beam and refixing a new one by tenant — Not contrary to provisions of Section 108 (o) entitling landlord to recover possession. Special Civil Appln. No. 431 of 1966, D/- 23-8-1968 (Bom), AIR 1929 PC 108 and (1968) 9 Guj LR 104, Rel. on. (Paras 4, 6)

Cases Referred: Chronological Paras (1968) Spl. Civil Appln. No. 431 of 1966, D/- 23-8-1968 (Bom) 6 (1968) 9 Guj LR 104 = ILR (1967) Guj 1159 10 (1958) Civil Revn. Appln. No. 431 of 1958, D/- 16-7-1958 (Bom) 5 AIR 1929 PC 108 = 56 Ind App 140 7

*(To set aside order of Joint Judge at Thana, in Civil Appeal No. 221 of 1970, D/- 18-1-1972).

HT/HT/C817/76/MBR/RSK

M. R. Kotwal and S. R. Chitnis, for Petitioner; S. S. Pandit for V. P. Tipnis, for Opponent.

ORDER:— This is a tenant's Special Civil Application under Article 227 of the Constitution directed against the judgment and the decree passed by the Joint Judge, Thana, on January 18, 1972, under Section 13 (1) (a) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947, read with Section 108 (o) of the Transfer of Property Act, 1882.

2. The learned Civil Judge, Senior Division, Thana, held in the suit for eviction, filed by the landlord in his judgment and decree, dated March 31, 1970, that the tenant had removed an old beam ridden with termite and refixed a new one; and this would not be an act contrary to the provisions of Clause (o) of Section 108 of the Transfer of Property Act; and, therefore, dismissed the plaintiff's suit.

3. The learned Joint Judge reversed that decision holding:—

"The act of the defendant in removing the old beam from its place was nothing but destructive or permanently injurious to the suit premises, irrespective of the fact whether actual damage was caused to the building or not. There is also some evidence of damage caused to the plaintiff's house. I, therefore, feel that the defendant's act of removing the old beam from its place was contrary to the provisions of Section 108 (o) of the Transfer of Property Act and defendant was liable to be evicted from the suit premises on that ground."

The learned Joint Judge misconceived the law under Section 13 (1) (a) of the Bombay Rent Act and Section 108 (o) of the Transfer of Property Act. The said provisions are as under:—

"S. 13 (1) Notwithstanding anything contained in this Act, a landlord shall be entitled to recover possession of any premises if the Court is satisfied—

(a) that the tenant has committed any act contrary to the provisions of clause (o) of Section 108 of the Transfer of Property Act, 1882;

x x x x x x

S. 108. In the absence of a contract or local usage to the contrary, the lessor and the lessee of immovable property, as against one another, respectively, possess the rights and are subject to the liabilities mentioned in the rules next following, or such of them as are applicable to the property leased:—

* * *

(o) The lessee may use the property and its products (if any) as a person of ordinary prudence would use them if they were his own; but he must not use, or permit another to use, the property for a purpose other than that for which it was leased, or fell or sell timber, pull down or damage buildings belonging to the lessor, or work mines or quarries not open when the lease was granted, or commit any other act which is destructive or permanently injurious thereto."

It is clear that Clause (o) of Section 108 requires the tenant to use the property as a person of ordinary prudence would use and not to use it for a purpose other than that for which it was leased. It is only when the Court is satisfied that the tenant has committed any act contrary to the provisions of Section 108 (o), that the Court has jurisdiction to pass a decree for possession in favour of the landlord under Section 13 (1) (a).

4. I do not think that if a termite affected beam is replaced with a new one and is removed, it can be said to be an act of imprudence on the part of the tenant. By no stretch of words, can it be said that removing such a old and hazardous beam and putting a new beam is an act contrary to provisions of Cl. (o) of Section 108 of the Transfer of Property Act, 1882.

5. Further it is well settled that a test that has to be applied for deciding whether there is a contravention of provisions of Section 108 (o) is what was the tenant doing? See an unreported decision in Civil Revn. Appln. No. 431 of 1958, decided by Chagla C. J., on 16-7-1958 (Bom).

6. In Special Civil Appln. No. 431 of 1966 decided on 23-8-1968 (Bom) V. S. Desai, J, discussed the effect of Section 13 (1) (a) of the Bombay Rent Act read with Section 108 (o) of the Transfer of Property Act as under:—

"Section 13 (1) (a) provides that if the tenant has committed any act contrary to the provisions of Clause (o) of Section 108 of the Transfer Property Act, 1882, the landlord would be entitled to a decree in eviction. Clause (o) of Section 108 of the Transfer of Property Act, so far as is material for our purpose, prohibits the tenant to use or permit another to use the property for a purpose other than that for which it was leased. In order that the tenant should be guilty under this clause, it must be shown that the property was let for a specific purpose and that the

tenant had used it nor for that purpose but for some other purpose. Now, the view taken by the lower Appellate Court was that the premises in the present case were let for the purpose of storage of goods and that by storing a motor-car the tenant had used it for a different purpose. It is difficult to accept this view of the lower appellate Court. The change of purpose, which is contemplated under the provisions of clause (o) of Section 108 of the Transfer of Property Act, is a purpose other than the one for which the premises let were intended to be used and contemplates the user of a different kind from the one which was intended at the time of letting.....

The change of purpose contemplated by clause (o) of Section 108 of the Transfer of Property Act is change from user of one kind to another involving waste, alterations, destruction or damage of the property etc. or amounting to an act of nuisance. A change of user, which does not involve any such element, will not amount to a breach of Section 108 (o) of the Transfer of Property Act. Under Section 6 of the Rent Act the broad classes of purposes or the users of the premises to which the rented premises may be put are specified as for residence, education, business, trade or storage. The actionable ground contemplated by Section 13 (1) (a) by its reference to clause (o) of Section 108 of the Transfer of Property Act is a change of purpose or user from one kind of user to another from amongst the several users as are specified in Section 6 of the Rent Act, except in cases where by a specific restrictive covenant in the lease the user is still further restricted."

With respect, what V. S. Desai J. has observed with regard to change of user would also apply under Section 108 (o) to the change of a termite ridden old beam to a new beam by the tenant, which instead of causing any damage to the tenement is bound to benefit. A breach of act which cannot be said to be contrary to Section 108 (o), unless it is an act of an imprudent person, or an act which is destructive or permanently injurious thereto. I do not think that if a termite ridden old beam is removed and a new beam is put, it can be said to be act of an imprudent person or an act destructive or permanently injurious to the premises.

7. In this connection, it is useful to refer to the decision of the Privy Coun-

cil in *UPO Naing v. Burmal Oil Co. Ltd.*, 56 Ind App 140 = (AIR 1929 PC 108). In that case the owner of oil sites and grantee from Government of the right to win oil therefrom leased sites and the right to win oil for twenty-five years to the respondents, who agreed to pay royalties on oil won by them. In sinking wells, which did not produce oil in commercial quantities, the respondents found natural gas. They tapped the gas by pipes, and for six years used it for their own purpose.

8. The Privy Council held that the appellant owner of the oil sites was not entitled to compensation for the gas, so taken, since that right was not included in the right to royalties upon the oil won; and the lease, on its true construction, was merely a lease for the purpose of winning oil, and the appellant having no property in the gas the respondents were entitled to reduce into possession and use it provided they did so without injury to the leased property; and that was consistent with the Transfer of Property Act, Section 108 (o).

9. The first Lord Hailsham L. Chancellor observed at page 145:—

"A further argument was based upon the provisions of Section 108 (o), of the Transfer of Property Act, 1882, which provides that the lessee of property must not use the property for a purpose other than that for which it was leased. In their Lordships' judgment it is not necessary exhaustively to discuss the limits of that provision, but there seems to be nothing inconsistent with its terms in the use of the gas which is necessarily set free by reason of the sinking of the oil well for the respondents' own purposes without doing any damage or any injury to the property leased."

The damage or injury to the property leased is, therefore, essential before the landlord can rely on the act as one in contravention of Section 108 (o) of the Transfer of Property Act within the meaning of Section 13 (1) (a) of the Bombay Rent Act.

10. Similar view appears to have been taken by a single Judge of the Gujarat High Court in *Mahmad Umar v. Manilal*, (1968) 9 Guj LR 104, where it was laid down that having regard to the provisions of Section 108 (o) of the Transfer of Property Act, a change of user in the absence of a contract to the contrary, would not result in giving a cause of action for evicting the tenant unless it is further proved that it is either destructive or

permanently injurious to the property or its produce in the eye of law.

11. In the result, it must be held that the learned Joint Judge acted without jurisdiction in passing the decree for eviction on the erroneous basis that he had a power to do so under Section 13 (1) (a) of the Bombay Rent Act. The petition is allowed. The judgment and the decree passed by the learned Joint Judge, Thana, on January 18, 1972, are set aside and the judgment and the decree passed by the learned Civil Judge, Senior Division, Thana, on March 31, 1970, as dismissing the plaintiff's suit with costs is restored. The respondent-landlord shall pay the costs of the petitioner in this Court and in the lower appellate Court, also.

Petition allowed.

AIR 1977 BOMBAY 10

VAIDYA AND MRIDUL, JJ.

The Union of India and another, Appellants v. M/s. D. P. Wadia and Sons, Respondents.

First Appeals Nos. 369 and 370 of 1975, D/- 15-4-1976.*

(A) Arbitration Act (1940), Section 2 (a) — Arbitration clause — Construction.

The words of arbitration clause which takes within its sweep any claim, right or matter in any way arising out of or relating to the contract have been held by the Courts to take in all claims which arise out of or pertain to the contract. The Courts have interpreted these words to include claims based on a quantum meruit, frustration of contracts as also non-payment under a promissory note given collaterally in respect of an agreement containing the arbitration clause.

(Para 12)

(E) Arbitration Act (1940), Sections 13, 29 — Nature of powers of arbitrator — Whether arbitrator can award interest.

An arbitrator is a domestic forum. It is a forum, other than a Court of law constituted by the parties, or by provisions of law for determination of disputes and differences, after hearing both the sides, in a judicial manner. The arbitrator has to conform broadly to judi-

cial trappings. An arbitrator is bound by the legal principles and has to adhere to the provisions of law applicable to the adjudication of matters before him. Having regard to the functions and position of the arbitrator, it is implicit that an arbitrator must have the powers of the judicial nature so as to facilitate determination of disputes and differences between the parties relating to an award which when made a rule of the court acquires legal sanctity, and becomes final binding and conclusive. The courts read into the scope of the power of an arbitrator, the powers which are accorded to the civil courts.

(Para 14)

A dispute as to payment of interest is a dispute which is capable of reference to arbitration under the provisions of the Arbitration Act. Such a dispute, if referred to the arbitrator, brings it within his competence to make an award in respect of payment of interest by one party to the other. The perimeters governing the exercise of his jurisdiction, however, will be the same as obtain to a court of law, in the matter of awarding interest.

(Para 21)

The arbitrator has competence to award interest provided the claim for such interest is based either on the agreement between the parties or substantive provision of law applicable thereto or upon an equitable principle impinging thereon. This is upon the principle that it is an implied incident of a reference that an arbitrator can give such relief with regard to interest as a Court could give if it decided the dispute. In all cases, it would be a question of fact as to whether a particular award for interest made by the arbitrator, is justified under the provisions of law, invoked by the parties and the material on record before the arbitrator. Case law discussed.

(Paras 33, 34)

Cases Referred: Chronological Paras

- (1974) Award No. 113 of 1973, D/- 27-6-1974 (Bom) 20
 (1973) 75 Bcm LR 355 = ILR (1974) Bom 851 14, 15
 AIR 1972 SC 1507 = (1972) 1 SCC 702 31
 (1969) Judgment of Bom. H. C. in Erach F. D. Mehta v. Minoo F. D. Mehta decided on 1-9-1969 14, 17
 AIR 1967 SC 1030 = (1967) 1 SCR 105 29, 30
 AIR 1967 SC 1032 = (1967) 1 SCR 324 29, 30

* (Against order of R. G. Randive, Civil J., Sr. Divn., Nasik, in S. C. S. No. 222 of 1974.)

AIR 1963 SC 1685 = (1964) 3 SCR 164
24, 27, 28
AIR 1961 SC 990 = (1961) 3 SCR 639 21
(1960) Award No. 5 of 1959, D/- 25-3-
1960 (Bom) 19, 20
AIR 1956 Punj 249 14
AIR 1955 SC 468 = (1955) 2 SCR 48 24,
25, 26, 29, 30
(1951) 1 KB 240 = 66 TLR (Pt. 2) 358
14, 17
AIR 1924 Cal 524 = 27 Cal WN 933 19
(1910) 2 KB 738 = 80 LJKB 49 14
(1819) 2 B and A 691 = 21 RR 455 19

V. H. Gumaste, Govt. Pleader, for Appellants in both the Appeals; R. M. Purandare, for Respondents in both the Appeals.

MRIDUL, J.:— These two appeals, preferred by the Union of India, Original Defendants, are directed against the Judgments and Orders dated 31st December, 1974, passed by the Civil Judge, Sr. Dn., Nasik, in Special Civil Suit Nos. 222 and 223 of 1974. By the said judgments and orders the learned trial Judge was pleased to repel the challenges made by the original Defendants as to the invalidity of the awards of the arbitrator B. S. Sekhon, in respect of the disputes and differences between the Union of India and the Respondents, viz., M/s. D. P. Wadia and Sons, being the Plaintiffs in the said suits.

2. As a common question of law arises in both the appeals, they are heard together and disposed of by this common judgment.

3. The facts in Special Civil Suit No. 222 of 1974, may be summarised as follows:— The Plaintiffs M/s. D. P. Wadia and Sons (hereinafter referred to as "the Contractors"), entered into a contract with the Union of India for the construction of certain buildings or quarters for the Government of India Printing Press at Nasik Road in or about 1956. The said construction was completed but in regard to the claims of the contractors against the Union of India and the counter claims of the Union of India, disputes and differences arose by and between the parties. It appears that in the correspondence antecedent to making of the reference, the Contractors claimed from the Union of India amounts which were payable to them under the said works contract together with interest thereon. The Union of India also in their turn counter-claimed certain amounts from the Contractors together with interest thereon. Having regard to the provisions of Cl. 25

of the said works contract, which was the arbitration clause therein, the parties referred their disputes and differences to the said arbitrator. In fact, the said arbitrator was appointed by the Chief Engineer (SWZ), C. P. W. D., Bombay, by his letter dated 6th September, 1972, as arbitrator to decide and make award regarding disputes between the parties, "which disputes fall within the purview of Clause 25 of the agreement".

4. The pleadings were filed on behalf of the Contractors and the Union of India before the learned arbitrator in the said reference. It is not disputed by the parties that in the said pleadings the question as to the payment of interest was raised by the parties. Upon the basis of the pleadings filed before the arbitrator issues in regard to the payment of interest by the Contractors to the Union of India and vice versa were raised. After hearing the parties, the arbitrator made and published his award on 17th October, 1973. The intimation relating thereto was given to the Contractors and the Union of India.

5. The award as filed in the Court, was challenged by the Union of India by an application dated 31st December, 1973. One of the contentions related to the direction in the award for payment of interest. It was contended that the awarding of interest to the Contractors was illegal as, "the said issue was never referred to the arbitrator". The learned trial Judge raised 4 issues. They related to the plea of limitation, in respect of the application dated 31st December, 1973, by which the award was sought to be challenged; as to whether the award was not legal and disclosed error apparent on the face of the award; as to whether the award was liable to be set aside or remitted and lastly, as to whether the direction as to interest was legal. The learned trial Judge made findings in favour of the Contractors, dismissed the application challenging the award and confirmed the award.

6. The facts in the Special Suit No. 223 of 1974, are similar. In fact, they appear to be identical save and except with regard to the quantum of claims involved. Identical issues were raised by the learned trial Judge in the said suit. The facts of the said suit, therefore, need not be reproduced here.

7. In both the suits, the challenge to the direction for payment of interest was two-fold. The contention of the

Union of India was that the issue of interest was not referred to the arbitrator by the parties. It was further contended that in any event, the award of interest was *ex facie* contrary to law and therefore, constituted an error apparent on the face of the award. The learned trial Judge found on facts that the contention that the issue as to interest was not referred to the arbitrator was not tenable. The learned trial Judge observed, "the award that has been produced in this Court and the finding of the arbitrator show that both the parties claimed interest on their respective claims and the arbitrator was requested to decide the point of interest and the issue was specifically framed regarding the claim of interest by the respective parties". In regard to the question of error apparent on the face of the award, the learned trial Judge noticed several judgments cited at the Bar before him and came to the conclusion that, "I do not find that the arbitrator committed any error which is apparent on the face of the award passed by him when he granted the interest pendente lite to the Plaintiff". In these circumstances, the learned trial Judge repelled the challenge to the award based on the ground of interest and as noticed above, the awards in both the suits were confirmed and were made rules of the Court.

8. Shri Gumaste, the learned counsel, for the Union of India, assails the judgments and orders of the learned trial Judge on the following two grounds: (1) that the direction as to the payment of interest made in the said awards was beyond the ambit of the arbitrator's authority. In other words, the claim relating to interest fell outside the scope of the reference; (2) the direction as to payment of interest was *ex facie* illegal and disclosed error of law apparent on the face of the award. The learned trial Judge held that the claim as to interest was a question of law, and such a question of law was not referred to the arbitrator and that being so, the mistake of the arbitrator in awarding interest was not binding on the Union of India and could be assailed before the Court.

9. The question whether the disputes and differences relating to the claim of interest by the Contractor or by the Union of India were referred to the arbitrator encompasses a very narrow factual controversy. The controversy will have to be resolved with reference to Cl. 25, which is the arbitration clause in the con-

tract and the facts antecedent to and surrounding the reference and the proceedings before arbitrator.

10. Material portion of Clause 25 reads as follows:—

"Except where otherwise provided in the contract all questions and disputes relating to the meaning of the specifications, designs, drawings, and instructions hereinbefore mentioned and as to the quality of workmanship, or materials used in the work, or as to any other question, claim, right, matter or materials used on the work, or as to any other question, claim, right, matter or thing whatsoever, in any way arising out of or relating to the contract, designs, drawings, specifications, estimates, instructions orders or these conditions or "otherwise concerning the works, or the execution or failure to execute the same, whether arising during the progress of the work, or after the completion or abandonment thereof shall be referred to the sole arbitration of the Chief/Additional Chief Engineer, Central Public Works Department, and if the Additional Chief Engineer is unable or unwilling to act, to the sole arbitration of some other person appointed by the Additional Chief Engineer willing to act as such arbitrator."

11. It is not disputed before us that prior to the reference the parties had formulated their claims in the correspondence exchanged by and between them. In the said correspondence the claim for interest was made both by the Union of India and the Contractors. The reference has not been produced before us, nor was the reference produced before the learned trial Judge. It is also not disputed before us that the claims made before the learned arbitrator by the parties included claims for interest made by the Contractors in respect of the amounts which according to the Contractors were payable to them, for execution of the works or amounts payable under the said works contract. The Union of India also claimed interest in respect of its claim which was based on the alleged breaches committed by the Contractors. It is also not disputed that before the arbitrator the issues as to interest were framed and the parties invited the arbitrator to decide the said issues.

12. The arbitration clause abstracted above, is very widely worded. The clause in regard to the subject-matter of the claim within its ambit, is in the widest possible terms. It takes within its

sweep any claim, right or matter in any way arising out of or relating to the contract. The words of such wide imports have been held by the Courts to take in all claims which arise out of or pertain to the contract. The Courts have interpreted these words to include claims based on a quantum meruit, frustration of contracts as also non-payment under a promissory note given collaterally in respect of an agreement containing the arbitration clause (see illustration given by Russel on Arbitration, 18th Edn. page 70).

13. In our opinion, having regard to the sweep of the arbitration clause it must be held that the claim of payment of interest respecting the amounts payable under the works contract was a claim or a question or a matter which arose out of the said works-contract or related to the said works-contract. Not only that, the parties themselves by making a claim for interest prior to the reference proceeded upon the footing that such a claim was claim which arose out of or related to the works-contract. The disputes and differences relating to interest were thus enumerated and set out in the correspondence and were referred amongst other disputes and differences, to the arbitration of the said arbitrator. The reference was made by a letter dated 5th September, 1972, written by the Chief Engineer (SWZ), C. P. W. D., Bombay. The said letter was not produced before us nor was it produced before the learned trial Judge. However, a copy of the award was produced before the learned trial Judge. We have gone through the said award and we find a reference to the said letter in the said award itself. The award recites that by the said letter the arbitrator was required "to decide and make award regarding the disputes between the above-named parties which disputes fall within the purview of Clause 25 of the agreement, referred to above". In other words, all disputes or claims which fall within the wide sweep of Clause 25, were referred to the arbitration. This circumstance clearly indicates that the claim as to interest was one of the claims and was in point of fact referred to the arbitration. We have no hesitation therefore, in rejecting the contention of the learned counsel for the Union of India that the dispute as to interest was not referred to the arbitrator.

14. This takes us to the second contention canvassed on behalf of the

Union of India. The said contention will have to be decided upon the basis of the legal frame-work which governs the duties and the powers of the arbitrator as also the principles which he has to adopt in the matter of proceedings before him. An arbitrator, undoubtedly, is a domestic forum. It is a forum, other than a Court of Law constituted by the parties, or by the provisions of law for determination of disputes and differences, after hearing both the sides, in a judicial manner. The arbitrator has to conform broadly to judicial trappings. It has been held by the several judgments of the Courts that an arbitrator is bound by the legal principles and has to adhere to the provisions of law applicable to the adjudication of matters before him. Having regard to the functions and position of the arbitrator, it is implicit that an arbitrator must have the powers of the judicial nature so as to facilitate determination of disputes and differences between the parties relating to an award which when made a rule of the court, acquires legal sanctity, and becomes final, binding and conclusive. In *Crighton v. Law Car and General Insurance Corporation Ltd.*, reported in (1910) 2 KB 738, Scrutton, J., at page 745, attributed to the arbitrator "inherent powers as a judicial officer". It has been held by the several judgments, both in England and India that an arbitrator has powers analogous to the powers conferred upon the Civil Court in regard to the proceedings before or for arbitration of disputes referred to him. These judgments relate to power and authority of the arbitrator to grant adjournments, permit amendments of the pleadings, compel evidence and production of documents and several other matters which are normal features of a civil litigation before a court of law. This principle is statutorily recognised by the Arbitration Act 1940. Section 13 of the Arbitration Act enumerates powers of arbitrators subject to a contrary intention expressed in the agreement. First Schedule of the said Act sets out the implied conditions of the arbitration agreement. The recent judicial trends also show that the courts read into the scope of the power of an arbitrator, the powers which are accorded to the Civil Courts. A graphic illustration of the rule is found in the dicta of Kantawala, J. (as the learned Chief Justice then was) in *Erach F. D. Mehta v. Minoo F. D. Mehta*, decided on 28th August/1st September, 1969, (unreported). In that case a question arose as

to whether an arbitrator is authorised to grant specific performance of a contract. It was argued on behalf of the counsel that power of the specific performance by the provisions of Specific Relief Act, 1963, was conferred upon a Court and therefore, such a power must be said to be negated in cases of arbitration. In dealing with the said contention, the learned Judge upon an infra-analysis of law came to the conclusion that, "it is, therefore, not possible to take the view that a relief by way of specific performance cannot be granted by an arbitrator". This was the conclusion arrived at by the learned Judge after a comprehensive review of the case law bearing on the subject. The dicta of the learned Judge in Erach F. D. Mehta's case was approved by a Division Bench of this Court in the Fertilizer Corporation of India v. Chemical Construction Corporation, reported in (1973) 75 Bom LR 335. The Fertilizer Corporation case (supra) was a case where the contention was that an arbitrator was not entitled to grant a declaratory relief or an injunctive relief. At page 350, the Division Bench dealt with the said contention by making the following observations:

"The next contention of Mr. Bhabha was that by prayers (a) and (b) the plaintiffs are seeking a declaratory relief and injunction; that such relief can only be granted by the Court having regard to the provisions of the Specific Relief Act and they cannot be granted by the arbitrators — The question whether an arbitrator acting within the provisions of the Arbitration Act, 1940 can grant relief by way of specific performance was considered by me sitting as a single Judge in Erach F. D. Mehta v. Minoo F. D. Mehta. Mr. Bhabha appeared for one of the parties in that matter and advanced the same arguments which are advanced by him before us. In short the view taken in that decision is that all matters of a civil nature, which can form the subject-matter of a suit within the meaning of Section 9 of the Code of Civil Procedure can be referred to arbitration; that the arbitrator will have jurisdiction even to grant a relief which can normally be granted by the Court under the Specific Relief Act. As pointed out in Halsbury's Laws of England, third Ed. Vol. 2, page 6:

"The dispute or difference which the parties to an arbitration agreement agree to refer must be of a justiciable issue triable civilly. A fair test of this is whether the difference can be compromis-

ed lawfully by way of accord and satisfaction."

Applying this test there can be no doubt that a dispute relating to a declaratory relief and injunction can be compromised lawfully by way of accord and satisfaction. A reference was made in my decision to the observation of Tucker, L. J., in *Chandris v. Isbrandtsen — Moller Co., Inc.*, (1951-1 KB 240). It is there stated (page 262):

"..... To that there are, of course, certain well-known exceptions, such as the right to grant an injunction, which stand on a different footing; one of the reasons why an arbitrator cannot give an injunction is, of course, that he has no power to enforce it; but such an objection does not apply to the award of interest."

So far as the award granting an injunction is concerned, in this country there is no difficulty in enforcing it because no award simpliciter is enforceable unless a decree in terms of the award has been passed under the provisions of the Arbitration Act, 1940. Once a decree in terms of the award has been passed, the award granting injunction is merged in the decree and the decree granting injunction can always be enforced. In fact in *Lakshmi Narain v. Raghbir Singh*, (AIR 1956 Punj 249, Harnam Singh, J., rejected the contention that suits in which granting of relief is entirely within the discretion of the Court cannot be referred to arbitration. The learned Judge there even went to the extent of saying that a suit for mandatory injunction can be referred to arbitration. There is nothing in the provisions of the Arbitration Act, 1940, which goes to suggest that a relief which may be granted by the Court under the Specific Relief Act cannot be granted by the arbitrator if the parties decide to have the dispute relating to such relief referred to arbitration. In our opinion, if a proper case is made out it will be permissible to an arbitrator acting within the provisions of paragraph 12.2 of the agreement to grant the relief in terms of prayers (a) and/or (b) or such part thereof as may be admissible."

15. The Fertilizer Corporation's case (1973-75 Bom LR 335) (supra) in our opinion, is an authority for the proposition, that it is an implied incident of all arbitrations that all disputes of civil nature can be referred to the arbitration and that in deciding the said disputes the arbitrator shall have all powers which

Normally the Court has in matters of such determination. In other words, the arbitrator can grant such reliefs as are normally granted by the Courts of law in that behalf.

16. Application of this principle to the question of competence of the arbitrator to award interest does not present any conceptual or other difficulty. The statement of law relating to this branch has been very accurately stated by Russell on Arbitration 18th Edn. at page 292, in the following words:—

"An arbitrator may award interest, by virtue of his implied authority to follow the ordinary rules of law".

17. It may also be noticed that this statement of law is *inter alia* based upon the ratio of the decision in *Chandris v. Isbrandtsen Moller Co., Inc.*, reported in (1951) 1 KB 240, and that the ratio of the decision in *Chandris'* case was approved by Kantawala, J., in *Erach F. D. Mehta's* case. This approval also received imprimatur of the Division Bench in the *Fertilizer Corporation's* case (*supra*).

18. Halsbury expounds the law to the same effect. The statement given by Halsbury, 4th Edn. Vol. 2, in paragraph 580, is in the following words:—

"Interest. — An arbitrator or umpire has power to award interest on the amount of any debt or damages for the whole or any part of the period between the date when the cause of action arose and the date of the award."

19. In *Seksaria Industries (Pvt.) Ltd. v. Tolaram Jalan*, (unreported, Award No. 5 of 1959, S. M. Shah, J., decided on 25th March, 1960), the learned single Judge of this Court repelled the challenge to the validity of the award on the ground that the direction as to the payment of interest by the award disclosed an error apparent on the face of the award. The learned Judge discussed several judgments including the judgments of the Calcutta High Court in *Bhowanidas Ramgovind v. Harsukhdas Balkishendas*, reported in 27 Cal WN 933 = (AIR 1924 Cal 524) and of English Court in *Re Badger*, (1819) 2 B & A 691, and observed (at page 104) as follows:—

"In my opinion, it is not necessary to provide for the power to award interest in the reference itself. It is entirely a matter of discretion with the arbitrator whether to award any interest on the amount awarded by him. In this case, the arbitrator thought it proper to award interest at the rate of 4% per annum on

the amount found due by him as payable by the petitioners to the respondent, and in my opinion, he was perfectly entitled to do so in law. He cannot, therefore, be said to be guilty of misconduct on the ground alleged by Mr. Parpia".

20. A view similar to the one taken by Shah, J., in *Seksaria Industries (Pvt.) Ltd.*, (Award No. 5 of 1959, D/-25-3-1960 (Bom)) (*supra*), was taken by another single Judge of this Court (unreported decision of S. K. Desai, J., dated 27th June, 1974, in O. D. C. J. Award No. 113 of 1973). This was a case relating to disputes between a contractor and the Union of India. The works contract appears to be in *pari materia* with the works contract in the present appeal. Incidentally the arbitrator whose award was sought to be assailed is the same arbitrator whose award is impeached before us. In regard to the direction for payment of interest made in the award the learned single Judge repelled the said contention on the view that the arbitrator had jurisdiction to award interest *pendente lite*. The learned Judge observed (at page 15) that:

"On a consideration of the several authorities cited at the bar I am of opinion that the learned arbitrator had jurisdiction in this case to award interest *pendente lite* and that there is no error of law apparent on the face of the award as alleged."

21. In our opinion, the position in law appears to be clear. A dispute as to payment of interest is a dispute which is capable of reference to arbitration under the provisions of the Arbitration Act. Such a dispute, if referred to the arbitrator, brings it within his competence to make an award in respect of payment of interest by one party to the other. The perimeters governing the exercise of his jurisdiction, however, will be the same as obtain to a court of law, in the matter of awarding interest. The Supreme Court authentically laid down the law relating to the awarding of interest in *Mahabir Prasad Rungta v. Durga Datta*, reported in AIR 1961 SC 990. It was laid down by the Supreme Court at page 993, that:—

"interest for a period prior to the commencement of suit is claimable either under an agreement, or usage of trade or under a statutory provision or under the Interest Act, for a sum certain where notice is given. Interest is also awarded in some cases by Courts of equity."

22. The Supreme Court further observed at the same page that:—

"As regards interest pendente lite until the date of realisation, such interest was within the discretion of the Court."

23. Upon the authority of the Supreme Court it can be therefore observed that pendente lite interest can be granted by a Court in cases where there is an agreement between the parties or there exists a usage of trade or a statutory provision providing for the grant of interest. Such interest also can be granted upon equitable grounds. There are several statutes which make provisions for the payment of interest, such as, Sale of Goods Act, Negotiable Instruments Act and the Interest Act. The question as to whether a person is entitled to the direction for interest would depend on the facts of each case or the provisions of law or of equity or of the contract in question upon which such a claim of interest is founded.

24. The learned counsel for the Union of India draws our attention to the judgment of the Supreme Court in Thawardas Phurmal v. Union of India, reported in AIR 1955 SC 468. According to him the said decision is an authority for the proposition that the arbitrator has no jurisdiction to award any interest. The learned counsel further submits that the same is the view taken by the Supreme Court in Union of India v. A. L. Rallia Ram, reported in AIR 1963 SC 1685.

25. Thawardas's case (AIR 1955 SC 468) is a case where the disputes and differences between a contractor and the Union of India were referred to arbitration. The claim before the arbitrator related to the payment of compensation for breaches allegedly committed by the Union of India. In the award made by the arbitrator certain amounts were awarded to the contractor as and by way of damages. The arbitrator also granted interest in respect of the amounts which were found to be payable to the contractor under the works-contract in question. In regard to the claim for damages, upon the contention of the Union of India, that the contractor was bound to mitigate damages under the provisions of Section 73 of the Contract Act, the Supreme Court dealt with the same and noticed the fact that not all legal errors can vitiate the award but such legal errors which are apparent on the face of the award alone can be said to vitiate the award. In regard to the interest, the Supreme Court made an assumption that the arbitrator was a Court within the meaning of the

Arbitration Act, which the Supreme Court characterised as "a fact that by no means appears to be the case and observed at page 478 as follows:—

"The following among other conditions must be fulfilled before interest can be awarded under the Act.

(1) there must be a debt or a sum certain;

(2) it must be payable at a certain time or otherwise;

(3) these debts or sums must be payable by virtue of some written contract at a certain time;

(4) there must have been a demand in writing stating that interest will be demanded from the date of the demand. Not one of these elements is present, so the arbitrator erred in law in thinking that he had the power to allow interest simply because he thought the demand was reasonable."

26. It may, therefore, be observed that the Supreme Court upheld the challenge to the award of the interest upon the factual foundation that none of the elements or ingredients expounded by the Supreme Court, was available in the case before the Court. In our opinion, it is clear from the judgment of the Supreme Court that the Supreme Court did not lay down any proposition to the effect that in no circumstances can interest be awarded by an arbitrator. Moreover, as will be observed later, the ratio of the decision of the Supreme Court in Thawardas's case (AIR 1955 SC 568) was subsequently explained by the Supreme Court itself and which explanation militates against the reading of the judgment of the Supreme Court in Thawardas's case as laying down any rigorous rule of law denying competence to the arbitrator to award interest.

27. In Rallia Ram's case (AIR 1963 SC 1685) the facts were different from those which are before us in the present appeal. In Rallia Ram's case interest was awarded against the Union of India by the arbitrator by giving reasoning in that behalf. The reason for awarding the interest was mentioned in the award in paragraph (ix) thereof. The Supreme Court reproduced the said reasoning in paragraph 20 of the judgment at page 1694. In paragraph 23 at page 1695, the Supreme Court dealt with the said reason for awarding the interest and observed as follows:—

"The umpire has awarded interest to the respondent on the footing that for

the purpose of carrying out his contract with the Government of India, the respondent was required to make arrangements by borrowing monies from his bankers and he had to pay interest in that behalf, and when the contract was abandoned after it was partially performed, the Government of India became liable to make good the loss of interest which the respondent suffered. We know of no principle on which the Government of India could be rendered liable for payment of interest in the circumstances relied upon."

28. We are unable to appreciate as to how the decision in Rallia Ram's case (AIR 1963 SC 1685) helps the learned counsel for the Union of India.

29. In our opinion, the dicta of the Supreme Court in Firm Madanlal Roshanlal Mahajan v. Hukumchand Mills Ltd., Indore, reported in AIR 1967 SC 1030 and in Union of India v. Bungo Steel Furniture Private Ltd., reported in the same volume at page 1032, are more apposite. In Firm Madanlal Roshanlal's case a reference arose out of a suit. In the said reference the arbitrator was invited to make an award in regard to interest. The arbitrator having awarded the interest, the award was challenged on the ground of want of authority in the arbitrator to award interest pendente lite. In support of the objection, reliance was placed on the decision of the Supreme Court in Thawardas' case (AIR 1955 SC 468) (supra). The said contention was repelled by the Supreme Court. The Supreme Court observed at page 1032 as follows:—

"It will be noticed that the judgment of this Court in Thawardas' case, 1955-2 SCR 48 = (AIR 1955 SC 468), is silent on the question whether the arbitrator can award interest during the pendency of arbitration proceedings if the claim regarding interest is referred to arbitration. In the present case, all the disputes in the suit were referred to the arbitrator for his decision. One of the disputes in the suit was whether the respondent was entitled to pendente lite interest. The arbitrator could decide the dispute and he could award pendente lite interest just as a Court could do so under Section 34 of the Code of Civil Procedure. Though in terms, Section 34 of the Code of Civil Procedure does not apply to arbitrations, it was an implied term of the reference in the suit that the arbitrator would decide the dispute according to law and

would give such relief with regard to pendente lite interest as the Court could give if it decided the dispute. This power of the arbitrator was not fettered either by the arbitration agreement or by the Arbitration Act, 1940."

30. It is true that Firm Madanlal Roshanlal's case (AIR 1967 SC 1030) was a case of reference out of a suit but the same principles were applied by the Supreme Court in the Bungo Steel Furniture case (AIR 1967 SC 1032) (supra). That was a case of a reference under Chapter II of the Arbitration Act. The award in that reference provided a direction for payment of interest. The provision in regard to the direction relating to interest was challenged, before the Calcutta High Court. The said challenge was repelled by Mallick, J. and a decree was granted on the basis of the award. Before the Supreme Court a similar contention was raised and was sought to be buttressed upon the basis of the decision in Thawardas's case (AIR 1955 SC 468) (supra). The Supreme Court expressed the view that the Thawardas's case did not deal with the question. The Supreme Court then observed at page 1032 as follows:—

"In our opinion, the arbitrator had jurisdiction, in the present case, to grant interest on the amount of the award from the date of the award till the date of the decree granted by Mallick, J. The reason is that it is an implied term of the reference that the arbitrator will decide the dispute according to existing law and give such relief with regard to interest as a Court could give if it decided the dispute. Though, in terms Section 34 of the Code of Civil Procedure does not apply to arbitration proceedings, the principle of that section will be applied by the arbitrator for awarding interest in cases where a Court of law in a suit having jurisdiction of the subject-matter covered by Section 34 could grant a decree for interest."

31. The learned counsel calls attention to another judgment of the Supreme Court in the State of Madhya Pradesh v. M/s. Saith and Skelton (P) Ltd., reported in (1972) 1 SCC 702 = (AIR 1972 SC 1507). We are unable to appreciate as to how the said decision helps the Union of India. It is observed by the Supreme Court in that case at p. 712 (of SCC) = (at p. 1514 of AIR) that:

"If the contention of Mr. Shroff that under no circumstances an arbitrator can award interest prior to the date of the

Award, or prior to the date of reference, is accepted, then the position will be very anomalous."

32. The Supreme Court further observes on the same page that:

"Therefore, the question ultimately will be whether the dispute referred to the arbitrator included the claim for interest from any particular period or whether the party is entitled by contract or usage or by a provision of law for interest from a particular date."

33. The Supreme Court rejected the challenge to the award of interest by the arbitrator. This authority, in our opinion, supports the view that the arbitrator has competence to award interest provided the claim for such interest is based either on the agreement between the parties or substantive provision of law applicable thereto or upon an equitable principle impinging thereon.

34. We are, therefore, of the view that it is within the competence of an arbitrator to award interest. This is upon the principle that it is an implied incident of a reference that an arbitrator can give such relief with regard to interest as a Court could give if it decided the dispute. In all cases, it would be a question of fact as to whether a particular award for interest made by the arbitrator, is justified under the provisions of law, invoked by the parties and the material on record before the arbitrator.

35. In the present case, there is nothing on the record to substantiate the claim made on behalf of the Union of India that the dispute as to the interest was not referred to the arbitrator. On the contrary, there is an intrinsic evidence to support the case that such a dispute was in fact the subject-matter of the arbitration before the arbitrator. In the award itself it has been recorded that the issues were framed in the course of the proceedings before the arbitrator. The award sets out the issues which were raised by and between the parties. One of the issues mentioned in the award (being issue No. 7) relates to the payment of interest at 9 per cent. per annum, raised on behalf of the Contractors. Similarly, additional issue No. 3 relates to the claim of the Union of India for interest. We are, therefore, satisfied that the dispute as to the claim for interest was referred to the arbitrator. The award is not a speaking award. It gives

no reason for awarding interest. There is nothing on the record to show as to how and upon what basis the award as to the payment of interest could be assailed by the Union of India. The Union of India did not produce any document while the proceedings were going on before the learned trial Judge so as to enable him to make a finding that the direction as to the payment of interest is erroneous much-less that the same amounted to an error apparent on the face of the record.

36. Even assuming that the grievance of the Union of India is justified, yet in our opinion, it is not entitled to raise any dispute upon the simple ground that the Courts do not permit parties to approbate and reprobate. It is admitted before us and is otherwise amply supported by the evidence on record that the Union of India claimed interest and invited the arbitrator to decide the aforesaid claim. In the circumstances, we are of the opinion, that it is not open to the Union of India to raise any contention relating to the award of interest.

37. In the circumstances, both the appeals fail and are dismissed with costs.

38. The orders of the learned trial Judge in both the suits are confirmed.

39. We have been informed at the Bar that the Union of India deposited amounts which were payable under the awards by way of interest in the Court. The amounts so deposited in the Court have been invested in fixed Deposits with the State Bank of India at its branch at Nasik. We are further informed that these amounts are to mature some-time in the year 1977. The Respondents are however, willing that these amounts may be recalled and paid to them. The Respondents are willing to forgo interest by reason of earlier recall of these amounts. We, therefore, order that the Respondents be at liberty to withdraw the amounts on their risk as to the loss of interest.

40. The Court shall accordingly take appropriate steps to have the amounts recalled from the Bank with liberty to the Respondents to receive the same.

Order accordingly.

AIR 1977 BOMBAY 19**CHANDURKAR AND LENTIN, JJ.**

Manik Mallappa Karale, Petitioner v. Kisan Nagurao Patil and others, Opponents.

Special Civil Appln. No. 289 of 1975, D/- 17-3-1976.*

(A) Maharashtra Zilla Parishads and Panchayat Samitis Act (1961), Section 27 — Election petition — Election of member of Panchayat Samiti challenged on allegation of disqualification incurred before date of nomination — Petition could not be entertained.

It is clear from Section 58 that the jurisdiction of the Court trying an election petition is regulated by Section 27 (2) and (5) not only when the election of the councillor of the Zilla Parishad is challenged but also when the election of member of the Panchayat Samiti is challenged. Section 27 (5) gives the grounds on which an election of an elected candidate can be set aside. It is difficult to take the view that when an enquiry is made on an election petition, the scope and the nature of the enquiry permissible to the Court relates to matters other than those provided in Section 27 (5). Moreover, none of the provisions of Section 27 (2) or (5) indicate that the question of initial disqualification of a candidate could be put in issue while challenging his election. There does not, therefore, appear to be any power in the Court to go into the question as to whether the elected candidate was disqualified, at the time when his nomination paper was accepted. (Paras 4, 7)

Since the abovementioned view is based on substantive provisions in Section 27 (5), the absence of a provision in the Maharashtra Panchayat Samitis Conduct of Election Rules analogous to the provisions in Rule 20 (8) of the rules relating to the election of councillors of the Zilla Parishad, would not make any difference. 1965 Mah LJ (Note) No. 56, Rel. on.

(Para 6)

Cases Referred: Chronological Paras
1966 Mah LJ 321 = 68 Bom LR 392 2
1965 Mah LJ (Note) No. 56 6

V. Z. Kankaria, for Petitioner; P. S. Patankar (for Nos. 2 and 3) and C. J. Sawant, Addl. Govt. Pleader (for Nos. 9 to 11), for Opponents.

*(To set aside order passed by Extra Asstt. Judge, Sholapur, in Civil Misc. Application No. 150 of 1972, D/- 10-12-1974.)

JT/JT/D68/76/MBR/RSK

CHANDURKAR, J.:— The petitioner in this petition had filed an election petition under Section 27 of the Maharashtra Zilla Parishads and Panchayat Samitis Act, 1961 (hereinafter referred to as the "Zilla Parishads Act") challenging the election to the Panchayat Samiti of North Sholapur from three wards, namely, Mardi-Wadala, Kasbe Sholapur-Bale and Degaon Kumthe from which each of the respondents Nos. 1 to 3 respectively were candidates. The petitioner himself is a voter only from Degaon village and it is not now disputed before us that he would be entitled, if at all, to challenge the election only so far as respondent No. 3 is concerned. In other words, it is conceded that the challenge to the election of respondents Nos. 1 and 2 was not maintainable at the instance of the present petitioner.

2. The petitioner's case against respondent No. 3 appeared to be that he was in arrears of the amount of hire in respect of engine of the North Sholapur Panchayat Samiti taken by him on hire from the said Panchayat Samiti and he had so remained in arrears for more than six months despite the service of a demand notice on him. The election petition came to be tried by the Extra Assistant Judge, Sholapur, who had framed several issues for determination on merits but did not think it necessary to give a finding on all the issues. Since the election of respondent No. 3 was challenged on the ground that he was initially disqualified to be elected, the learned Judge first took up for consideration the contention of the elected candidates that the petition challenging the election of the candidate was not maintainable under Section 27 of the Zilla Parishads Act. The learned Judge relied upon the decision of this Court in *Gopikisan Agarwal v. District Judge, Bhandara*, 1966 Mah LJ 321 and came to the conclusion that an election petition on the basis of an allegation of a disqualification incurred before the date of the nomination could not be entertained. He, however, seems to have taken the view that the proper remedy of the petitioner was to approach the Commissioner under Section 40 of the Zilla Parishads Act. Since the election petition filed by the petitioner came to be rejected, this petition has been filed by him challenging the decision of the learned Assistant Judge.

3. It was contended on behalf of the petitioner by Mr. Kankaria that the learned Judge was in error in applying

the decision in Gopikisan Agarwal's case, because according to the learned Counsel, the election challenged in the instant proceedings was not an election as councillor of the Zilla Parishad, but the election was in respect of the Panchayat Samiti and the relevant rules regulating the scrutiny of the nomination papers did not contain a clause that the decision of the scrutinising authority would be final and conclusive and not open to challenge in an election petition.

4. Now, so far as the elections and election disputes with regard to the election of members of a Panchayat Samiti are concerned, the relevant provision is to be found in Section 58 which reads as follows:—

"(1) The provisions of Section 16 relating to the disqualifications of Councillors shall apply in relation to the disqualifications of the members of a Panchayat Samiti with the modification that in clause (d) of sub-section (1) of Section 16, for the figures '39' the figures '61' shall be substituted.

(2) The provisions of Sections 19 to 25 (both inclusive) and 27, 28, 28-A, to 28-D (both inclusive), 29 to 33 (both inclusive), 33-A and 34 to 37 (both inclusive) relating to elections and election disputes and any rules made thereunder shall apply mutatis mutandis in relation to election of members under clause (f) of sub-section (1) of Section 57."

Thus even where the election of a member of a Panchayat Samiti is to be challenged, the relevant provision which must be looked into is Section 27 of the Zilla Parishads Act. Under Section 27 (2) it is provided that after the election petition is filed before the District Judge, an enquiry shall thereupon be held by a Judge, not below the rank of an Assistant Judge, appointed by the State Government either especially for the case, or for such cases generally, and such Judge may, after such enquiry as he deems necessary, pass an order confirming or amending the declared result of the election or the order of the officer empowered by the Collector in that behalf under Section 26, or setting the election aside. The Judge trying the election petition is empowered to exercise any of the powers of the Civil Court and his decision has been made conclusive. Sub-section (5) of Section 27 is as follows:—

"(a) If on holding such enquiry, the Judge finds that a candidate has, for the purpose of election, committed a corrupt

practice within the meaning of sub-section (6), he shall declare the candidate disqualified for the purpose of that election and of such fresh election as may be held under sub-section (2) and shall set aside the election of such candidate if he has been elected.

(b) If in any case to which clause (a) does not apply, the validity of an election is in dispute between two or more candidates, the Judge, after a scrutiny and computation of the votes recorded in favour of each candidate, is of opinion that in fact any candidate in whose favour the declaration is sought has received the highest number of the valid votes, the Judge shall after declaring the election of the returned candidate to be void declare the candidate in whose favour the declaration is sought, to have been duly elected;

Provided that, for the purpose of such computation no vote shall be reckoned as valid if the Judge finds that any corrupt practice was committed by any person, known or unknown, in giving or obtaining it;

Provided further that, after such computation if an equality of votes is found to exist between any candidates and the addition of one vote will entitle any candidate to be declared elected, one additional vote shall be added to the total number of valid votes found to have been received in favour of such candidate selected by lot drawn in the presence of the Judge in such manner as he may determine."

Under sub-section (6) the corrupt practices have been set out as those specified in Section 123 of the Representation of the People Act subject to certain modifications which are not material for the purposes of the present petition. In view of Section 58 of the Zilla Parishads Act it is clear that the jurisdiction of the Court trying the election petition challenging the election of a member of a Panchayat Samiti is also regulated by sub-sections (2) and (5) in Section 27 of the Zilla Parishads Act. Under clause (a) of sub-section (5) it is made obligatory on the Judge to declare a candidate disqualified for the purpose of an election or of such fresh election as may be held as contemplated by sub-section (2) if the Judge finds that a candidate has for the purpose of election committed a corrupt practice within the meaning of sub-section (6). However, in a case where corrupt practice is not proved against a can-

candidate who has been elected, the question of setting aside his election on that ground under clause (a) of sub-section (5) does not arise. Another power which is given to the Court which tries the election petition is in a case which is not covered by sub-section (5) (a) and that is to be found in clause (b) of sub-section (5) under which the Court is empowered to scrutinise and compute the votes recorded in favour of each candidate and then if it is of opinion that in fact a candidate in whose favour a declaration is sought has received the highest number of valid votes, the Court has to declare the election of the returned candidate to be void and declare the candidate in whose favour the declaration is sought to have been duly elected. In other words, sub-section (5) gives the grounds on which an election of an elected candidate can be set aside. It is difficult to take the view that when an enquiry is made on an election petition, the scope and the nature of the enquiry permissible to the Court relates to matters other than those provided in sub-section (5). There does not, therefore, appear to be any power in the Court to go into the question as to whether the elected candidate was disqualified at the time when his nomination paper was accepted. In other words, the validity of the order of acceptance of a nomination paper is not open to challenge in an election petition filed under Section 27 of the Zilla Parishads Act.

5. Now, it is no doubt true that in the rules relating to the election of councillors of the Zilla Parishad, under sub-rule (8) of Rule 20 it is provided that the decision of a District Judge on appeal under that rule and subject only to such decision, the decision of the Returning Officer accepting or rejecting the nomination paper of a candidate shall be final and conclusive and shall not be called in question in any Court or before a Judge referred to in sub-section (2) of Section 27. No such provision is to be found in the rules styled as Maharashtra Panchayat Samitis (Registration of Voters and Conduct of Election) Rules, 1962.

6. Under Rule 19 (6) of the rules relating to conduct of election to the Panchayat Samitis it is only provided that the Returning Officer shall endorse on each nomination paper his decision accepting or rejecting the same and if the nomination paper is rejected, he has to record in writing a brief statement of his reasons for such rejection. Thereafter under sub-rule (7) it is provided that the

Returning Officer shall prepare a list of candidates whose nominations have been accepted and he has to affix the list on his notice board recording the date on which and the time at which the list was so affixed. Rule 20 deals with withdrawal of candidature and R. 21 deals with preparation of list of contesting candidates. Under R. 22 provision is made of publication of list of contesting candidates. Rules 23 to 27 deal with appointment of election agent, polling agent and counting agent and provision is made in Chap. VI and thereafter in the matter of actual election. There is thus no rule-making final the decision of the Returning Officer regarding the acceptance of the nomination paper. The absence of a provision in the Maharashtra Panchayat Samitis Conduct of Election Rules analogous to the provision in sub-rule (8), however, in our opinion, would not make any difference since we are basing our decision on the substantive provisions in Section 27 (5) of the Zilla Parishads Act. We are supported in the view which we have taken by a Division Bench decision of this Court in *Brijlal Sao v. D. J., Bhandara*, reported in 1965 Mah LJ Note No. 56. There also the election of an elected candidate to the Panchayat Samiti was declared void on an election petition under Section 27 of the Zilla Parishads Act on the ground that he was disqualified under Section 16 (1) and that order was challenged by a writ petition. The Division Bench took the view that the challenge to the election of a candidate on the ground of his disqualification under Section 16 is not open in an election petition under Section 27.

7. Mr. Kankaria emphasised the words "validity of any election" in the opening part of Section 27 of the Zilla Parishads Act and the argument made was that when the legislature used the words "any election", it must be taken to mean that an election could be challenged on any ground whatsoever including disqualification incurred even before the nomination paper was filed. It is difficult for us to accept this contention. It is difficult to appreciate how these words could indicate, even remotely, the scope of the challenge which could be made in an election petition or how those words could give any indication with regard to the powers of the Court entertaining an election petition. All that Section 27 does is to give a right to file an election petition when validity of any election of a councillor is brought in question either by a candidate or by any person qualified to

vote at the election the validity of which is put in issue. The jurisdiction which the Court trying the election petition could exercise would have to depend on the statutory provisions made in sub-section (2) and sub-section (5) and, as we have already pointed out, none of these provisions indicate that the question of initial disqualification of a candidate could be put in issue while challenging his election. In our view, there is no substance in this petition. The petition must fail and is dismissed. Rule discharged with costs.

Petition dismissed.

AIR 1977 BOMBAY 22

DESHPANDE AND MRIDUL, JJ.

Ebrahim Yusuf Lambe, Petitioner v. Abdul Razak Abdul Rahiman Mulla and another, Opponents.

Special Civil Appln. No. 2110 of 1974, D/- 27-2-1976.

(A) Bombay Tenancy and Agricultural Lands Act (1948), Ss. 74 (1)(a), 70 (b), and 4 — Order determining claim of contractual tenancy — Order is appealable under Section 74 (1) (a). AIR 1973 Bom 203 and Spl. Civil Appln. No. 1908 of 1970, D/- 3-4-1972 (Bom), Overruled.

Section 4 in the context of Section 74 (1) (a) is wide enough to cover every order in regard to claim to tenancy passed under Section 70 (b) of the Act and the order of the Awal Karkun determining the claim of the applicant based on contract is appealable to the Collector under Section 74 (1) (a) of the Act. Every order under Section 4 is made appealable under clause (a) in Section 74 (1). Section 4 indicates who can claim to be a deemed tenant of the land. It is an error to assume that section contains mere definition. It confers right on every one to claim deemed tenancy if he satisfies the requirement of Section 4. But the wide wording of this section does not admit of excluding other kinds of tenants e. g. contractual tenant, protected tenant or permanent tenant from its purview. AIR 1973 Bom 203 Overruled. (Para 9)

The right of appeal is entirely a creature of the statute. There can be no assumption of such right by reference to Section 247 of the Land Revenue Code. Section 74 (2) makes Chapter XIII of the

Land Revenue Code applicable to appeals under "this Act". The words "To the appeals to the Collector under this Act" signify that provision for the appeal has to be traced in the Tenancy Act itself and provisions of Chapter XIII are to be applicable not for tracing the right of appeal but for some procedural purpose. Spl. Civil Appln. No. 1908 of 1970, D/- 3-4-1972 (Bom), Overruled. (Para 5)

Cases Referred: Chronological Paras
AIR 1973 Bom 203 = 75 Bom LR 79 2, 10 (1972) Spl. Civil Appln. No. 1908 of 1970, D/- 3-4-1972 (Bom) 3
(1958) 60 Bom LR 1071 = JLR (1958) Bom 1379 7

V. M. Limaye, for Petitioner; D. M. Farulekar, for Opponents.

DESHPANDE, J.:— The Petitioner applied to the Tahsildar for a declaration of his being the tenant of certain land. The application was made under Section 70 (b) of the Bombay Tenancy and Agricultural Lands Act, (hereinafter referred to as "the Act"). Tenancy is claimed on the basis of contract with opponents' father and rent also is claimed to have been paid to him during his lifetime and thereafter to the opponents. Opponents denied all this. On evidence, the Aval Karkun accepted his claim. In an appeal by the opponents, the petitioner raised a preliminary point that Section 74 (1) did not provide for any appeal against such declaration under Section 70 (b) of the Act. The Collector overruled this, saying that the Petitioner is found to be a deemed tenant under Section 4 of the Act and hence appeal under Section 74 (1) (a) was competent. The Revenue Tribunal declined to interfere in revision.

2. In the case of Shantabai v. Pandurang, reported in 75 Bom LR 79 = (AIR 1973 Bom 203), Malvankar, J., held that no appeal against the order of Tahsildar passed under Section 70 (b) would lie unless it is in regard to the claim of deemed tenancy.

3. Mr. Limaye, the learned Advocate appearing for the Petitioner, relied on this case and contends that the petitioner having claimed contractual tenancy and succeeded therein, appeal to the Collector was not competent. But in Spl. Civil Appln. No. 1908 of 1970, decided on 3-4-1972 (Bom), Vaidya, J., on the other hand held that every order under Section 70 (b), is appealable to the immediate Superior Revenue Officer, under Section 247 of the Land Revenue Code

which according to him is made applicable to tenancy appeals by virtue of Section 74 (2) of the Act. Mr. Parulekar, learned Advocate for Respondents relied on this. He also contended that a claim of even being a contractual tenant cannot be excluded from Section 4 of the Act, order under which is made expressly appealable under Section 74 (1) (a) of the Act, even though Section 4 deals with "who can claim to be a deemed tenant".

4. Sawant, J., referred the case to the Division Bench in view of this conflict of opinion proceeding presumably but rightly on the basis that petitioner claimed contractual tenancy, and impugned declaration is based thereon.

5. It is now well settled that right of appeal is entirely a creature of the Statute. Assumption of such right by reference to Section 247 of the Land Revenue Code appears to us to be open to doubt. Section 74 (1) enumerates the various sections, orders passed under which, are made expressly appealable. Section 74 (2) makes Chapter XIII of the Land Revenue Code applicable to appeals under "this Act". The words "to the appeals to the Collector under this Act" signify that provision for the appeal has to be traced in the Tenancy Act itself and provisions of Chapter XIII are to be applicable not for tracing the right of appeal but for some procedural purpose. The words obviously seem to have reference to the appeals indicated in Section 74 (1) of the Act which are all contemplated to be to the Collector.

6. Secondly such application of the Code is subject to "save as otherwise provided" in this Act. An appeal under Section 247 of the Code against orders under other enactments also is made subject to any contrary provision. Section 74 (1) itself is such a contrary provision. By specifying appealable orders, Section 74 (1) impliedly prohibits other orders being appealable. Thirdly Deputy Collector would be the immediate superior Revenue Officer to the Tahsildar and appeal against the order of the latter would lie to the former under Section 247 of the Code. But Section 74 (2) refers to the "appeal to the Collector", which again is indication of contrary intention. That, Collector's such powers are exercisable by Deputy Collector is wholly irrelevant for this construction. With respect, it is difficult to draw an inference of the right of appeal by reference to Section 247 of the Land Revenue Code.

7. The fact however, remains that Section 74 (1) (a) makes only order under Section 4 appealable and not the order under Section 70 (b). Curiously enough both the Sections 4 and 70 (b) do not contemplate any application or passing of any order as such. Section 70 enumerates duties and functions of the Tahsildar for the purposes of the Tenancy Act, clause (b) therein indicating deciding claims to tenancy as one of his such duties and functions. Section 2 (18) defines the word "tenant" so as to include (1) contractual (2) deemed (3) permanent and (4) protected tenant. Curiously enough again clause (b) in Section 70 does not specifically refer to the duties with regard to the claim to deemed tenancy, covered by Section 4 of the Act. These peculiar features create doubts whether Section 4 and Section 70 (b) contemplate creation of rights and of any applications or any orders at all, for enforcement thereof, and if so, any negative declaration against the rights claimed is conceivable thereunder or not. In *Mela Kabhai v. Motibhai Kahandas Patel*, reported in 60 Bom LR 1071, a Division Bench of this Court exhaustively considered these points and held that: application for declarations of tenancy rights conceived under definition of Section 2 (18) of the Act were maintainable under Section 70 (b) of the Act to the Tahsildar and duties and functions of the Tahsildar thereunder included, even power to make negative declarations and declarations as to the deemed tenancy rights claimable under Section 4 of the Act though not specifically included under Section 70 (b) of the Act. This Court noted the defects in the phraseology of the concerned provisions but gathered the Legislative intent by reading other provisions of the Act.

8. The discussion in the above case is illustrative of how the provisions of the Act are not that explicit and how it would not be safe to rule out the right of appeal in the instant case merely because order under Section 70 (b) is not made specifically appealable under Section 74 (1) of the Act. It is pertinent to note that under Section 74 (1) (v) orders under Section 85-A are made appealable. Tahsildar is required to decide under that section all questions referred to him by the Civil Court, for want of jurisdiction and because the same are triable exclusively by him under the provisions of the Tenancy Act. Such orders include orders on claims to tenancy of every kind de-

fined under Section 2 (18) including contractual tenancies. His such order, as discussed earlier, is expressly made appealable under Section 74 (1) (v) of the Act. It is difficult to conceive of any good reason why Legislature could have thought of excluding identical orders passed by reference to Section 70 (b), from the purview of Section 74 (1), when the same are expressly brought under it when passed by the Tahsildar on reference under Section 85-A.

9. All this lends considerable support to the contention of Mr. Parulekar. Clause (a) in Section 74 (1) calls for broader construction. Every order under Section 4 is made appealable under this clause. Section 4 indicates, who can claim to be a deemed tenant of the land. It is an error to assume that section contains mere definition. It confers right on every one to claim deemed tenancy if he satisfies the requirement of Section 4. But the wide wording of this section does not admit of excluding other kinds of tenants from its purview. Thus contractual tenant, protected tenant or permanent tenant also cultivates land personally, and also lawfully which belongs to others, and does not happen to be a person covered by clauses (a) to (c). The fact that, section contemplates to cover also persons who cannot lay claim to the said three kinds of tenancies, is not enough to exclude them from the purview of this section for the limited purpose of ascertaining its true content in the context of the scheme of Section 74 (1) (a) of the Act. The Legislature presumably did not think it necessary to provide for appeals specifically against order under Section 70 (b) separately for this reason, and advisedly remained content by providing appeal against order under Section 4 only. We are thus of the opinion that Section 4 in the context of Section 74 (1) (a) is wide enough to cover every order in regard to claim to tenancy passed under Section 70 (b) of the Act and the order under consideration of the *Awal Karkun*, was appealable to the Collector under Section 74 (1) (a) of the Act.

10. With respect, the view enumerated in *Shantabai Ramchandra Ghatge v. Pandurang Ramchandra Mandlik*, reported in 75 Bom LR 79 = (AIR 1973 Bom 203), is not acceptable to us for the above reasons. We do not think that any rights can be deemed to have been created by mere definition.

11. Rule is accordingly discharged.

12. No order as to costs.
Order accordingly.

AIR 1977 BOMBAY 24

(NAGPUR BENCH)

DHARMADHIKARI AND DIGHE JJ.

Ratanlal Sitaram and another, Petitioners
v. Rukhmabai and others, Respondents.

Special Civil Appln. No. 1171 of 1971,
D/- 21-4-1976.

(A) Bombay Tenancy and Agricultural Lands (Vidharbha Region) Act (99 of 1958) Section 38 (2) and (3) — Words 'ancestors' and 'or otherwise' used in Section 38 (3) (d) — Interpretation of — Rules of ejusdem generis — Applicability — Provisions of Section 38 (3) held applicable to the application under Section 36 read with Section 38 (2) filed by successor-in-title of a widow by virtue of a right conferred upon him by Section 38 (2). 1970 Mah LJ 185 Overruled — (Interpretation of Statutes).

It is well settled rule of construction that the provisions of a statute should be so read as to harmonise with one another and the provisions of one section cannot be used to defeat those of another unless it is impossible to effect reconciliation between them. AIR 1967 SC 1211 Rel. on. (Para 10)

Section 38, as a whole deals with termination of tenancy by landlord for cultivating land personally. Sub-section (2) of Section 38 is part and parcel of the scheme. The Court has to gather the intention of the Legislature from the enactment as a whole. All the sub-sections should be read together as a whole each clause throwing light on the other. No precedence could be given to one sub-section or sub-clause over another. Sub-section (2) of Section 38 cannot be read by itself, in isolation, and will have to be read with other sub-sections of Section 38. All the parts of the section will have to be read together and be given their full and normal effect and as far as possible harmony will have to be aimed at. So read, it is clear that Sub-s. (2) provides only an extended period for filing of an application. During the lifetime of a widow she could have terminated the tenancy of the tenant at any time, if she required the land for personal cultivation. This right was obviously subject to the conditions laid down by Sub-section (3) of Section 38. The period for filing of an application in case of a successor-in-title is further extended by Sub-sec. (2). It was not the intention of the Le-

gislature to confer on the successor-in-title of a widow's interest in the property a right to claim land for personal cultivation without any restriction. More so when the widow's right in this behalf was itself subject to these conditions. The successor-in-title can exercise the right under Sub-section (2) if person under disability, including the widow, had not already exercised such right by giving notice and filing an application under Section 38 (1). The right is conferred by Sub-section (1) and by Sub-section (2) the Legislature had only provided further period for exercising such a right in the case of successor-in-title. In substance, therefore, the application is filed under Section 38 (1) though within extended period. Therefore an application filed by the successor-in-title of a widow by virtue of a right conferred upon him by Section 38 (2) is also subject to the restrictions and conditions laid down by sub-section (3). (Para 10)

Therefore, for terminating a tenancy of a tenant for bona fide personal cultivation, it is necessary that the landlord should satisfy all the conditions referred to in Section 38 (3). One of the conditions laid down by Sub-section (d) of S. 38 (3) is that the land leased must stand in the Record of rights or in public record or a similar Revenue records on the 1st day of August 1957 and thereafter during the period between the said date and the date of the commencement of the Act in the name of the landlord himself or any of his ancestors or if the landlord is a member of the joint family, in the name of the member of such family but not of any other predecessor-in-title from whom title is derived whether by assignment or Court sale or otherwise. This condition was laid down by the Legislature so as to check unscrupulous termination of tenancies of the tenants by manipulations. Every form of transfer, voluntary or involuntary inter vivos or testamentary was covered by the words 'or otherwise' referred to in Sub-section (d) of Section 38 (3). The Legislature when it used the words "or otherwise" apparently intended to cover other cases which may not come within the meaning of the preceding words. By using the general words "or otherwise" the Legislature intended to cover all possible cases of assignments which are not transfers inter vivos or by act of parties. Therefore the Legislature used these words "or otherwise" in all inclusive sense to bar all avenues of escape. The ejusdem generis doctrine cannot be applied in construing them. The words "or otherwise" are not words of limitation, but are words of extension so as to cover all possible ways in which title in the land might vest in the person concerned.

(Para 14)

If the general words "or otherwise" used in Section 38 (3) are given their natural meaning, it will obviously include derivation of title by virtue of a will, and therefore, the persons claiming title to the land in dispute by virtue of the will executed by a widow will be covered by bracketed portion of Section 38 (3) (d) and therefore, are not entitled to claim resumption of the land if they fail (as in the instant case) to satisfy the condition laid down by Section 38 (3) (d). Case Law discussed.

(Para 15)

Further, the word 'ancestors' used in Section 38 (3) (d) will have to be interpreted liberally and not in restricted sense in which it is used in Hindu Law. It cannot be forgotten that the Tenancy Act applies to all the citizens of the Vidarbha region irrespective of their religion. A narrow or a restricted meaning cannot be given to the word 'ancestors'. Therefore it will cover the cases of the landholders who derived the title to the property by succession or inheritance. 1970 Mah LJ 185, Overruled.

(Para 18)

Therefore, taking into consideration the object of the section and the scheme of the Act, a person of any sex who goes before either on the paternal or maternal side could be looked upon as ancestor of the person inheriting the former's property, if in the normal and natural course of inheritance he is entitled to inherit the property as an heir.

(Para 18)

The field in dispute originally belonged to one G. Before her death she executed a will and gave a limited estate in respect of the field to P the widow of her son. The will further provided that on the death of P the field will become an absolute property of the petitioners in this case. The name of G was however not recorded in the Record of Rights for the relevant years though the name of P was recorded. It appeared from the record that one S, the predecessor-in-title of the respondents-tenants, took the field on lease from P. After her death the petitioners filed an application under Section 36 read with Sec. 38 claiming restoration of possession of the field on the ground that they required it for their bona fide personal cultivation. According to the petitioners, by virtue of the will executed by G they became the owners of the property. However, it was clear from the material placed on record that in the normal and material course of inheritance, the petitioners could not have inherited the suit property as their mother K was alive when the proceedings were instituted by them.

Held that petitioners were not entitled to restoration of possession as they did not satisfy the conditions referred to in Section 38 (3) (d). Till K was alive, by no stretch of imagination the petitioners could have derived title to the suit property by inheritance, because K being a preferential heir would have inherited the property in her own right. Therefore, it could not be said that P and G were ancestors of the petitioners.

The petitioners' case was wholly covered by the bracketed portion of Section 38 (3) (d) as they had derived title to the suit field from their predecessor-in-title otherwise than by inheritance. The source of their title was a will, which was wholly covered by the words "or otherwise" as used in the bracketed portion of Section 38 (3) (d). Even otherwise they derived the title to the suit field by virtue of a will executed by G and the land was not recorded in Record of rights for the relevant period in the name of G. It was an admitted position that it stood recorded in the name of P alone. (Para 21)

(B) Bombay Tenancy and Agricultural Lands (Vidarbha Region) Act (99 of 1958), Sec. 111 — Revision — Concurrent findings of fact based on material partly irrelevant and partly on conjectures and surmises — Authorities below also misunderstood real point for determination — Tribunal can interfere. (Para 23)

Cases Referred:	Chronological	Paras
AIR 1976 Bom 10 = 1975 Mah LJ 566	13	
1970 Mah LJ 185	17, 18	
AIR 1973 SC 1214 = 1973 Tax LR 1042	11	
(1968) 16 Tenancy Law Rep 83	14, 16, 17, 18	
AIR 1967 SC 849 = (1967) 1 SCR 1004	11	
AIR 1967 SC 1211 = (1967) 2 SCR 489	10	
(1966) 14 Tenancy Law Rep 2	14	
(1965) Spl. C. A. No. 902 of 1954 D/-	9-4-1965 (Bom)	14
1964 Mah LJ Note No. 57	10	
(1964) 12 Tenancy Law Rep 2	18	
AIR 1961 SC 1491 = (1962) 1 SCR 568	12	
(1959) 61 Bom LR 1267 = ILR (1959) Bom 1726	11, 14, 18	
AIR 1957 SC 521 = (1957) SCR 721	13, 14	
(1950) 1 All ER 996 = 1950 Ch 540	11	

V. R. Manohar, G. S. Kakde, A. B. Oke and A. K. Trivedi, for Petitioners; M/s. V. D. and A. M. Deshmukh, for Respondents.

DHARMADHIKARI J.:— The dispute involved in this writ petition relates to field survey number 5, admeasuring 36 acres 19 gunthas of Mouza Marathwadki, taluq Kelapur district Yeotmal. The field originally belonged to one Giglabai wife of Laduram Agarwal, who died on 3-2-1951. Before her death, she executed a will dated 5th August 1948 and

gave a limited estate in respect of the field to Smt. Parwatibai wife of her son Bajranglal, who died sometime in 1918 or 1919. In the will it was further stated that on the death of Parwatibai the field will become an absolute property of the petitioners before this Court. It appears from the record that one Sambha, the predecessor-in-title of the respondents-tenants, took the aforesaid field on lease from Parwatibai in the agricultural year 1952-53. After her death, according to the petitioners, by virtue of the will executed by Giglabai, the petitioners became the owners of the field property. According to the petitioners, as they required the suit field for their bona fide cultivation, after serving a notice under Section 38 (2) of the Bombay Tenancy and Agricultural Lands (Vidarbha Region) Act, 1958, referred to hereinafter as the Vidarbha Tenancy Act, terminating the tenancy of original tenant Sambha, they filed an application under Section 36 read with Section 38 of the Vidarbha Tenancy Act claiming restoration of possession on the ground that they required it for their bona fide personal cultivation.

2. Sambha, the tenant, opposed the application and contended that Parwatibai was not a limited owner as after the commencement of the Hindu Succession Act, 1956 she became an absolute owner of the property. He denied the service of the notice and further contended that the field was not required by the petitioners for their bona fide personal cultivation.

3. It appears from the record that both the parties adduced evidence before the Tenancy Naib Tahsildar and the Tenancy Naib Tahsildar after appreciating the evidence on record found that the two cloth shops which were being run by the father of the petitioners were petty cloth shops. He further found that they were neither the members of joint family, nor the said shops were ancestral properties of the petitioners, and therefore, merely because they are working in the said shop, it could not be said that they have any pecuniary interest therein. The Tenancy Naib Tahsildar further found that the income from the disputed field was the principal source of income of the petitioners and they required the suit field for bona fide personal cultivation.

4. Against this order of the Tenancy Naib Tahsildar dated 13th December 1967, tenant Sambha filed an appeal which was heard and decided by the Sub-Divisional Officer, Kelapur. By his order dated 6th July 1968, the learned Sub-Divisional Officer found that the petitioners did not own any ancestral property nor they are the owners of the both shops which are in the name of their father.

According to the learned Sub-Divisional Officer, the Tenancy Naib Tahsildar was wrong in calculating the income of the petitioners on the very vague presumption based on imagination. He further found that it is no way proved as to what exact amount of income the petitioners are getting from the house in Rajputana and at Yeotmal and shops at Pandharkawda. Therefore he recorded a finding that in these circumstances it is not possible to calculate the exact income of the petitioners since they do not own anything in their name. According to the learned Sub-Divisional Officer, the petitioners were just helping their father in his business and, therefore, half of the land, which they are entitled to resume, is the principal source of their income. He, therefore, found that the petitioners have satisfied the conditions specified in clauses (c) and (d) of sub-section (3) and clauses (b), (c) and (d) of Sub-section (4) of Section 38 of the Vidarbha Tenancy Act.

5. Being aggrieved by this appellate order, Sambha the original tenant, filed a revision application before the Maharashtra Revenue Tribunal. It seems from the record that during the course of proceedings before the Maharashtra Revenue Tribunal, Sambha, the original tenant, died, and therefore, his legal representatives were brought on records at the revisional stage. The learned Member of the Maharashtra Revenue Tribunal came to conclusion that the findings of fact recorded by both the authorities below were based on no evidence. He further found that the findings of fact recorded were based on conjectures, surmises and inferences not supported by any material on record. Therefore, on the basis of fresh appreciation of evidence on record, the learned Member came to the conclusion that the petitioners did not want the field bona fide for their personal cultivation and they have also failed to satisfy the condition laid down under Section 38 (3) (c) of the Vidarbha Tenancy Act, being aggrieved by this order passed by the Maharashtra Revenue Tribunal, the petitioners have filed the present writ petition.

6. Initially this writ petition came up for hearing before the Single Judge of this Court, viz. Masodkar J. As the learned Single Judge found that the petition involves substantial questions of law regarding interpretation of the provisions of Vidarbha Tenancy Act, particularly Section 38 (3) (d) thereof, the learned Judge, therefore, directed that this petition should be placed for hearing before the Division Bench.

7. It appears from the records that permission to amend the return was granted

to the respondents-tenants and by an amendment application para 10-A was added to the return. A contention was raised in this paragraph on behalf of the respondents-tenants that the field originally belonged to one Giglai, who, under the will dated 5-8-1948, gave the field to her daughter-in-law Parvatibai. Therefore, the field was never in the family of the petitioners, nor it was recorded in the name of the petitioners or any of their ancestors as required by Section 38 (3) (d) of the Vidarbha Tenancy Act and hence the petition was liable to be dismissed on that ground alone. It is an admitted position that for the relevant period the land stood recorded in Record of rights in the name of Parvatibai alone.

8. Shri Manohar, the learned counsel for the petitioners, contended before us that the right which the landlord are seeking to enforce in the present proceedings is conferred upon them by Section 38 (2) of the Vidarbha Tenancy Act. Therefore, the provisions of Section 38 (3), including the provisions of Section 38 (3) (c) or (d), have no application to the present proceedings. In substance, therefore, it is the contention of Shri Manohar that the reference is not at all called for as the provisions of Section 38 (3) are not at all applicable to the proceedings instituted by the successors-in-title of a widow under sub-section (2) of Section 38 of the Vidarbha Tenancy Act. It is not possible for us to accept this contention.

9. Chapter III of the Vidarbha Tenancy Act deals with the termination of tenancies by landlords and special rights of tenants. Then Section 38 provides for termination of tenancy by landlord on the ground of personal cultivation. Sub-section (1) of Section 38 then lays down that notwithstanding anything contained in Section 9 or 19 but subject to the provisions of sub-sections (2) to (5), a landlord may after giving to the tenant a notice in writing at any time on or before 15th day of February 1961 and making an application for possession under Section 36, within the prescribed period terminate the tenancy of the land held by the tenant, if he bona fide requires the land to cultivate it personally. Then comes sub-section (2) of Section 38 which deals with the special categories of a landlord, namely, (a) a minor, (b) a widow and (c) or a person subject to any physical or mental disability. Sub-section (2) of Section 38 then lays down that if a person belonging to the specific categories had not given a notice and made an application as required by sub-section (1), such a notice could be given and such an application may be made in case of a widow by a successor-in-title within one

year from the date on which the widow's interest in the land ceases to exist. Therefore, it is quite clear that the provisions of sub-section (2) of Section 38 are subject to the provisions of sub-section (1) of Section 38.

10. It is well settled rule of construction that the provisions of a statute should be so read as to harmonise with one another and the provisions of one section cannot be used to defeat those of another unless it is impossible to effect reconciliation between them. The principles stated in Crawford's Statutory Construction at page 260 is as follows:

"Hence, the Court should, when it seeks the legislative intent, construe all of the constituent parts of the Statute together, and seek to ascertain the legislative intention from the whole Act, considering every provision thereof in the light of the general purpose and object of the Act itself, and endeavouring to make every part effective, harmonious, and sensible. This means, of course, that the Court should attempt to avoid absurd consequences in any part of the statute and refuse to regard any word, phrase, clause or sentence superfluous, unless such a result is clearly unavoidable." (See *Sanjeevayya v. Election Tribunal, Andhra Pradesh* (AIR 1967 SC 1211).

In the present case we are concerned with the construction of sub-sections of Section 38 itself. Section 38, as a whole deals with termination of tenancy by landlord for cultivating land personally. Sub-section (2) of Section 38 is part and parcel of the scheme. Therefore, all the sub-sections of Section 38 will have to be read together and harmoniously. The Court has to gather the intention of the Legislature from the enactment as a whole. All the sub-sections should be read together as a whole, each clause throwing light on the other. No precedence could be given to one sub-section or sub-clause over another. All these sub-sections should be read as part of integral whole. So construed, it is clear that they are interdependent. Sub-section (2) of Section 38 cannot be read by itself, in isolation, and will have to be read with other sub-sections of S. 38. All the parts of the section will have to be read together and be given their full and normal effect and as far as possible harmony will have to be aimed at. This provision will have to be so construed so as to further the object and purpose of the enactment uniformly. The restrictions contemplated should apply to each set of circumstances without resulting in any inequities. In our opinion, this is the only permissible interpretation. This interpretation is in conformity with the intention and purpose of the Statute. So read, it is clear that sub-section (2) of Section 38 provides only an extended

period for filing of an application. Under sub-section (1) an application could be filed by the persons not belonging to the specified categories referred to in sub-section (2) within the period prescribed by sub-section (1) of Section 38 itself. In cases of specified categories referred to in sub-section (2) such an application could be filed within one year from the date on which the minor attains majority, or a person ceases to be subject to such physical or mental disability, or in case of a widow by the successor-in-title within one year from the date on which the widow's interest in the land ceases to exist. Therefore, on proper construction of this sub-clause and taking into consideration the object of the Legislation in *Nagarbai Shankar Rao Kokate v. Gahinath* (1964 Mah LJ Note No. 57) this Court found that a widow can file an application even beyond the date prescribed under sub-s. (1) during her lifetime because the tenant's right to purchase land does not come into existence and the tenant continues to be a tenant notwithstanding the other provisions of the Act. On the true construction this Court further found that there can be no possible point in limiting the right of the widow or a minor or a person under disability to acquire possession for personal cultivation only within that date. Cases may arise where a widow or a minor or a person under disability may not require the land for the purpose of cultivating personally during that period because of the then existing circumstances. These circumstances and conditions may change from time to time and it would be highly impossible to imagine that the Legislature could have intended to continue them as landlords and still to prevent them from taking possession for their own cultivation in spite of imminent necessity for their maintenance. It is obvious from this decision of this Court that during the lifetime of a widow she could have terminated the tenancy of the tenant at any time, if she required the land for personal cultivation. This right was obviously subject to the conditions laid down by sub-section (3) of Section 38 of the Act. The period for filing of an application in case of a successor-in-title is further extended by sub-section (2) of Section 38. It was not the intention of the Legislature to confer on the successor-in-title of a widow's interest in the property a right to claim land for personal cultivation without any restriction. More so when the widow's right in this behalf was itself subject to these conditions. To accept such an interpretation would run counter to the scheme of the whole legislation. The successor-in-title can exercise the right under sub-section (2) if person under disability, including the widow, had not already ex-

exercised such right by giving notice and filing an application under Section 38 (1) of the Act. The right is conferred by sub-section (1) of Section 38, and by sub-section (2) the Legislature has only provided further period for exercising such a right in the case of successor-in-title. In substance, therefore, the application is filed under Section 38 (1) of the Act though within extended period. It must, therefore be held that an application filed by the successor-in-title of a widow by virtue of a right conferred upon him by Section 38 (2) is also subject to the restrictions and conditions laid down by sub-section (3) of Sec. 38 of the Vidarbha Tenancy Act. Therefore, it is not possible for us to accept this contention of Shri Manohar.

11. It was then contended by Shri Manohar that the petitioners landlords have satisfied the condition incorporated in Sec. 38 (3) (d) of the Vidarbha Tenancy Act, because Gignabai and Parvatibai were their ancestors and the land leased stands in the records of rights in the name of Parvatibai. He further contended that the bracketed portion of Section 38 (3) (d) will not apply to a case where the title is derived by the landlord by a will, it not being an assignment of Court sale, as contemplated by Section 38 (3) (d) of the Act. According to Shri Manohar, the words or otherwise "referred to in Section 38 (3) (d) should be read as *eiusdem generis* and so read they will take the colour from the words used earlier, namely, "assignment" or "Court sale, which are transfers *inter vivos*". Therefore, the will not being a transfer or assignment by act of parties is not covered by the bracketed portion of Section 38 (3) (d) of the Vidarbha Tenancy Act. Shri Manohar further contended that in this view of the matter, the earlier decision of this Court in Waman Ganesh Joshi v. Ganu Guna Khapre, ((1959) 61 Bom LR 1267) will apply to the present case. In support of his contention that the words "or otherwise" should be construed as *eiusdem generis* Shri Manohar has relied upon the decisions of the Supreme Court in George Da Costa v. Controller of Estate Duty Mysore (AIR 1967 SC 849) and Collector of Estate Duty v. M/s. R. Kanakasabai (AIR 1973 SC 1214) and a decision in Eton Rural District Council v. River Thames Conservators (1950 (1) All ER 996). He has also relied upon para 191 of Statutory Construction Interpretation of Laws, by Crawford at page 326, and pages 110 to 115 of Legislation and Interpretation by Swarup. It is not possible for us to accept this contention.

12. It is quite clear from the bare reading of the two Supreme Court decisions, namely, George Da Costa v. Controller of Estate Duty, Mysore (AIR 1967 SC 849) and

Collector of Estate Duty v. M/s. R. Kanakasabai (AIR 1973 SC 1214) (cit supra) that in those cases the Supreme Court was concerned with the Taxing Statutes which call for a strict interpretation in favour of the subject who was being taxed. Therefore, these decisions are of little assistance while construing the present Legislation which is a piece of beneficial Legislation. This Act provides for additional rights and protection to the tenants. This is manifestly a step in the process of agrarian reforms launched with the object of improving the economic condition of peasants. Moreover in a case where Courts are dealing with a beneficial legislation intended for the protection of tenants if there is any doubt about the meaning of provision, it should be resolved in favour of the tenant. (See Jivabhai v. Chhagan (AIR 1961 SC 1491)).

13. The Supreme Court had an occasion to deal with the question as to when the rule of *eiusdem generis* should be applied in Smt. Lila Vati Bai v. State of Bombay (AIR 1957 SC 521). In that case also the Supreme Court was concerned with the interpretation of words "or otherwise" as used in Section 6, Explanation (a), of Bombay Land Requisition Act, 1948, amended by Bombay Act No. 2 of 1950. In this context, the Supreme Court observed as under:

"The rule of *eiusdem generis* is intended to be applied where general words have been used following particular and specific words of the same nature on the established rule of construction that the Legislature presumed to use the general words in a restricted sense; that is to say, as belonging to the same genus as the particular and specific words. Such a restricted meaning has to be given to words of general import only where the context of the whole scheme of legislation requires it. But where the context and the object and mischief of the enactment do not require such restricted meaning to be attached to words of general import, it becomes the duty of the Courts to give those words their plain and ordinary meaning. In our opinion, in the context of the object and the mischief of the enactment there is no room for the application of the rule of *eiusdem generis*."

Earlier in Para 11 of the said decision on the construction of the section under consideration, the Supreme Court observed as under:

"The Legislature has been cautious and thorough-going enough to bar all avenues of escape by using the words "or otherwise". Those words are not words of limitation but of extension so as to cover all possible ways in which a vacancy may occur. Generally speaking, a tenant's occupation of his premises

ceases when his tenancy is terminated by acts of parties or by operation of law or by eviction by the landlord or by assignment or transfer of the tenant's interest. But the Legislature, when it used the words "or otherwise", apparently intended to cover other cases which may not come within the meaning of the preceding clauses, for example, a case where the tenants occupation has ceased as a result of trespass by a third party. The Legislature, in our opinion intended to cover all possible cases of vacancy occurring due to any reasons whatsoever. Hence, far from using those words *ejusdem generis* with the preceding clauses of the explanation, the Legislature used those words in an all inclusive sense."

This Court had also an occasion to construe the word "otherwise" as used in Section 31 of the Bombay Prevention of Fragmentation and Consolidation of Holdings Act, 1947. After making a reference to the decision of the Supreme Court in *Smt. Lilavati Bai v. State of Bombay* (AIR 1957 SC 521) (cit supra) this Court in *Vinayakrao v. State* (AIR 1976 Bom 10) held that the interpretation of the word "otherwise" as put up by the Supreme Court was amply applicable to the provisions of Section 31 of the said Act also.

14. In our opinion the interpretation of the word "otherwise" as put up by the Supreme Court in *Smt. Lilavati Bai v. State of Bombay* (AIR 1957 SC 521) will aptly apply to Section 38 (3) (d) of the Act. From the bare reading of Section 38 (3) (d) it is quite clear that the Legislature has used the words "or otherwise" in an all inclusive sense to bar all avenues of escape. The bracketed portion in Section 38 (3) (d) was inserted by Act No. 4 of 1960. The Objects and Reasons for this amendment are as under:

"In the course of the implementation of the principal Act, certain difficulties had arisen which could not be overcome without amending certain sections. Also as a result of certain judgments of the High Court, it had been found necessary to amend certain provisions either for making the intention of the Legislature quite clear in respect of those provisions or to remove lacunae which had still remained in that Act. This Act was designed to achieve this object."

Section 38 (3) (d) of the Vidarbha Tenancy Act, as amended, now reads as under:

"38 (3) The right of a landlord to terminate a tenancy under sub-section (1) shall be subject to the following conditions, namely:—

- (a)
- (b)

(c)

(d) The land leased stands in the record-of-rights or in any public record or similar revenue record on the 1st day of August 1957 and thereafter during the period between the said date and the date of the commencement of this Act in the name of the landlord himself or any of his ancestors, (but not of any other predecessor-in-title from whom title is derived, whether by assignment or Court sale or otherwise) or if the landlord is a member of a joint family, in the name of a member of such family."

This Court had an occasion to consider the true import of Section 33-B of the Bombay Tenancy Act which is similar to Section 38 (3) (d) of the Vidarbha Tenancy Act. While construing this provision, in the light of the legislative history of the expression used in the bracket, the Division Bench of this Court in *Shaila v. S. B. Mali* (Special Civil Appns. Nos. 1330/1333 of 1965 decided on 23-1-1968 reported in (1968) 16 Tenancy Law Rep 83), observed as under:

"The interpretation placed by the Revenue Tribunal on the terms of clause (c) of sub-section (5) of Section 33-B is not correct. It appears to us that the words "any person" which occur in the expression "but not of any person from whom title is derived by assignment or Court sale or otherwise" were not intended to include the ancestors of the certificated landlord. In our view, the words "any person" in that expression mean any other person, that is, any persons other than the ancestors of the landlord. This would mean that a certificated landlord fulfils the conditions laid down in the said clause if he derives title to the land from any of his ancestors irrespective of whether the title was derived by inheritance, survivorship, partition, gift, testamentary disposition or any other form of assignment, but that he does not fulfil the requirements of the said clause if he derives title from any person other than one of his ancestors, irrespective of whether the title was derived by assignments, or by Court sale or in any other manner. In the present case, the petitioners derived title to the leased lands by an assignment from their father whose name had been entered in the Record of Rights as the occupier of the lands on 1st January 1958 and they had, therefore fulfilled the requirements of that sub-clause.

There are several reasons why we prefer the interpretation mentioned above. In the first place no meaning can be attached to the words "or otherwise" in the expression "but not of any person from whom title is derived by assignment or Court sale or otherwise," if the person referred to in that expression in-

cludes an ancestor of the certificated landlord. This is because every form of transfer, voluntary or involuntary *inter vivos* or testamentary, is covered by that expression. Even a certificated landlord who derives title by inheritance from his father derives it otherwise than by assignment or Court-sale and if the words "any person" were to include ancestors, such a certificated landlord would fail to satisfy the requirement of clause (c) of Sub-section (5) and be debarred from terminating the tenancy of his tenant. This shows that the words "any person" in that expression do not include ancestors of a certificated landlord.

Secondly, the legislative history of the above expression ("but not of any person from whom title is derived by assignment or court sale or otherwise") corroborates the interpretation which we are inclined to place on the terms used in clause (c) of sub-section (5) of Section 33-B. Sections 33-A to 33-C were added to the Bombay Tenancy and Agricultural Lands Act by an amendment brought about by Maharashtra Act IX of 1961. By the same Act clause (d) of Section 31-A was also amended. Section 31-A deals with the conditions which regulate the right of an ordinary landlord to terminate the tenancy of his tenant, and clause (d) of that section, prior to the said amendment, laid down that the right of a landlord to terminate a tenancy for cultivating the land personally shall be subject to the following conditions:

"The land leased stands in the record of rights or in any public record or similar revenue record on the 1st day of January, 1952 and thereafter during the period between the said date and the appointed day in the name of the landlord himself, or of any of his ancestors, or if the landlord is a member of a joint family, in the name of a member of such family."

By the said amendment the words "but not of any person from whom title is derived by assignment by Court sale or otherwise" were added after the words "any of his ancestors" occurring in clause (d) of S. 31-A. Clause (c) of sub-section (5) of Section 33-B introduced by the amending Act was thus in identical terms with clause (d) of Section 31-A as amended by the same Act. Now, it seems clear that the purpose why the legislature amended clause (d) of Section 31-A by adding the above expression was that the legislature intended to nullify the effect of the decision of a Division Bench in *Waman Ganesh v. Ganu Guna* (1959) 61 Bom LR 1267, which was decided on 7th April 1959. In that case a person had purchased a land in Court auc-

tion in 1955 and had thereafter applied for possession of the land from the tenant under Section 31 on the ground that he required it for personal cultivation. The question before the Court was whether the person who had applied for possession of the land had fulfilled the requirement of clause (d) of Section 31-A as it then stood. The Court held that the term "landlord" occurring in Section 31-A (d) included any person from whom or through whom a landlord derived his right as such landlord, and that a purchaser at the Court auction must be held to have fulfilled the requirement of clause (d) of Section 31-A if the name of his predecessor-in-title stood in the record of rights as an occupant on 1st January 1952. By adding the words "but not of any person from whom title is derived by assignment by Court sale or otherwise" the legislature intended, to make it clear that the landlord who derives title from a stranger (i. e. from any person other than ancestors) by any mode such as an assignment, Court sale or otherwise, does not fulfil the requirement of the clause. The above expression was not added by the Legislature to curtail the rights of landlord who derived title from their ancestors by some form of assignment such as a gift deed or a will.

It appears from the judgment of the Revenue Tribunal that in its opinion, a landlord fulfils the requirement of Section 33-B (5) (c) only if he has acquired the leased land by inheritance from an ancestor or as a member of a joint family. Such an interpretation would lead to inequitable results and does not accord with legislative intention. A person, for instance, who has acquired lands from his independent earnings may leave them by a will to his sons. There is no reason why the sons in such a case should be subject to greater disabilities vis-a-vis their tenants than other landlords who have derived title by inheritance or as members of a joint family.

An interpretation similar to the one which we are inclined to adopt was placed on the terms of clause (c) of sub-section (5) of Section 33-B by Mr. Justice Chandrachud, sitting single, in Special C. A. No. 902 of 1954; decided on 9-4-1965 (Bom). In that case a woman who was the landlady of a certain land had gifted the land in three equal parts to her three daughters, who after obtaining certificates under Section 88-C, had applied for possession of their respective portions of the land under Section 33-B. The learned Judge held that the daughters had fulfilled the requirement of Section 33-B (5) (c), although they derived titled by a gift. We are, with respect, in agreement with that view. See (1966) 14 Tenancy Law Rep 2."

From the bare reading of the aforesaid decision, it is quite clear that according to the Division Bench by using the words "or otherwise" every form of transfer, voluntary or involuntary inter vivos or testamentary was covered by that expression. The right conferred upon the landlord to terminate tenancy of a tenant for personal cultivation is not an absolute right, but it is fettered by the conditions incorporated in sub-sections of sub-section (3) of Section 38 of the Vidarbha Tenancy Act. For terminating a tenancy of a tenant for bona fide personal cultivation, it is necessary that the landlord should satisfy all the conditions referred to in Section 38 (3). One of the conditions laid down by sub-section (d) of Section 38 (3) is that the land leased must stand in the Record of rights or in public record or a similar Revenue records on the 1st day of August 1957 and thereafter during the period between the said date and the date of the commencement of the Act in the name of the landlord himself or any of his ancestors or if the landlord is a member of the joint family, in the name of the member of such family but not of any other predecessor-in-title from whom title is derived whether by assignment or Court sale or otherwise. It is quite clear from the bare reading of this provision that this condition was laid down by the Legislature so as to check unscrupulous termination of tenancies of the tenants by manipulations. To check all sorts of manipulations an all pervading phraseology is used in the bracketed portion of Section 38 (3) (d) of the Act. Therefore, in our opinion, if the ejusdem generis doctrine is applied to the present provision, it will not only imply departure from the natural meaning of the words, but will give them a meaning which may or may not have been intended by the Legislature. If the intention of the Legislature would have been to include in the words "or otherwise" the same kind of assignment, which is contemplated by earlier words, then there was no necessity of using the general words "or otherwise", because the earlier specific words used, namely 'whether by assignment or Court sale' were wide enough to include all kinds of assignments. An interpretation of the general words "or otherwise" limiting their import or scope to the matters and things of the same kind as covered by previous words would make the general words (or otherwise) following the preceding specific words redundant. Therefore, in our opinion, the proper construction to be applied to the words "or otherwise" is to construe these general words in such a way as to carry out the object sought to be achieved by the Legislature. The Legislature when it used the words "or otherwise"

apparently intended to cover other cases which may not come within the meaning of the preceding words. By using the general words "or otherwise" the Legislature intended to cover all possible cases of assignments which are not transfers inter vivos or by act of parties. Therefore the Legislature used these words "or otherwise" in all inclusive sense to bar all avenues of escape. Therefore, in our opinion, the words "or otherwise" used in Section 38 (3) (d) are not words of limitation, but are words of extension so as to cover all possible ways in which title in the land might vest in the person concerned. As already observed, similar view seems to have been taken by the Division Bench of this Court in *Shaila v. S. B. Mali* (cit. supra). Therefore, it is not possible for us to accept this contention of Shri Manohar.

15. If the general words "or otherwise" used in Sec. 38 (3) (d) of the Vidarbha Tenancy Act are given their natural meaning, it will obviously include derivation of title by virtue of a will, and therefore, obviously as the petitioners before us are claiming title to the land in dispute by virtue of the will executed by Giglabai, they will be covered by bracketed portion of Section 38 (3) (d) of the Act, and therefore, are not entitled to claim resumption of the land as they have failed to satisfy the condition laid down by Section 38 (3) (d) of the Act.

16. However, it is contended by Shri Manohar that the bracketed portion will not apply to a case where the title is derived by the present landlords from their ancestor. According to him, Parvatibai and Giglabai being the petitioners' ancestors, even if it is assumed that they have derived a title by virtue of a will executed by Giglabai, the said assignment is not covered by the bracketed portion of Section 38 (3) (d). In support of this contention Shri Manohar has relied upon the observations of this Court in *Shaila's case* ((1968) 16 Tenancy Law Rep 83).

17. It is no doubt true that in view of the decision of the Division Bench in *Shaila's case*, (1968) 16 Tenancy Law Rep 83 referred to hereinbefore, it is quite clear that the expression used in bracketed portion of Section 38 (3) (d) was not added by the Legislature to curtail the right of a landlord who derived title from his ancestors by some form of assignment such as a gift-deed or a will. However, in reply to this contention of Shri Manohar, Shri Deshmukh, the learned counsel appearing for the respondents-tenants has strongly relied upon the decision of this Court in *Vithal v. Maharashtra Revenue Tribunal, Nagpur* (1970 Mah LJ 185). According to Shri

Deshmukh, the word "ancestor" has been used in Section 38 (3) (d) as connoting a progenitor and one indirect lineal line of ascent. As neither Parvatibai nor Giglabei could be said to be progenitor in the direct lineal line of ascent of the present petitioners they cannot be termed as ancestors of the petitioners. However according to Shri Manohar the said decision requires reconsideration.

18. It is no doubt true that such a view has been taken by the Single Judge of this Court in *Vithal v. Maharashtra Revenue Tribunal* 1970 Mah LJ 185 (cit supra). However, it appears that in the earlier Division Bench decisions of this Court in *Shaila v. S. B. Mali* (1968) 16 Tenancy Law Rep 83 (cit supra) and *Waman v. Ganu* (1959) 61 Bom LR 1267 and a decision of single Judge in *Nima v. Putalabai* (1964) 12 Tenancy Law Rep 2 were not brought to the notice of the learned Judge. The Legislature thought it expedient to amend the provisions of Sec. 28 (3) (d) by inserting the bracketed portion in view of the earlier decision of this Court in *Waman v. Ganu* ((1959) 61 Bom LR 1267). In that case this Court had an occasion to consider the true import of Sec. 31-A (d) of the Bombay Tenancy Act, as unamended while construing the said provisions, the Division Bench of this Court in *Waman v. Ganu* (cit. supra) observed as under:

"The cases of an heir and of a member in a joint family are now expressly provided for by the introduction of the words 'of any of his ancestors, or if the landlord is a member of a joint family, in the name of a member of such family' in clause (d) of Sec. 31-A of the Act"

Besides, we do not see why any distinction in principle should be made between the case of an heir and that of a transferee. In one case the property of the original landlord is taken by succession and in the other, by transfer."

From the bare reading of those observations it is quite clear that the words "any of his ancestors" in Section 31-A (d) of the Bombay Tenancy Act, which are analogous to the words used in Section 38 (3) (d) of the Vidarbha Tenancy Act, were construed by the Division Bench as referring to cases of Landholders who derived their title to the land by succession as an heir. From the bare reading of Section 38 (3) (d) it is quite clear that before a landlord could resume a land under Section 38, he must establish that the land leased stands in the Record of Rights or in public record or similar Revenue records on the 1st day of August 1957 and thereafter during the period between the said date and the date of the commencement of the Vidar-

bha Tenancy Act, (1) in the name of a landlord himself, (2) in the name of any of his ancestors, but not of any other predecessor-in-title from whom title is derived whether by assignment or Court sale or otherwise and (3) if the landlord is a member of a joint family, in the name of a member of such family. Therefore, it is obvious that the word "ancestors" has been used by the Legislature to cover the cases of the landholders who derived title to the property by succession or inheritance. In our view, the word "ancestors" will have to be interpreted liberally and not in the restricted sense in which it is used in Hindu Law. It cannot be forgotten that the Tenancy Act applies to all the citizens of the Vidarbha region irrespective of their religion. It applies to Hindus, Muslims, Christians, Parsis and the persons belonging to other communities, who are residing within the Vidarbha region. Therefore, a narrow or a restricted meaning could not be given to the word "ancestors" as has been given in *Vithal v. Maharashtra Revenue Tribunal* (1970 Mah LJ 185) (cit. supra). In the cases of natural and normal inheritance there is no scope for manipulation. Therefore, taking into consideration the object of the section and the scheme of the Act, in our opinion, a person of any sex who goes before either on the paternal or maternal side could be looked upon as an ancestor of the person inheriting the former's property, if in the normal and natural course of inheritance he is entitled to inherit the property as an heir. Normally, phrase 'heir' cannot be limited to issue only. It must include all persons who are entitled to the property of another under the Law of inheritance. However, in the present case it is not necessary to probe in this question any further because it is quite clear from the material placed on record that in the normal and natural course of inheritance, the petitioners could not have inherited the suit property, as their mother Kanibai was alive when the proceedings were instituted by them. We are informed by the counsel for petitioners that Kanibai died in the year 1972. Therefore, till Kanibai was alive, by no stretch of imagination the petitioners could have derived title to the suit property by inheritance, because Kanibai being a preferential heir would have inherited the property in her own right. Therefore, in our opinion, there is no substance in the contention raised by Shri Manohar that Parvatibai and Giglabei were ancestors of the petitioners.

19. However, it was contended by Shri Manohar that the word "ancestors" should be construed with reference to the personal law of the person concerned and, therefore, under old Hindu Text, the petitioners being Sapindas of Parvatibai and Giglabei, it can be

said that Parvatibai and Gignabai were their ancestors. In support of this proposition he has relied upon the Commentary on Hindu Law by Shrinivasan. However, it is not possible for us to accept this contention also.

20. Looking to the nature of the Statute which is secular and applicable to persons belonging to all religions, in our opinion, no reliance could be placed on the original Texts of the Hindu Law in this behalf. Apart from this, the theory of Sapindas, as found in the old Texts, applies to spiritual matters and matters relating to the marriages etc. It has no application to any secular matters or matters relating to the property. So far as the matters relating to the property are concerned, they are now specifically covered by the Hindu Succession Act. In this view of the matter, in our opinion, there is no substance in this contention also.

21. Therefore, taking a cumulative view of the whole matter, it is quite clear that the petitioners have not satisfied the condition laid down in Section 38 (3) (d) of the Vidarbha Tenancy Act. The land in dispute did not stand in the Record of Rights for the relevant period either in the name of the petitioners or in the name of any of their ancestors. It is further clear that the petitioners were not members of the joint family of either Gignabai or Parvatibai, and, therefore, that part of the section will not apply to their case. Therefore, the petitioners' case is wholly covered by the bracketed portion of Section 38 (3) (d) of the Vidarbha Tenancy Act as they have derived title to the suit field from their predecessor-in-title otherwise than by inheritance. The source of their title is a will, which is wholly covered by the words "or otherwise" as used in the bracketed portion of Section 38 (3) (d) of the Act. Even otherwise they derived the title to the suit field by virtue of a will executed by Gignabai and the land was not recorded in Record of Rights for the relevant period in the name of Gignabai. It is an admitted position that it stood recorded in the name of Parvatibai alone. In this view of the matter, as the petitioners have not satisfied the condition referred to in Section 38 (3) (d) of the Act, their application was liable to be dismissed.

22. In the view we have taken, therefore, it is not necessary to consider the rival contentions raised before us so far as the merits of the matter are concerned.

23. Even on merits, in our opinion, the authorities below, namely, the Tenancy Naib Tahsildar and the Sub-Divisional Officer, have not properly approached the case. From the order of the Sub-Divisional Officer it is quite clear that he found that the Tenancy

Naib Tahsildar was wrong in calculating the income of the landholders on the basis of very vague presumption. From the record it appears that the petitioners are working in the cloth shop with their father and the father owns two shops. No material has been placed before the authorities concerned to indicate as to what is the income of the shop and how it is shown in the account books which are maintained for the purposes of Income-tax. It is pertinent to note that the petitioners are married and have children. They are actually working in the cloth shops. In the application filed by the landholders no averments were made to indicate as to what was their income from other sources and as to why they require the land in question for their bona fide personal cultivation. The landholders were not agriculturists when they filed the present application. The material in this behalf is introduced for the first time during the course of evidence. The petitioners failed to disclose the true and correct position of the cloth shop in which they were working. They have also not disclosed the income from other sources i. e. house property. In these circumstances, in our opinion, it can safely be said that the findings of fact recorded by both the authorities below were to some extent based on conjectures and surmises not supported by the material on record. The burden to prove various conditions was obviously upon the landholders. It is no doubt true that while exercising its jurisdiction under Section 111 of the Vidarbha Tenancy Act it is not open to the Revenue Tribunal to set aside the concurrent finding of fact recorded by the authorities below, but it is further clear from the material placed on record that even while deciding the question as to whether the income by cultivation of the land, of which the petitioners were entitled to take possession, was the principal source of income or not, the authorities below have misunderstood the real point for determination. The appellate Court has found that the petitioners could use water for improvement in the field from Saikheda Project, and therefore, might get more income. To say the least, the finding in this behalf is to some extent speculative. The lower Courts whose decisions on a question of fact are final have arrived at a decision on material point by considering material which is partly irrelevant to the enquiry and have based their decisions partly on conjectures and surmises. Therefore, so far as the merits of the matter are concerned, in the interest of justice, we were inclined to remit back the whole case over again to the stage of Tenancy Naib Tahsildar for giving reasonable opportunity to both the parties to adduce evi-

dence in support of their respective cases. But as we have found that the petitioners have not satisfied the conditions incorporated in Section 38 (3) (d) of the Vidarbha Tenancy Act itself, such a remand is not now necessary.

24. In the result, therefore, the petition fails and is dismissed. However, in the circumstances of the case there will be no order as to costs.

Petition dismissed.

AIR 1977 BOMBAY 35

MUKHI, J.

Radhakishin N. Advani, Appellant v. Mrs. Sheila Gobind Mirchandani and another, Respondents.

A. F. O. No. 48 of 1975, D/- 16-1-1976.*

(A) Civil P. C. (1908), Section 9-A — Application for interim relief — Objection to jurisdiction of Court taken — Duty of Court.

Where an application for an interim injunction is made and an objection to the jurisdiction of the Court to entertain the suit is taken by any party the Court must decide the question of jurisdiction as a preliminary issue at the hearing of the application. The Court can grant an ad interim injunction but it must decide the application as expeditiously as possible and cannot adjourn the hearing of the application till the hearing of the suit.

(Paras 4, 5, 10, 14)

P. L. Nain with G. V. Bansi, for Appellant; Keshavdas Dalpatrai, for Respondent No. 1.

JUDGMENT:— This is an appeal from an order of a Judge of the City Civil Court, Bombay, (Judge Guttal) whereby on a Notice of Motion taken out by the plaintiff he granted an interim injunction in terms of prayer (c) of the Notice of Motion and adjourned the hearing of the Notice of Motion itself till the hearing of the suit.

2. It requires to be stated at once that the 1st defendant in reply to the application for interim relief took up the plea that the City Civil Court, Bombay, had no jurisdiction to entertain and try this suit and/or grant any interim relief inter alia on the ground that the value of the subject-matter of the suit, viz., a flat in Brothers Co-operative Housing Society

*(Against order of Guttal Judge, City Civil Court, Bombay, D/- 22-10-1974.)

Ltd., Mahim, being Rs. 35,000/-, exceeded the pecuniary jurisdiction of the Court. Secondly it was contended that the City Civil Court would have no jurisdiction because the plaintiff was claiming under a will left by one Jethmal Mulchand Malkani (who died on the 24th of October, 1972) unless a probate of the will was obtained from the High Court.

3. It would appear that the learned Judge did not appreciate the scope and ambit of Section 9-A of the Civil Procedure Code, which was introduced in 1970. Now, Section 9-A reads as follows:—

"9-A. (1) If, at the hearing of any application for granting or setting aside an order granting any interim relief, whether by way of injunction, appointment of a receiver or otherwise, made in any suit, an objection to the jurisdiction of the Court to entertain such suit is taken by any of the parties to the suit, the Court shall proceed to determine at the hearing of such application the issue as to the jurisdiction as a preliminary issue before granting or setting aside the order granting the interim relief. Any such application shall be heard and disposed of by the Court as expeditiously as possible and shall not in any case be adjourned to the hearing of the suit.

(2) Notwithstanding anything contained in sub-section (1), at the hearing of any such application, the Court may grant such interim relief as it may consider necessary, pending determination by it of the preliminary issue as to the jurisdiction."

4. A plain reading of the section discloses that whenever an objection to the jurisdiction of the Court is taken to entertain a suit in which an application for granting or setting aside an order granting an interim relief is made, then it becomes a duty of the Court to proceed to determine, at the hearing of such application, the issue as to jurisdiction as a preliminary issue before granting or setting aside the order granting interim relief.

5. In other words, the Court is enjoined to first determine the question of jurisdiction as a preliminary issue not at the hearing of the suit but at the hearing of the application for interim relief. Then there is a further provision that any such application, that is to say, the application for granting or setting aside an order granting any interim relief shall be heard and disposed of by the Court as expeditiously as possible, and what is per-

haps more important it "shall not in any case be adjourned to the hearing of the suit."

6. It is the grievance of Mr. Nain, the learned Advocate for the 1st defendant, that the learned trial Judge has done precisely the reverse.

7. Now, the order which the learned trial Judge passed reads as follows:—

"On the plaintiff's Notice of Motion No. 2135 dated 7-5-1974 there shall be an interim injunction in terms of prayer (c). Hearing of the Notice of Motion is adjourned till the hearing of the suit."

8. It is Mr. Nain's contention that the learned trial Judge has first of all failed to expeditiously determine the question of jurisdiction and that secondly contrary to the mandate of Section 9-A of the Civil Procedure Code he has adjourned the application for interim relief, in the form of the Notice of Motion, to the hearing of the suit.

9. I am afraid, Mr. Nain, is right and that is precisely how the learned Judge has fallen in error.

10. It requires to be stated that there is no prohibition even when the question of the jurisdiction of the Court is involved for the Court to grant an ad interim relief. The emphasis is on the ad interim nature of the relief, precisely because an ad interim order cannot be converted into an interim order without hearing the application itself in the form of the Notice of Motion. The learned Judge has not heard the Notice of Motion as such, because he adjourned it to the hearing of the suit.

11. Mr. Keshavdas Dalpatrai, the learned Advocate for the plaintiff-respondent, contended that the word "ad" may have been inadvertently left out so that what the learned Judge was in fact doing was to grant an ad interim injunction and then hear the Notice of Motion at the time of the hearing of the suit where the preliminary issue as to the jurisdiction would be considered. It is good of Mr. Keshavdas Dalpatrai to argue in this manner, but I am afraid that does not seem to be the case. Even assuming that what the learned Judge intended to grant was an ad interim injunction and not an interim injunction, the fact that he had adjourned the hearing of the Notice of Motion to the hearing of the suit speaks for itself.

12. Section 9-A of the Civil Procedure Code, as I find it, is in the clearest possible terms and, in my opinion, it

would be the duty of the Court in such matters to forthwith hear the application for granting or setting aside an order granting an interim relief and determine the question of jurisdiction of the Court wherever it is taken. It is only after the question of jurisdiction has been put away that further proceedings may go on.

13. It is substantially clear that the purpose and intent of this legislation (which is expressed fortunately in the clearest of terms) is that if a suit is capable of being disposed of on the question of jurisdiction it should be so disposed of forthwith before any further proceedings are taken or the suit is allowed to be in some docket for years to come and becomes part of the arrears about which we hear so much.

14. In the result, the appeal is allowed, and the order of the learned trial Judge is modified so that there will now be an ad interim injunction in terms of prayer (c) of the Notice of Motion pending the hearing and final disposal of the Notice of Motion.

15. On Mr. Nain's request it is clarified that the words "dealing with" used in the ad interim order will not include carrying on necessary repairs in the flat or doing anything for the preservation of the property.

16. In the circumstances of the case there will be no order as to costs.

Order accordingly.

AIR 1977 BOMBAY 36

DESAI, J.

Krishnaji Mahadeo Bapat, Applicant
v. Wamanrao Balwantrao Shinde and another, Opponents.

Civil Revn. Appln. No. 218 of 1976,
D/- 6-10-1976.*

(A) Civil P. P. (1908), Order 3, R. 4
— Authority of advocate — Transfer of proceedings to another court — Authority of advocate in original court comes to an end.

If the suit or the proceeding is transferred from one court to a totally distinct Court, the authority of an advocate in the original court would come to an end. All Vakalatnamas and appearances are

*(Against order of J. R. Limaye, Dist. J., Ratnagiri, in M. A. No. 10 of 1975, D/- 3-4-1976.)

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filed for a particular Court. It is for a suit or the proceedings in that Court that the Advocate is authorised to and obliges himself to appear. Neither the client nor the advocate can be bound by that authority given with reference to a particular Court if the proceedings are transferred to a different Court. (Para 4)

(B) Civil P. C. (1908), Order 9, Rule 6 — Ex parte decree — Transfer of suit to distinct court — Merely because defendant was aware of transfer but did not take steps to acquaint himself with progress of suit or to appoint an advocate that would not be ground for sustaining ex parte decree. (Para 4)

K. J. Abhyankar, for Applicant; M. A. Rane, for Opponents.

ORDER:— This revision is against the order of the learned District Judge, Ratnagiri, dated 3rd April, 1976, dismissing Miscellaneous Appeal No. 10 of 1975. That appeal was from the order of the Civil Judge, Junior Division, Khed, in Miscellaneous Application No. 4 of 1974. That application was filed by the defendant, against whom an ex parte decree has been passed on 29th June, 1974, for restoration of the suit for hearing on merits.

2. The suit was originally filed in the Court of the Civil Judge, Junior Division, Chiplun. Thereafter by an order of the District Court it was transferred to the Court of the Civil Judge, Junior Division, Khed. One Mr. Chitley, Advocate, had put in the Vakalatnama for the petitioner before me in the Court at Chiplun. The Court at Khed gave a notice of hearing to the said Advocate. On the day namely on 28th June 1974 both the Advocate and the petitioner remained absent. Evidence on behalf of the plaintiff was taken on affidavit. An affidavit of the Mukhtyar was filed. Issues were framed as the written-statement had already been filed and the suit was decided ex parte. On 3rd August 1974 the petitioner claims that he went to Khed to enquire about the further progress of the case and on coming to know what had transpired about the suit he made an application on the same day for setting aside the said ex parte decree.

3. Evidence was taken by the Civil Judge, Junior Division, Khed, who held that he was not satisfied with the explanation given by the petitioner as to his inability to attend the Court on the relevant date. Being aggrieved by the said decision the petitioner preferred an

appeal which was dismissed by the learned District Judge.

4. The learned District Judge refers to Order 3, Rule 4 of the Civil Procedure Code and observes that the authority of the Advocate concerned would not come to an end merely by reason of the transfer of the suit from Chiplun to Khed. I am a little doubtful about the correctness of the legal position. All Vakalatnamas and appearances are filed for a particular Court. It is for a suit or the proceedings in that Court that the Advocate is authorised to and obliges himself to appear. Neither the client nor the advocate can be bound by that authority given with reference to a particular Court if the proceedings are transferred to a different Court. Here it is important that I am not talking about the place of the Court. For example, it would be correct to say that the authority would continue if the work of the Civil Judge, Junior Division, Chiplun, was to be attended to at Khed by the Civil Judge concerned there, because in that case the Civil Judge at Khed would have a dual capacity acting as Civil Judge both at Chiplun and Khed. But if the matter was to be transferred from one Court to a totally distinct Court, it appears to me that the application under authority in the Court by an Advocate would come to an end. However, it appears to me unnecessary to go deeper into the matter since on the facts before me, both the Courts below have taken an extremely harsh view against the petitioner. The finding of the Court is not that the petitioner was aware of the date and had deliberately chosen to remain absent. The finding only is that the petitioner was only aware of the transfer and thereafter did not take any steps to acquaint himself with the progress of the suit or appoint an Advocate to represent him at Khed. Merely on this footing I do not think that the ex parte decree ought to be sustained. Assuming that there is some negligence on the part of the Advocate or the party, such negligence would not disentitle him for an opportunity to defend the suit on merits provided an order can be made against him compensating the other side for the costs thrown away. It is true that the powers of this Court to interfere in revision with such orders are limited; but such powers have to be called into play when such orders are passed which shock the conscience of the Court. It appears to me that such ex parte decrees and orders

dismissing the suit for default are being increasingly sought to be sustained merely on the ground that if the suit is restored, then the matter shown as disposed of and no longer lying in the Court will be restored on the file of the Court and perhaps included in the arrears of the Court. It is also important to note that by taking extensive evidence for such application more time is spent which could have been utilised to dispose of the suit itself.

5. In the result, the rule is made absolute, but the restoration will be on the following terms:—

"The petitioner will pay to the respondent the costs of the Miscellaneous Application, of the Misc. Appeal and of this revision petition as well as the costs thrown away on 29th June, 1974, quantified in the aggregate at Rs. 350/-, before the date of effective hearing of the suit. Such payment of costs will be condition-precendent to the petitioner being allowed to further appear in the suit." The petitioner through his Advocate also undertakes that he will file the Vakalatnama of some Advocate in the Khed Court on or before 15th November, 1976. I further direct the Khed Court to dispose of the suit as expeditiously as possible and in any case on or before 15th January, 1977. Records and proceedings and the writ be sent down forthwith.

Rule made absolute.

AIR 1977 BOMBAY 38

VAIDYA, J.

Sardruddin Allisaheb Mutavali and others, Appellants v. Hajarat Peer Shamma Meer Saheb Darga and others, Respondents.

A. F. A. D. No. 225 of 1969, D/- 3-8-1976.*

(A) Civil P. C. (1908), Section 9, Explanation — 'Right to property' — Right to distribute offerings made to Dargah is 'right to property'.

The right of trustees of a Dargah to distribute the offerings made to the Dargah amongst persons entitled thereto is a right to property though the trustees may not have any personal interest in the offerings. The words 'right to property'

*(Against order of M. A. Deshpande, Asst. J., Sangli, in Civil Appeal No. 47 of 1967.)

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cannot be narrowly construed to mean only 'right of ownership of property'. Where the plaintiffs, trustees of the Dargah, filed a suit for a permanent injunction restraining the defendants from removing the offerings made to the Dargah and the defendants contended that they were entitled to the share in the offerings and the trustees had no right to the offerings qua trustees, held the suit was maintainable. The trustees were responsible for the proper management of the Trust. In the course of the management, they were in duty bound to distribute properly the offerings made to the Dargah in accordance with the ancient custom and usage of the Dargah. They could not allow the defendants to raise disputes among themselves or quarrel among themselves and mar the sanctity of the offerings made to the Dargah by the devotees. (Paras 15, 16, 17, 18)

Cases Referred: Chronological Paras
(1974) 76 Bom LR 654 = 1974 Mah LJ 941 14
(1973) 75 Bom LR 668 14

S. C. Pratap, for Appellants; K. J. Abhyankar, for Respondents.

JUDGMENT:— The respondents are the Trustees of the famous Dargah of Hajarat Peer Shamma Meer Saheb at Miraj. The Dargah is registered as a Public Trust under the Bombay Public Trusts Act, 1950.

2. On November 30, 1964, the respondents filed a suit in the Court of the Civil Judge, Junior Division, Miraj, against the appellants to get a permanent injunction restraining the appellants from touching or removing the Maitana and Amish, i.e., articles and cash amounts of Navas offered by the devotees of the Dargah at the time of Moharrum and Urus festivals, and further restraining them from interfering with the plaintiffs' right of distributing the said Maitana and Amish and cash amount. They also sued to obtain accounts from the defendants about the Maitana and Amish removed by the defendants during the Moharrum and Urus of 1963 and during the Moharrum of 1964; and for the recovery of the amount that would be found due from the defendants at the foot of the accounts and costs.

3. According to the plaintiffs, Moharrum and Urus festivals are celebrated in the Dargah every year. Devotees offer cash amounts and other articles of Navas called maitana and Amish to the Kabrasthan (Tomb) in the Dargah at

the time of Moharrum and Urus. The plaintiffs keep a box for that Maitana and Amish and cash amounts. The three families of Mutavallis, Sharik Maslats and Mushrifs of Miraj had shares in that Maitana, Amish and cash amounts. The Mutavallis had 1 1/2 share, Sharik Maslats had one share and Mushrifs had one share in the said Maitana, Amish and cash amounts. The plaintiffs were distributing the same among the members of the three families of Mutavallis, Sharik Maslats and Mushrifs in proportion of their respective shares according to the usage from ancient times.

4. However, the defendants, who belong to the said three families, removed the Maitana and Amish etc., received at the time of Moharrum and Urus of 1963 and at the time of Moharrum of 1964 illegally and unauthorisedly and were threatening to do the same even in the year 1964 by unauthorisedly taking away the box and other articles. Hence the plaintiffs filed the suit claiming the aforesaid reliefs.

5. The suit was resisted by the defendants. They denied the allegations made by the plaintiffs and contended that the plaintiffs alone were not the Trustees of the Dargah and the plaintiffs had no right to keep the box for collecting the cash amount and other articles of Navas offered at the Dargah. According to the defendants, the box was kept there by the three families of Mushrifs, Sharik Maslats and Mutavallis for collecting the Maitana, Amish, cash and other articles offered by the devotees at the time of Moharrum and Urus. The defendants' families distribute them according to their respective shares and the custom and usage of the Dargah.

6. They denied the right of the plaintiffs to distribute the same among the families. They contended that all the amounts and articles received at the time of Moharrum and Urus were given to the Mulla of the Dargah for safe custody after making a list of the same. They further contended that sugar and coconuts offered to the Dargah were kept on the Gala above the door in front of the Dargah and the same were distributed according to the shares of the families. They also contended that the cash amounts were distributed by themselves once a year after Moharrum and Urus.

7. They described the following method of customary distribution, viz., — Rupees 12 were given to Mulla before distribution; rupee one was reserved for

Ramzan Id; Rs. 3.50 were given to Fakirs; Rs. 25/- were paid by way of Khidamati charges and after deducting the amount of Rs. 41.50 the balance was distributed among the three families. They admitted that Mutavallis have got 1 1/2 share; Sharik Maslats have got one share and Mushrifs have got one share.

8. They denied that they had removed the boxes containing cash amounts and articles of Navas at the time of Moharrum and Urus of 1963 or at the time of Moharrum of 1964 unauthorisedly. They also denied that they were threatening to remove the box at the time of Urus of 1964. They contended that the cause of action for the suit was a false one; and the plaintiffs were not entitled to claim accounts of amounts and articles in the boxes during the Urus and Moharrum of 1963 and Moharrum of 1964. They submitted that the plaintiffs' suit was liable to be dismissed with costs.

9. The learned Civil Judge framed as many as eight issues as per Exhibit 26. The defendants led oral and documentary evidence consisting of two decisions of the Charity Commissioner regarding the Dargah, viz., Exhibit 82, under which the Assistant Charity Commissioner had ordered that the Dargah and its endowment property be registered as a religious Public Trust; and Exhibit 83, ordering certain properties to be registered as properties of the Public Trust. The plaintiffs also produced registers and other documents from the record of the suit Dargah at Exhibits 62, 63 and 66 to 76.

10. The learned Civil Judge very carefully considered the oral and documentary evidence and particularly the previous litigations relating to the Dargah and the previous records of the Dargah and came to the conclusion that the plaintiffs had a right of distributing Maitana, Amish, cash amounts and other articles offered to the Dargah at the time of Moharrum and Urus festivals; and the plaintiffs were, therefore, entitled to an injunction. He, however, dismissed the suit for accounts as the plaintiffs had no share in the said offerings.

11. Accordingly, the learned Civil Judge passed a decree on December 10, 1966, in the following terms:—

"(1) It is hereby declared that plaintiffs, as Trustees of the Hajarat Peer Shamma Meerasaheb Darga of Miraj have got a right to distribute the Maitana, Amish, cash amounts and other articles of Navas received from the devotees in

that Darga at the time of Moharrum and Urus festivals every year amongst the members of the three Mujavar families of Mutavallies, Sharik Maslats and Mushrifis according to their 1 1/2, 1 and 1 share respectively.

(2) Defendants are hereby permanently restrained by a perpetual injunction, from touching or removing the Maitana, the Amish, the cash amounts and other articles of Navas offered by the devotees to the Peer's Tomb (Kabarasthan) in the Hajarat Peer Shamma Meer-saheb Darga of Miraj at the time of Moharram and Urus festivals every year and from interfering with the right of plaintiffs, as trustees of that Darga, of distributing the said Maitana, Amish cash amounts and other property amongst the three families of Mutavallis, Sharik Maslats and Mushrifis according to their respective shares, either by themselves or through their agents, servants and such other persons.

(3) Plaintiffs' suit so far as it relates to the claim for accounts and for possession of Maitana, Amish, cash amounts and other articles of Navas received in the Darga at the time of Moharrum and Urus of 1963 and Moharrum of 1964 at the foot of those accounts, stands dismissed.

(4) Parties to bear their own costs as incurred.

(5) Decree to be drawn up in terms of this order."

12. The said judgment and decree passed by the learned Civil Judge were challenged by the defendants in Civil Appeal No. 47 of 1967. The learned Assistant Judge, who heard the said appeal, dismissed it with costs on August 22, 1968, having regard to the registered agreement executed in favour of the Secretary of State for India in Council on January 7, 1916, referred to in the orders of the Assistant Charity Commissioner at Exhibits 82 and 83, overruling the contentions raised by the defendants. The concurrent judgments and the decrees are challenged in the above Second Appeal by the defendants.

13. Mr. Pratap, the learned Counsel appearing for the defendants-appellants, submitted that having regard to the fact that the plaintiffs themselves have no share in the suit offerings before the Dargah and also having regard to the fact that it was undisputed that the defendants' families were entitled to their respective shares in the offerings according to the custom and usage of the Dar-

gah, the suit was liable to be dismissed on the ground that it was not a suit of a civil nature.

14. He relied upon the decision of this Court in Ramchandra Keshav Gore v. Gavalakha Gangadhar Swami, (1973) 75 Bom LR 668, and the provisions of Section 9 of the Code of Civil Procedure. He also contended that the questions as to how the offerings were to be distributed and who actually had to distribute them, were matters of indoor management of the three families who were entitled to their respective shares in the offerings and hence the Civil Court could not interfere in such matter of indoor managements of the three families. In support of his arguments he relied on a judgment of this Court in Janardhan C. Upadhye v. Rajni Patel, (1974) 76 Bom LR 654.

15. There is no merit in these arguments as the present suit is clearly covered by the Explanation to Section 9 of the Code of Civil Procedure, which runs as follows:—

"A suit in which the right to property or to an office is contested is a suit of a civil nature, notwithstanding that such right may depend entirely on the decision of questions as to religious rites or ceremonies."

The right to distribute the offerings is, undoubtedly, a right to property, though the Trustees may not have any personal interest in the offerings.

16. Mr. Pratap's argument that because the defendants alone were interested in the distribution of the offerings, the plaintiffs could not claim any right as Trustees, cannot be accepted because the Trustees are responsible for the proper management of the Public Trust. In the course of the management, they are in duty bound to distribute the offerings made to the Dargah of Hajarat Peer Shamma Meer Saheb in accordance with the ancient custom and usage of the Dargah.

17. They cannot allow the defendants to raise disputes among themselves or quarrel among themselves and mar the sanctity of the offerings made to the Dargah by the devotees. The cases cited by Mr. Pratap cannot, therefore, be of any assistance to him in the present case. It must be held that the Civil Court had jurisdiction to entertain the suit for injunction filed by the Trustees in the facts and circumstances of the present case.

18. Secondly, it was argued by Mr. Pratap that in any event, the Trus-

tees had no right to the offerings qua Trustees as it was admitted that the offerings were to be distributed, as stated above, among the three families of the defendants. The words "right to property" in the Explanation to Section 9 of the Code of Civil Procedure cannot be narrowly construed to be meaning as only "the right of ownership of the property". In the case of the offerings, the proper distribution thereof among the three families is a duty of the Trustees who are entrusted with the management of the Dargah. The right to distribute it must necessarily vest in the Trustees. It is the duty of the Trustees, as already stated above, to see that the offerings are properly distributed in accordance with the custom. The right so to distribute or deal with offerings is also a right to property within the meaning of the Explanation to Section 9 of the Code of Civil Procedure.

19. Thirdly, it was submitted by Mr. Pratap that in any event as since 1950 the defendants were distributing the offerings by themselves, the plaintiffs' suit instituted in 1964 was barred by time. The two Courts below have very carefully appreciated the oral and documentary evidence; and have held that the contention raised by the defendants is false; and the record clearly shows that the distribution of the offerings was made by the Trustees before 1963.

20. The learned Civil Judge has very carefully summarised the position in paragraph 10 of his judgment as follows:—

"A series of documents produced at Exhibit 76 by the Plaintiffs go to show that there were constant disputes amongst the members of the three Mujavar families regarding distribution of the Amish property and that the Police and the Government of the Ex-Miraj State and the Collector of Satara had to intervene from time to time to see that the distribution of the Amish was made properly and without breach of peace. The register of the Darga produced at Ex. 62 shows that on 22nd October, 1936, distribution of Amish was made. The words "Watun Dile" in Marathi therein show that the Panchas of the Darga had made distribution of that property. The register at Exh. 63 shows that similar distribution was made by the panchas of the Darga on 28th May, 1950, in the presence of the Mamlatdar of Miraj. The file of the Darga for the years 1900 and 1901 produced at Exh. 66 shows that in Decem-

ber 1900, distribution of Amish was similarly made and that on 30th January, 1901 some amount was paid to Fakirs in the presence of the Karbhari of Ex-Miraj State. The file of the Darga produced at Exh. 67 shows that in October 1906, distribution of Amish was made under the supervision of the Panchas of the Darga. The receipt book of the Darga for the years 1922 and 1923 produced at Exh. 68 shows that the panchas of the Darga had made the distribution of Amish during the year 1922-23. The receipt book of the Darga for the year 1927 produced at Exh. 69 shows that the panchas of the Darga had distributed the Amish for the year 1927 amongst the members of the three families on 13th February, 1927. The proceeding book of the suit Durga for the year 1940-41 produced at Exh. 70, shows that on 10th September, 1940, the Durga Panchas had distributed the Amish received during the year 1940-41. The proceeding book of the suit Darga for the year 1941-42 produced by plaintiffs at Exh. 71 shows that the Darga Panchas had made the distribution of Amish received during the year 1941-42 on 28th August, 1941. The proceeding book of the suit Darga for the year 1945-46 produced at Exh. 72 shows that the Amish received during the year 1945-46 was distributed by the Panchas of the Darga. The proceeding book of the suit Darga for the year 1947-48 produced at Exh. 73 shows that the Darga Panchas had distributed the Amish for the year 1947-48. The proceeding Book of the Darga for the year 1950-51 produced at Exh. 74 shows that the Darga Panchas had distributed the Amish for the year 1950-51 on 11th July, 1951, in the presence of the Mamlatdar of Miraj. The outward register of the Darga for the year 1950-51 produced at Exh. 75 shows at its pages Nos. 6 and 7 that the distribution of Amish for the year 1950-51 was made in the presence of Mamlatdar of Miraj and that the Mamlatdar was informed on 9th July, 1951, that no receipts regarding that distribution were obtained as the Amish was distributed in the presence of the Mamlatdar of Miraj. All these documents prima facie go to show that distribution of Amish is made by the Panchas or Trustees of the suit Darga every year. Thus Plaintiffs have proved their right and longstanding Vahiwat of distributing the Amish."

21. The said findings are fully supported by the evidence on the record and are impeccable. I find no error in

the judgments of the two Courts below. The judgments and decrees passed by the two Courts below are, therefore, confirmed and the Second Appeal is dismissed. Having regard to the fact that the Trustees also belong to the families of the defendants and in the hope that the offerings made to a saint like Hajarat Peer Shamma Meer Saheb will not be squandered by the parties in litigation like the present appeal, the parties are directed to bear their own respective costs of this Second Appeal.

Appeal dismissed.

AIR 1977 BOMBAY 42

MRIDUL, J.

Pramod M. Jhaveri and another, Debtors v. Sukhdeo Ramratan and another, Creditors.

Insolvency Petn. No. 11 of 1974, D/-5-7-1976.

(A) Maharashtra Debt Relief Act (1976), Secs. 2, 4, 7 (1), 11, 12 — Applicability of Act to insolvency proceedings — Claim by debtor that he is entitled to benefits or protection of the Act — Jurisdiction of insolvency Court whether barred.

An insolvency proceeding or the claims arising in insolvency proceedings are not outside the radiational periphery of the provisions of the Act. The expression 'civil court' in clause (b) of Section 4 must be held to take in the insolvency court deriving its powers and authorities from the Letters Patent of High Court and the provisions of the Presidency Towns Insolvency Act. The word 'proceeding' in the clause has a wide spectrum of variable shades of meanings. The expression must, of necessity, take its colour from intendments of the Act or the remedies provided thereby or the mischief sought to be remedied by it. The Act is conceived as a social welfare legislation to provide relief from indebtedness. Insolvency being one of the modes in which the indebtedness of a debtor can be enforced through the instrumentality of an insolvency court, any legislative provision for relief therefrom must be held to 'include a relief from the claims in insolvency proceedings in respect of indebtedness of a person covered by the Act. Clause (c) in using the expression "suits and proceedings" keeps company with clause (b). It also has to be read

Noscitur a Sociis. Therefore, clause (c) also must be held to apply to insolvency proceedings based on a debt covered by the Act. (Paras 26, 27, 28)

It cannot be said that all the claims of a debtor arising under the Act are the matters which have to be 'settled, decided or dealt with by the authorised officer'. It is only the claims which relate to release and delivery of possession of security fall within the scope of authorised officer's authority. (Para 34)

It is true the opening words of sub-section (1) of Section 7 mention the provisions of Section 4 as a whole and do not refer to any specific clause thereof. But reading Section 7 as a whole, the reference to Section 4 in opening part of sub-section (1) of Section 7 must be said to be a reference only to clause (e) of the said Section 4. The governing concept in sub-section (1) of Section 7 is, implementation of the provisions of Section 4. The implementation is the implementation in regard to return of the pledged or the mortgaged properties belonging to the debtor and which implementation has to be done through the instrumentalities of the authorities mentioned in Section 6. It cannot be said that when the courts give effect to the consequences enumerated in clauses (a), (b), (c) and (d) of Section 4, the courts can be said to be the instrumentalities charged with the task of implementing the provisions of the said Section 4. The courts do not implement the provisions of law. The courts merely enforce the rights and liabilities recognised by law. Any other construction of the said provisions will be at variance with the basic tenets of Indian Constitutional polity and will expose the said provisions to the vice of unconstitutionality. Such an interpretation has to be eschewed. Hence in taking cognizance of the provisions of Section 4, courts cannot be said to be implementing the said provisions.

(Paras 37, 38)

An authorised officer is entitled to settle, decide or deal with, questions which can be raised by a creditor in his application under Section 7, that is to say, claims arising in connection with release and delivery of possession of 'property pledged or mortgaged by' a debtor. That being so, civil courts have jurisdiction to adjudicate upon and adjudge all claims, questions and disputes other than those which are raised by the creditor in his application under Section 7. The applications contemplated by Section 7 do not

take within their sweep claims, questions and disputes pertaining to clauses (a), (b), (c) and (d) of Section 4 in so far as the said disputes relate to unsecured debts or merely to debt aspect of secured debts as contradistinguished from security aspect thereof. The mischief of Sections 11 and 12 do not extend to the cases of unsecured debts or debt-aspects of secured debts, which matters being within the purview of clauses (a), (b), (c) and (d) thereof, have to be dealt by the civil courts concerned. (Para 44)

Cases Referred: Chronological Paras

(1975) Insolvency Petn. Nos. 115, 126 and 225 of 1975 (Bom)	43
(1975) Appeal No. 144 of 1975 From Insolvency Petn. No. 10 of 1975, D/- 8-10-1975 (Bom)	43
AIR 1970 SC 1292 = (1971) 1 SCR 288	38
AIR 1969 SC 78 = (1968) 3 SCR 662	31
(1969) 71 Bom LR 638 = 1969 Mah LJ 827	22
AIR 1964 Mad 136 = ILR (1964) 1 Mad 288 (FB)	1
(1957) 2 All ER 45 = (1957) 2 WLR 607	38
(1956) 2 All ER 603 = (1956) 1 WLR 662	29
(1954) 3 All ER 74 = (1954) 1 WLR 1190	22
(1952) 2 QB 198 = (1952) 1 All ER 823	7
AIR 1939 Cal 35 = ILR (1938) 1 Cal	13
(1918) 25 CLR 434 (Aus)	38
(1894) 1 Mans 68 = 38 SJ 420	22
(1889) ILR 13 Bom 520 = 16 Ind App (PC)	156
(1873) LR 16 Eq 614 = 29 LT 72	22
(1859) 6 C. B. (NS) 336 = 141 ER 486	31
(1842) 4 M & G 421 = 134 ER 172	30
(1831-34) 8 L Ed 414 = 6 Pet 323	7

U. J. Makhija, H. J. Thacker, B. S. Chandnani, Chande, for the Creditors; S. V. Shah, K. K. Vyas, Jaisinghani, Nerulkar, C. K. Shah, R. S. Daruwalla, for the Debtors; D. R. Zaiwala, as Amicus Curiae.

ORDER:— In this creditors' petition for an order of adjudication, an interesting but neat question of law arises for determination. The question is whether the Insolvency Court has jurisdiction to adjudicate upon claims based on the provisions of the Maharashtra Debt Relief Act, 1976 (hereinafter referred to as "the Act"), or whether such claims must be determined by the authorised officer constituted thereunder. In a large number of cases, whether they are petitions for orders of adjudication or notice of motion for setting aside insolvency notices, this

threshold question arises. It was therefore, considered necessary that in the above-mentioned petition, this question be tried as a preliminary question. Having regard to the pendency of the various other matters, in which this question arises, counsel for the parties thereto, were permitted to address the Court on this question. Consequently, besides the learned counsel for the petitioning creditors and the debtors herein, counsel appearing in the other matters also addressed the Court. On behalf of the creditors, principal submissions were made by Shri Makhija, the learned counsel for the petitioning-creditors herein. He was supported by Shri Thakkar, Shri Chande and other counsel appearing on behalf of the various creditors in the other proceedings. On behalf of the debtors, main arguments were advanced by Shri S. V. Shah. He was supported by Shri C. K. Shah, Shri Vyas, Shri Hinduja and Shri Jaysinghani. Shri D. R. Zaiwala appeared amicus curiae. The arguments advanced at the bar have been grouped together and have been, for the sake of convenience, compendiously referred to as arguments of counsel for the debtors or those for the creditors.

2. The above-mentioned insolvency petition was filed on 18th January, 1974, by Messrs. Punjalal H. Shah, in respect of a debt of Rs. 1,447.31 p. being the balance on a decree on admission, obtained by the said petitioning-creditors in a Suit filed in the Court of the Small Causes, Bombay. The said petitioning-creditors were substituted from time to time. Ultimately, the present petitioning-creditors Sukhdeo Ramratan and another, came on the scene in respect of their claim of Rs. 5,226.17 ps., payable under an ex parte decree passed in their favour by the Bombay City Civil Court in Suit No. 1637 of 1972.

3. The petition is founded on the facts that an insolvency notice dated 16th October, 1973, was served on the debtors on 18th October, 1973, but the debtors did not adopt any proceedings to have the said insolvency notice set aside. Nor did the debtors comply with the said insolvency notice with the result that the act of insolvency was complete on 23rd November, 1973.

4. On behalf of the debtors an affidavit-in-reply was filed on 4th March, 1975. In the said affidavit-in-reply the main defences raised by the debtors were, that the firm M/s. Cosmic Corporation, of which they were the partners and in res-

pect of the debts of which firm the said insolvency proceedings were adopted, was closed in November 1971. According to the debtors, the said firm was dissolved and did not exist since then. The debtors also mentioned about the proceedings adopted by them for extension of time to comply with the insolvency notice in question. On 22nd August, 1975, the Governor of Maharashtra promulgated the Maharashtra Debt Relief Ordinance, 1975, being Ordinance No. VII of 1975. Having regard to the provisions of the said Ordinance, the debtors filed a further affidavit affirmed on 8th October, 1975, inter alia, claiming protection under the provisions of the said Ordinance. In the said affidavit, the debtors claimed that this Court had no jurisdiction to entertain the proceedings. The said Ordinance was replaced by the Maharashtra Debt Relief Act, 1976, which was brought in force on 3rd January, 1976. Consequent thereupon the debtors further filed an affidavit affirmed on 11th March, 1976, inter alia claiming protection under the Act and benefits conferred upon the workers and other debtors as provided thereunder.

5. The defences of the debtors, as disclosed by the three affidavits referred to above, relate to: (a) the defences based upon the provisions of the Act, (b) the defences arising out of the plea that the said firm of M/s. Cosmic Corporation was closed in 1971, and did not exist thereafter and (c) the plea that the debtors had made an application for extension of time for compliance with the insolvency notices upon which the petition is founded. The only defence that needs to be dealt with here is the defence relating to the provisions of the Act.

6. The facts relied upon, in support of the claims of the debtors based on the provisions of the Act, are to the effect that the first debtor viz., Pramod M. Jhaveri is a broker and does not earn more than Rs. 400/- per month. The assets disclosed by the 1st debtor, by his affidavit affirmed on 27th March 1975, indicate that he has no immoveable properties worth any name. The 2nd judgment-debtor viz., Smt. Jyotsna Pramod Jhaveri, claims that she does not do any business and is merely a house-wife. She admits being a partner in the said firm M/s. Cosmic Corporation. She claims that she does not own any immovable properties. From the affidavit of assets and liabilities dated 27th March, 1975, however, it may be observed that tenancy rights

in respect of a residential 'single' room at Bhartiya Bhavan (formerly servants quarter) at Marine Drive, is shown as part of the assets of the debtors. The said affidavit further shows that the tenancy rights in respect of the said premises stand in the name of the brother of the 2nd debtor. Some arguments were advanced in respect of this aspect of the matter but as it will be seen presently, it would be apposite, for determination of preliminary questions to assume without deciding that the debtors are workers within the meaning of the said Act and are covered by the provisions of the said Act.

7. Normally, a court decides the question of jurisdiction upon the basis of the averments made by the person who invokes its jurisdiction, whether he be a plaintiff or a petitioner. This however, does not mean that it is wholly impermissible for a court to refer to a written statement or a reply in order to determine whether it has jurisdiction to deal with claims or questions raised before it. In my opinion, there may be situations where it may be necessary or desirable for a Court to look into the defences in order to determine its jurisdiction. Such, for example, would be the case where a defence is based on a mandate of law which clearly bars the jurisdiction of the Court in respect of the subject matter of adjudication before it. Under the American legal system, it is one of the demurrable situations. Under the American systems, a plea of demurrer is said to be 'an answer in law' (see *New Jersey v. New York*, (1831-34) 8 L. Ed. 414 at p. 415). In English law the pleas on demurrer in the High Court are regulated by the provisions of Rules of the Supreme Court. Even earlier thereto, legal pleas were allowed to be raised on demurrer. In fact, the concept of demurrer connoted as follows:—

"Demurrer is when any action is brought and the defendant pleadeth a plea to which plaintiffe answereth that he will not answer for that it is not sufficient plea in law, and the defendant saith to the contrary that it is a sufficient plea and thereupon both parties doe submit the cause to the judgement of the court — then it is called a demurrer, for that they goe not forward in pleading, but abide upon the judgement of that point and is said, in the Latine used in the record, *Moratur in lege*"

(Termes de la Ley. Cf. Stroud: Judicial Dictionary Vol. 2, page 739).

Even under the modern English practice in certain situations certain points are permitted to be raised on pleadings for decisions as preliminary issues. In *Everett v. Ribbands*, (1952) 2 QB 198, *Romer, L. J.*, said at page 206:—

"Where there is a point of law if decided in one way, is going to be a decisive of litigation, advantage ought to be taken of the facilities afforded by the Rules of Court to have disposed of at the close of the pleadings or very shortly afterwards". (emphasis supplied).

8. Provisions of Order 14 also warrant pleas of legal character being dealt with as preliminary issues. I am persuaded to decide these pleas, more particularly because of an emphatic argument made on behalf of the debtors. It is urged that having regard to the injunction of Section 4 of the Act, this court has no jurisdiction to entertain the suit. Emphasising the word "entertain", say, the counsel for debtors that the moment a defence is raised that the debtor is entitled to the protection of the provisions of the Act, even a question whether such a defence is bona fide or not will have to be determined by the forum constituted under the Act, viz., the authorised officer. It is not necessary for me to determine this subtle question of legal semantics. But such a contention is sufficiently compelling to call for determination of preliminary questions. I, therefore, proceed on the assumption that it is permissible for this Court to look into the nature of the defences raised. I also proceed on the assumption, without deciding, that the debtors are workers or debtors within the meaning of the said Act. These assumptions have been made to deal with the demurrable pleas raised by the debtors. This course is largely dictated by the consideration that in some of matters which are before me to-day, it is indisputable that the debtors therein are workers or debtors factually covered and protected by the provisions of the Act.

9. The Maharashtra Debt Relief Ordinance 1975, was promulgated on 22nd August, 1975. It was conceived as a welfare measure seeking "to provide for relief from indebtedness to certain farmers, rural artisans, rural labourers and workers". The appointed day designated by the said Ordinance was the day on which it came into force viz., 22nd August, 1975. Section 2 (e) of the said Ordinance defined "debt", Section 2 (f) defined "debtor"; Section 2 (o) defined

"worker". Section 3 enumerated the consequences flowing from the commencement of the said Ordinance. It provided non obstante clause for discharge of every debt outstanding on the appointed day. It also enumerated further consequences viz., non-recoverability of such debt; non-entertainment of suits and proceedings relating thereto and abatement thereof. The section also provided for release and return of the property pledged or mortgaged by the debtor covered by the said Ordinance. It contemplated the instrumentality of the police authorities or other authorities, to assist the debtor in the matter of securing delivery of the possession of the pledged or mortgaged property.

10. Section 2 (2) of the said Ordinance is very material for the purpose of the present controversy. The said section reads as follows:—

"If a question arises whether a person is a marginal or small farmer, or a rural labourer, or rural artisan, or a worker, the question shall be referred to an officer not below the rank of a Tahsildar duly appointed by the State Government in that behalf, and the decision of such officer on the question shall be final and conclusive and shall not be called in any civil court;

Provided that no such question shall be decided unless an opportunity has been given to such person to be heard."

11. The Act which replaced the Ordinance, by Section 3 thereof, revives all debts covered by the said Ordinance. It further provides that "the provisions of the said Ordinance as amended by this Act as herein provided shall operate in relation to all such revived debts, as if those provisions were always amended and in operation on the appointed day." The Act comprises of six Chapters and 23 sections. The Act makes several departures from the provisions of the Ordinance.

12. Section 2 (e) of the Act defines debt. It provides;

" "Debt" means any liability, in cash or kind, outstanding on the appointed day, being a liability arising out of a loan (with interest if the loan is taken by a worker and with or without interest, in any other case), whether secured or unsecured, due from a debtor whether payable under a decree or order of any court or otherwise."

13. The expression, "arising out of a loan" being the qualifying expression for the liability is an innovation not to be found in the corresponding provi-

sion of the Ordinance. Section 2 (f) which defines "debtor" also makes a departure and alters the parameter. It provides for a total annual income of a worker as not exceeding Rs. 6,000/-, if living in an urban area and not exceeding Rs. 4,800/-, if living elsewhere. The corresponding provisions in the Ordinance provided for the limit of Rs. 2,400/- per annum. Section 2 (o) of the Act defining "worker", retains the formulae thereof to be found in the Ordinance, save and except that the said Section 2 (o) deletes qualifications as to income mentioned in the corresponding provisions of the said Ordinance.

14. The Act omits Section 2 (2) of the Ordinance which provided for reference to the officer contemplated thereunder and thereby contemplated exclusion of the jurisdiction of the civil court in respect thereof. The Act however, makes provisions in Sections 11 and 12 thereof in respect of the bar of jurisdiction of the civil court or in respect of references to be made in regard to the issues which are required to be settled or decided or dealt with by the authorised officer constituted under the Act. Departing from the wide phraseology of Section 2 (2) of the Ordinance viz., "whether a person is a marginal or a small farmer or a rural labourer, or rural artisan, or a worker, the question shall be referred to an officer", Section 11 (1) of the Act merely provides: "no civil court shall have jurisdiction to settle, decide or deal with any question which is by or under this chapter required to be settled, decided or dealt with by the Authorised Officer". Sub-section (2) of Section 11, further provides that "no order of the State Government or of any officer or authority made under this Chapter shall be questioned in any court". The said Chapter is Chapter III which provides for "Liquidation of certain debts". Section 12 provides for reference. It ordains in sub-section (1) thereof, "if a suit instituted in any Civil Court, involves any issues which are required to be settled, decided, or dealt with, by the Authorised Officer under this Act, the civil court shall stay the suit and refer such issues to the Authorised Officer for determination". Sub-section (2) of Section 12 provides for the procedure on reference.

15. Section 7 of the Act provides for procedure where a creditor disputes a debtor's claim. It contemplates adjudication of such questions and disputes by the Authorised Officer, Section 7 (1)

provides that in case a creditor raises "a question that the person who claims to be his debtor is not a marginal farmer, a rural artisan, a rural labourer or, as the case may be, a worker, or disputes the eligibility of the debtor for relief under this Act on any other ground including the valuation of the immoveable property, if any, of a worker, then the creditor "shall make an application in writing" to the Authorised Officer. Sub-sec. (2) provides for such an application, and inter alia requires such an application be made within 7 days from the happening of two alternative contingencies mentioned therein. Sub-sec. (3) of S. 7 provides that application of the creditor shall not be entertained by the authorised officer unless the creditor deposits the pledged property or documents relating to pledge or both or the value of such property if the property is not available. Sub-secs. (4), (5), (6) and (7) of Section 7 prescribe procedure and confer powers on the Authorised Officer. Sub-sec. (8) of Section 7 inter alia provides that the decision of the authorised officer shall be final and conclusive and shall not be called in question in any civil court.

16. The learned counsel for the debtors submit that upon a true construction of the provisions of Sections 4, 7, 11 and 12, the claim of the debtors for protection under the provisions of the Act is beyond the pale of the jurisdiction of this Court. The learned counsel submits that a question or claim which relates to the status of the debtor as a worker or the qualification of the debt in question for immunity under the Act, is a question or a claim which by the express provision of the Act or by necessary implications flowing therefrom, has to be determined by the Authorised Officer. According to the learned counsel, provisions of Section 4, more particularly (b) and (c) thereof read with Sections 11 and 12 remove determination of all claims and questions arising under the Act from the province of the Civil Courts and transport them to the Authorised Officer for his exclusive adjudication.

17. Against the arguments of the learned counsel for the debtors, the contention raised on behalf of the creditors is that the Act does not apply to insolvency proceedings because insolvency proceedings are not intended to enforce a debt. It is submitted that Insolvency Court has exclusive jurisdiction to try all claims arising in an insolvency proceeding. Say the learned counsel that under

the Act there is no express bar to this Court entertaining disputes as to whether a debtor is a worker within the meaning of the said Act or as to whether the debt on which the insolvency proceedings are founded qualifies for the benefits of the Act. The learned counsel submit that there is no exclusion of the jurisdiction of this Court even by the necessary implication, regard being had to the relevant provisions of the Act or the scheme unfolded thereby.

18. The conflict between the two view points canvassed before me, will have to be resolved with reference to the provisions of the Act, as also the relevant provisions of the Presidency Towns Insolvency Act (hereinafter referred to as the "Insolvency Act"). It will have to be determined as to whether (i) the provisions of the Act or immunities conferred thereby or the embargoes postulated thereunder cover the insolvency proceedings and if so, (ii) which is the forum for adjudging questions or the claims pertaining thereto.

19. The jurisdiction of this Court to administer insolvency law is rooted in its charter. Clause 18 of the Letters Patent confers upon it powers and authorities, "with respect to original and appellate jurisdiction and otherwise as are constituted by the laws relating to insolvent debtors in India". Sections 3, 4, 5, 6 and 7 of the Insolvency Act provide for constitution and the powers of the insolvency Courts. Section 7 is a very material section. It inter alia confers upon the insolvency Court "full power to decide all questions of priorities and all other questions whatsoever, whether of law or fact which may arise in any case of insolvency coming within the cognizance of the Court or which the Court may deem it expedient or necessary to decide for the purpose of doing complete justice or making a complete distribution of property in any such cases."

20. The genesis, nature and content of the insolvency proceedings have been succinctly expounded in Halsbury's Laws of England, 3rd Edn. Vol. 2 at page 250, paragraph 463. The learned Author writes:

"Bankruptcy is a proceeding by which the State takes possession of the property of a debtor by an officer appointed for the purpose, and such property is realised and, subject to certain priorities, distributed rateably amongst the persons to whom the debtor owes money or has incurred pecuniary liabilities."

21. Undoubtedly, as also enunciated by Henley in Bankrupt Law (3rd Edn. page 1), one of the chief aims of the law of Bankruptcy is, "the distribution of the effects of the debtor in the most expeditious, the most equal and the most economical mode". These objects of the law of Insolvency have been given statutory effect and are sought to be subserved, by the provisions of the Insolvency Act; more particularly by Section 17, Sections 33 to 37 and Sections 46 to 76 thereof. The provisions of the Insolvency Act and the Letters Patent of this Court leave no manner of doubt that the proceedings under the provisions of the Insolvency Act before this Court are the proceedings of civil nature and pertain to the ordinary original civil jurisdiction of this Court. This aspect of the matter is concluded by the judgment of the Privy Council in *In the matter of Candass Narrondas; Navivahas v. C. A. Turner, Official Assignee*, reported in (1889) ILR 13 Bom 520 (PC).

22. An insolvency petition filed by the creditor for an order of adjudication under Section 13 (2) of the Insolvency Act, requires proof of (a) the debt of the petitioning creditor and (b) and the act of insolvency. It is settled law that the debt must exist before the act of insolvency is committed by the debtor. A catena of cases both in England and India have established the legal principles that such a debt must exist at the time of the presentation of the petition; and that it must continue to exist at the hearing thereof as also at the time of making of the order of adjudication (see *M/s. Bhimji Nanji and Co.*, (1969) 71 Bom LR 638; also *Ex Parte Hammond*, (1873) LR 16 Eq. 614; *Re Stables* (1894) 1 Mans. 68; *Re A Debtor v. Scott*, (1954) 3 All ER 74; *Ahmed Mahmomed v. Praphulla Nath Tagore*, ILR (1938) 1 Cal 13 = (AIR 1939 Cal 35)).

23. In the light of the foregoing discussion as to the nature of the insolvency proceedings and the requirements of a creditor's petition to sustain an order of adjudication, it may now be seen as to whether these proceedings or the claims arising therein come within the provisions of the Act. Section 2 (e) of the Act defines debt. It takes in 'a liability arising out of a loan'. The said definition embraces all loans whether they are secured or unsecured or whether they were payable under a decree or an order of any court or otherwise. Thus, a debt on which a creditor's petition is founded will fall within the concept of

liability contemplated by Section 2. (e) of the Act, provided however, such a liability arises out of a transaction of loan. Consequently, all petitions or acts of insolvency referable to liabilities arising out of loan transactions come within the purview of the definition of debt in Section 2 (e) of the Act, provided debt relates to a person who is covered by the 2 (o) of the said Act. In other words, a combined provisions of Sections 2 (f) and person who earns his livelihood through any profession, calling or trade including a Badli worker, will be entitled to the benefits of the Act provided his total income 'from all sources did not exceed, if living in an urban area six thousand rupees during the year immediately before 1st August, 1975, and if living elsewhere, four thousand and eight hundred rupees during that year'.

24. Section 4 is the key section of the Act. It ordains that every debt of a worker whose immoveable property if any, does not exceed Rs. 20,000/- in market value and every debt of any other debtor outstanding on the appointed day, shall be deemed to be wholly discharged. Section 4 is a non obstante provision. It also provides for a legal fiction. A non obstante clause and a legal fiction created by a law, must be given full effect. Consequently, it must be held that the debt including the debt which is foundation of an insolvency proceeding, if it answers the description thereof under the provisions of the Act must be held to be wholly discharged. The expression "wholly discharged" must mean discharged for all intents and purposes including for the purposes of furnishing a cause of action for an insolvency proceeding or an order therein.

25. Provisions of clauses (a), (b) and (c) of Section 4 also reinforce the aforesaid position. The said clause (a) is in three parts. It interdicts (i) recovery of the debt from a debtor; (ii) recovery of debt from or against any moveable or immovable property belonging to a debtor and (iii) proceeding against such properties by way of attachment or sale in any manner in execution of a decree or order relating to such debt. The second interdict aforesaid viz., against the recovery of a debt by realisation, from and out of moveable or immovable properties would cover insolvency proceedings. By its very definition and content an insolvency proceeding is an equitable mode of enforcement of debt and liabilities or

recovery of such debts or discharge of liabilities by realisation of the assets of the insolvent and by distribution thereof amongst the body of creditor.

26. The expression "civil court" mentioned in clause (b) of Section 4 must be held to take in the insolvency court deriving its powers and authorities from the Letters Patent of this Court and the provisions of the Insolvency Act. The expression "proceeding" contained in the said clause has a wide denotation. The word proceeding is a web of several conceptual strands. It is a word of multiple import. It has a wide spectrum of variable shades of meanings. It is capable of a narrow as also a wide connotation. The interpretation of such an expression, therefore, largely depends upon the nature of the statute in question, the collocation of words in which it is found and the objectives the Act is designated to subserve. The expression must, of necessity, take its colour from intendments of the Act or the remedies provided thereby or the mischief sought to be remedied by it. The Act is conceived as a social welfare legislation to provide relief from indebtedness. Insolvency being one of the modes in which the indebtedness of a debtor can be enforced through the instrumentality of an insolvency court, any legislative provision for relief therefrom must be held to include a relief from the claims in insolvency proceedings in respect of indebtedness of a person covered by the Act. The plain intendment of the Act is to remedy the mischief arising out of loan transactions. This cannot be fully eradicated if the coverage of the Act is denied to a vital and a sensitive area where debtors are subjected to the extraordinary remedies of the 'Civil death' or compulsory vesting of their properties in an officer of the State entrusted with the obligation of distributing the realisations thereof amongst his creditors.

27. Moreover, the expression "proceeding" immediately follows the word "suit". It must take its colour from the said expression. Even otherwise the word "proceeding" includes "a prescribed course of action for enforcing a legal right", (see 'Words and Phrases' at p. 83 C. F. Prem's Judicial Dictionary, (1964) Vol. III at page 1310). An insolvency proceeding is for the enforcement of a right of a creditor. It partakes all the trappings of a judicial procedure which characterises the trial of suits or civil actions. I am therefore of opinion that the

provisions of clause (b) of Section 4 also apply to the insolvency proceedings. Clause (c) in using the expression "suits and proceedings" keeps company with clause (b). It also has to be read *Noscitur a Sociis*. Therefore, clause (c) also must be held to apply to insolvency proceedings based on a debt covered by the Act.

28. The conspectus of Section 2 (e), (f) and (o) and Section 4 as also the principles enshrined therein, when seen in the setting of the intendments, scheme and the purposes of the Act must lead to an inference that a debt payable by a worker whose income during the period of one year immediately before the 1st August, 1975, did not exceed Rs. 6,000/- if he lived in an urban area as defined by the said Act or did not exceed Rs. 4,800/- if he lived elsewhere, must come within the reach of the said Act. This debt includes all liabilities of such a debtor arising out of a transaction of a loan. The impact of S. 4 on such a debt is its total annihilation. The categorical imperative of Section 4 is that all debts falling within the coverage of the Act and of a person answering the description contained therein if outstanding on the appointed day, that is to say, 22nd August, 1975, must be treated as wholly discharged. In so far as the existence of a debt is *sine qua non* for an insolvency proceeding more particularly a creditor's petition based on non-compliance with the insolvency notice or in so far as such a debt sustains an insolvency notice or an act of insolvency arising from non-compliance thereof, it must be held that all debts which come within the mischief of the provisions of Section 4 would become *non est* and would be incapable of sustaining any such proceedings in insolvency, as are of necessity, referable to such debts. I therefore reject the contention of the learned counsel for the creditors that an insolvency proceedings or the claims arising in insolvency proceedings are outside the radiational periphery of the provisions of the Act. I hold that the Act is applicable to insolvency proceedings also.

29. The application of the provisions of the Act to the insolvency proceedings based on a creditor's claim to a debt immunised by the Act having been held, the only question which remains to be considered is whether a claim by a debtor that he is a worker or a debtor within the meaning of the Act or that he is otherwise entitled to benefits or the

protection of the Act can be decided by the Insolvency Court. As is stated above, an Insolvency court, in any case, this Court exercising insolvency jurisdiction is a civil court. It is a court of record constituted by its Letters Patent. It therefore, is a superior court. The canon of construction applicable to the cases where questions arise as to the exclusion of the superior courts is that such an exclusion is not to be inferred unless and until there are express words in the statute or that such an exclusion can be inferred by necessary implication. In *Board of Governors of the London Hospital v. Jacobs*, reported in (1956) 2 All ER 603, a question arose as to whether a certificate issued under the provisions of Housing Repairs and Rents Act, 1954, was binding on the court and excluded the jurisdiction of the court to review it. It was argued on behalf of the landlords that issuance of the certificate from the local authority and a declaration made under the said Act which satisfied the provisions thereof, were binding and 'the powers of the court were wholly ousted in regard to any challenge by the tenant to a declaration of fulfilment by the landlord'. In repelling the said contention Lord Evershed, M. R., observed at page 607 of the report as follows:

"the point submitted on behalf of the landlords seems to me of so far-reaching a character that I find it unnecessary to express at any length the grounds for the view that I take, grounds which rest on principles of very longstanding namely, that very clear words will be required to oust altogether the jurisdiction of the Queen's courts in matters of private rights."

30. The principle of longstanding referred to by the learned Judge above, is a principle which was articulated emphatically as far back as 1842, by Tindal, C. J., in *Albon v. Pyke*, reported in (1842) 4 M. & C. 421. At page 424, the learned Chief Justice expounded that:

"The general rule undoubtedly is that the jurisdiction of superior Courts is not taken away except by express words or necessary implication."

31. In India the statutory recognition of the principle is to be found in Section 9 of the Code of Civil Procedure. The said section provides that the civil courts have jurisdiction to try all the suits of a civil nature excepting suits of which their cognizance is expressly or

impliedly barred. The section makes no distinction between a superior or an inferior court. It puts all civil courts at par. In *Dhulabhai v. State of Madhya Pradesh*, reported in AIR 1969 SC 78, the Supreme Court was called upon to consider the question of exclusion of the jurisdiction of the civil courts. At page 81, the Supreme Court enunciated the principle in the following words:—

"At the very start we may observe that the jurisdiction of the civil courts is all embracing except to the extent it is excluded by an express provision of law or by clear intendment arising from such law. This is the purport of Section 9 of the Code of Civil Procedure. How Section 9 operates is perhaps best illustrated by referring to the categories of cases, mentioned by Willes, J., in *Wolverhampton New Waterworks Co. v. Hawkesford*, (1859) 6 CB (NS) 336. They are:

"one is where there was a liability existing at common law, and that liability is affirmed by a statute which gives a special and peculiar form of remedy different from the remedy which existed at common law; there, unless the statute contains words which expressly or by necessary implication exclude the common law remedy the party suing has his election to pursue either that or the statutory remedy. The second class of case is, where the statute gives the right to sue merely, but provides no particular form of remedy there, the party can only proceed by action at common law. But there is a third class, viz., where a liability not existing at common law is created by a statute which at the same time gives a special and particular remedy for enforcing it. The remedy provided by the statute must be followed and it is not competent to the party to pursue the course applicable to cases of the second class".

32. In my opinion, the principle of construction which upon the dicta of Willes, J., is applicable to 'right to sue' cases mentioned above, also applies to 'right to defences or immunities' cases because right to defences or immunities is a jural correlative of right to sue'. Thus in cases where statutory defences or immunities are given but no particular form of remedy for adjudication of such defences or enforcement of such immunities are given parties claiming immunities have to proceed by an action at the common law. In other words, such defences and immunities or corresponding obligations arising therefrom have to be agitated

before a Court of competent jurisdiction in an action filed in that behalf.

33. As observed above, the Ordinance by Section 2 (2) thereof expressly excluded the jurisdiction of the courts by providing in terms, "if a question arises whether a person is a marginal or small farmer, or a rural labourer, or rural artisan, or a woker, the question shall be referred to an officer not below the rank of a Tahsildar duly appointed by the State Government in that behalf, and the decision of such officer on the question shall be final and conclusive and shall not be called in question in any civil court". This was the legislative barricade raised by the said section against the courts deciding a question as to the status of a debtor as a worker or as a person belonging to the other categories benefitted by the said Act. This provision is however, been omitted in the Act. In my opinion, the omission by the legislature is intentional and deliberate. This is further buttressed by the fact that in Sections 11 and 12, phraseology used by the Legislature is different. It is an established law that a change of language in an amending or repealing Act postulates a change of law. (See *S. V. Natesa Mudliar v. Sri Dhanpal Bus Service Pvt. Ltd.*, AIR 1964 Mad 136 (FB) at page 142).

34. The contention raised on behalf of the debtors that all the claims of a debtor arising under the Act are the matters which have to be 'settled, decided or dealt with by the authorised officer' is not wholly correct. It is only partially true. In other words only claims which relate to release and delivery of possession of security fall within the scope of authorised officer's authority. In this connection it would be necessary to turn to the provisions of Sections 4, 6, 7, 9, 10, 11 and 12 of the Act.

35. Section 4 can be divided in three parts. The first part comprises of the opening clause. The second part comprises of clauses (a), (b), (c) and (d) thereof. The third part comprises of clause (e). The first part of Section 4 deals with the debts. It provides for discharge of all debt whether secured or unsecured. Consequences of such discharge debts as debts simpliciter are dealt with in second part viz., clauses (a), (b), (c) and (d), whereas third part deals with the properties pledged or mortgaged by the debtor their release and return to the debtors.

36. Clause (e) of Section 4 provides that such properties as are pledged and mortgaged by a debtor must be returned to the debtor forthwith on the debtor making an application in writing in that behalf. It enjoins upon the creditor to pass a receipt to the debtor of having received an application. In cases, where the creditor refuses to pass a receipt the debtor is given liberty to have his application endorsed to the said effect by an officer referred to in Section 6 of the Act. Under Section 6, in the event of the creditor failing to return the property pledged or mortgaged by a debtor, the Police Commissioner or the District Magistrate or the other authorities mentioned therein are obligated to take or caused to be taken such steps or use or caused to be used such force as might be reasonably necessary for securing delivery of possession of the properties pledged or mortgaged by the debtor.

37. Counsel for the debtors emphasises the opening words in sub-sec. (1) of Section 7. The opening words are to the effect that "if, in the course of implementing the provisions of Section 4" a dispute arises as to the eligibility of the debtor for relief under the Act, "on any other ground including the valuation of the immoveable property if any" then the creditor has to make an application in writing to the authorised officer. It is true that the opening words of sub-sec. (1) of S. 7 mention the provisions of Section 4 as a whole and do not refer to any specific clause thereof. But in my opinion reading Section 7 as a whole, the reference to Section 4 in opening part of sub-sec. (1) of Section 7 must be said to be a reference only to clause (e) of the said Section 4. The governing concept in sub-section (1) of Section 7 is, implementation of the provisions of Section 4. The implementation to which the said sub-section (1) refers is the implementation in regard to return of the pledged or the mortgaged properties belonging to the debtor and which implementation has to be done through the instrumentalities of the authorities mentioned in Section 6. It cannot be said that when the courts give effect to the consequences enumerated in clauses (a), (b), (c) and (d) of Section 4, the courts can be said to be the instrumentalities charged with the task of implementing the provisions of the said Section 4. The courts do not implement the provisions of law. The courts merely enforce the rights and liabilities recognised by law. Halsbury's Laws of Eng-

land 4th Edn. Vol. 2, paragraph 502 at page 255 suggests the principle succinctly:

"A judicial process is concerned with the ascertainment, declaration and enforcement of rights and liabilities as they exist, in accordance with some recognised system of law."

38. The aforesaid exposition of law by Halsbury is based on the dicta of the Australian High Court (Issacs and Rich, JJ.) in *Waterside Workers Federation v. J. W. Alexander Ltd.* (1918) 25 CLR 434 at 463. The said dicta received imprimatur of the Privy Council in *Attorney-General of the Commonwealth of Australia v. Raginam and the Boilermakers' Society of Australia* reported in (1957) 2 All ER 45. In *Raginam's* case (supra) the Privy Council was concerned with the doctrine of separation of powers enshrined in the Constitution of the Commonwealth of Australia in the context of the competence of Federal Parliament. In our country also, the same jurisprudential approach is postulated by the Constitution. It is therefore, said that legislation can remove the basis of a decision rendered by a competent court but it cannot set at naught Judicial orders directly (see *Ahmedabad Corporation v. New Shrook Weaving & Spinning Co.*, AIR 1970 SC 1292). Thus all that clauses (a), (b), (c) and (d) of Section 4 do is to provide legal basis for court's decision. In other words, when the courts take cognizance of the injunctions contained in the provisions of clauses (a), (b), (c) and (d) of S. 4, the courts merely enforce the rights which accrue to the debtors therein or recognise immunities granted to the debtors concerned, or effectuate legal disabilities of the creditors in that behalf. The courts merely work out rights, liabilities and obligations created by the said provisions. Any other construction of the said provisions will be at variance with the basic tenets of Indian Constitutional polity and will expose the said provisions to the vice of unconstitutionality. Such an interpretation has to be eschewed. I take the view that in taking cognizance of the provisions of Section 4, Courts cannot be said to be implementing the said provisions.

39. There is a further reason to hold that the provisions of sub-section (1) of Section 7 refer to contingencies arising under clause (e) of Section 4. Sub-section (1) of Section 4 provides for an application to an authorised officer by a creditor. Thus "an application" in sub-sec. (1) becomes "the application" in

sub-sec. (2) of Section 7. Sub-section (2) provides that such an application should state the "facts of the case in brief and the point raised for the decision of the authorised officer". More importantly, it also provides that such an application should be made "within 7 days from the date of receipt of the application by the creditor, under clause (2) of Section 4 or from the date of the endorsement made on the application under the clause. This period of 7 days mentioned in sub-section (2) shows that the application by the creditor can have no reference to the situations contemplated by clauses (a), (b), (c) and (d) of Section 4. It cannot be said that sub-section (2) of Section 7 provides for two different situations: its earlier part viz., statement of facts of point to be raised "deals with all applications whether relating to clauses (a) to (d) clause (e) of Section 4, and the latter part deals only with particular situations mentioned in clause (e) of Section 4. This will be a wrong reading of sub-section (2) of Section 7. Sub-section (2) has to be read as a whole. It cannot be contemplated that the said sub-section in its two parts deals with two different situations differently. This would make the provisions of the said sub-section (2) ambiguous.

40. Sub-section (3) of Section 7 also underpins the fact that sub-section (1) of Section 7 merely deals with situations covered by clause (e) of Section 4. Sub-section (3) categorically provides that "no application under this section shall be entertained by the authorised officer unless the creditor either deposits the pledged property or any document evidencing such pledge or both or the value of such property if the property for any reason is not available with the creditor" (emphasis supplied). It would be absurd to suggest that application relating to clauses (a), (b), (c) and (d) of Section 4 would be subject to the conditions precedent of deposit of pledged property or documents of pledge, particularly when in cases covered by the said clauses the debts may be wholly unsecured and there may not be any pledged property involved in connection therewith. Sub-sec. (3) therefore, upon its plain and unambiguous language must of necessity be held to refer only to all cases arising under clause (e) of Section 4. Thus, when sub-section (3) of Section 7 refers to an application under this Section it must be deemed as referring to all applications under Section 7 and all these applications

must of necessity be the applications referable to clause (e) of Section 4 of the Act. Any other interpretation would render the expressions "no application under this section" occurring in sub-sec. (3) of Section 7 and the expression "shall be made within 7 days from the date of the receipt of the application by the creditor under clause (e) of Section 4 or from the date of the endorsement made on the application under that clause" occurring in sub-section (2) of Section 7 otiose or redundant or meaningless in so far as such an interpretation brings within the ambit of Section 7 (1) applications referable to clauses (a), (b), (c) and (d) of Section 4. I am therefore of opinion, that applications contemplated by sub-section (1) of Section 7 deal with the situations covered by clause (e) of Section 4.

41. By an express intendment of sub-section (6), the jurisdiction of the authorised officer is confined to such questions as are raised by the creditor in his application. The said sub-section enumerates powers of the authorised officer. The ambit of the powers mentioned therein, however, is governed by the perimeter of the disputes "raised by the creditor in his application".

42. From the above analysis of Sec. 7 the view that emerges is that the only cases where a creditor refused to release the pledged or mortgaged property to the debtor and disputes the claim of the debtor in that behalf that the creditor has to make an application to the authorised officer. Such an application has to be made within 7 days from the receipt of the application by the creditor under clause (e) of Section 4 or from the date of the endorsement mentioned therein. As a condition precedent for entertainment of such an application the creditor has to deposit the pledged or mortgaged property or documents of the pledge or mortgage or both or the value of such property if the property is not available with the creditor. In such an application the creditor is entitled, as contemplated by sub-section (1) of Section 7, to dispute that the person concerned is not a worker or can dispute the eligibility of the debtor for relief under the Act on any other grounds including the value of immovable property if any. These are the only questions which a creditor can raise. The jurisdiction of the authorised officer is to determine all questions in relation to or

connected with the questions or disputes which can be raised by the creditors in their applications. Having regard to the words of limitations found in sub-s. (6) of Sec. 7 viz., "all questions in relation to or connected with, the questions or disputes raised by the creditor in his application", it must be held that the authorised officer has no jurisdiction to decide questions or disputes which are not capable of being raised by the creditor in his application to the authorised officer. The authorised officer is not required by the Act to go into questions or claims pertaining to debts simpliciter.

43. Reliance was placed on behalf of the debtors on a judgment of a Division Bench of this Court in Appeal No. 144 of 1975, from Insolvency Petition No. 10 of 1975 (unreported: Kantawala, C. J. and Naik, J. dated 8th October, 1975) (Bom). The said judgment was followed by Madan, J., in Insolvency Petition Nos. 115, 126 and 225 of 1975 (Bom) (unreported: dated 8th October, 1975). The ratio of the said decision, however, is not helpful inasmuch as the said decision rested on the mandate of Section 2 (2) of the Ordinance. The said provision has been omitted in the Act. The scheme of the Act is also different from that of the Ordinance. As already seen above the Act makes departures from the provisions of the Ordinance in regard to several material aspects.

44. In my opinion, an authorised officer is entitled to settle, decide or deal with, questions which can be raised by a creditor in his application under Section 7, that is to say, claims arising in connection with release and delivery of possession of 'property pledged or mortgaged by' a debtor. That being so, civil courts have jurisdiction to adjudicate upon and adjudge all claims, questions and disputes other than those which are raised by the creditor in his application under Section 7. As held above, the applications contemplated by Section 7 of the Act do not take within their sweep claims, questions and disputes pertaining to clauses (a), (b), (c) and (d) of Section 4 in so far as the said disputes relate to unsecured debts or merely to debt aspect of secured debts as contradistinguished from security aspect thereof. In my opinion, the mischief of Sections 11, and 12 does not extend to the cases of unsecured debts or debt-aspects of secured debts, which matters being within the purview of clauses (a) (b), (c) and (d) thereof, have to be dealt by the civil courts concerned.

45. In the result, I hold that this court has jurisdiction in cases of unsecured debts or mere debt-aspects of secured debts to decide as to whether the debtor concerned is a worker or is a debtor within the meaning of the Act or is otherwise entitled to the benefit or the protection of the provisions of the Act. Accordingly, the preliminary objections raised on behalf of the debtors as to the jurisdiction of this Court are rejected.

46. The petition shall proceed for determination of the other issues arising therein.

Order accordingly.

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VAIDYA AND MRIDUL, JJ.

M/s. Marine and General Insurance Co. Ltd. and others, Appellants v. Balkrishna Ramchandra Nayan, Respondent.

F. A. F. O. D. No. 449 of 1975, D/- 23-3-1976.*

(A) Motor Vehicles Act (1939), Sections 95, 96, 97, 101, 102, 109, 110, 110-F — Liability in respect of death or injury caused by or arising out of the "use" of the vehicle in a public place — Basis of such liability arises from statutory provisions of the Act — Principles of law of torts are relevant in quantification of damages. AIR 1971 Madh Pra 5 (FB) and 1974 Acc CJ 182 (Mad) and AIR 1962 Punj 540, Dissented from.

Per Vaidya, J.:—

The moment a motor vehicle is used and injury is caused, a liability to pay compensation arises; and the Tribunal can adjudicate upon that liability and determine 'just' compensation. This can be on the general basis of *ubi jus ibi remedium*. (Para 50)

Public good requires that everyone injured, viz., by the use of a motor vehicle, must immediately get compensation for the injury. Every person has a right to safety and security of his person irrespective of fault or negligence or carelessness or efficient functioning of the motor vehicle. Every person has a right to claim compensation as that is the only way of remedying the injury caused to him in a modern urbanized, industrialis-

*(Against decision of Member, Addl. Motor Accidents Claims Tribunal, Greater Bombay at Bombay, in Appln. No. 727 of 1969.)

JT/JT/D454/76/RSK

ed and automobile ridden life.

(Para 51)

In the absence of any words used by the legislature to underpin the liability as a liability with respect to negligence or any other specific tort or tort generally that liability must be held to be in respect of injuries done or caused as a result of the "use" of motor vehicle unless there is some reason recognised by law for exempting the user from that liability.

(Para 56)

Whether we apply the law of torts or not, the liability to pay 'just' compensation arises when the injuries are caused by the use of the motor vehicle. The Tribunal has power to determine what is 'just' compensation irrespective of whether the defendant was at fault or was negligent or careless or not. When a person is injured by use of a vehicle, that itself is an infringement of a right. That person must, therefore, have a remedy of recovering compensation from the person whose vehicle has caused injury. That is the scheme of the provisions contained in Sections 110 to 110-F of the Motor Vehicles Act. Principles of law of negligence are relevant for determining the quantum of damages and the person liable to pay it like any other principle to be followed in the administration of justice.

(Para 58)

Merely because the word 'liability' is used in Sec. 95 it cannot be said that the Tribunal's jurisdiction under Section 110F is limited to considering and applying the law of torts in a claim for compensation.

(Para 61)

Per Mridul, J.:—

Upon a true construction of the provisions of Chapter VIII the fact of an injury resulting from an accident involving the use of a car on public road is the basis of the liability. The tribunal has to award a 'just compensation' that is the compensation which appears to it 'just' in the facts and circumstances of the case. The cause of action is breach of statutory obligations imposed by the Act and the damage that has been caused to the injured. 'The quantification of damages' is not an essential part of the cause of action. The principles of law of Torts or the principles enshrined in the provisions of Fatal Accidents Act, as indeed all other relevant legal principles impinging on the facts of a given case, will enter the judicial mind in the matter of determination of the extent of compensation in cases arising out of accidents. This is a conclusion that follows from the interpretation

of the provisions of the Act seen in its historical and humanistic perspective.

(Para 114)

The Act is not merely a consolidated Act, it also amends the law relating to motor vehicles. The Act makes detail provisions enumerating duties of a driver of a motor vehicle in Chapter VI. It makes elaborate provisions for an insurance coverage in Sections 94, 95. It makes departure in several respects from the law of Torts and other laws in Ss. 97, 99, 101, 102. It provides in Section 110-B for a cheap and expeditious remedy by tribunals constituted to hear motor accident claims. It must be held to be the policy of the Act that tribunals must award 'just compensation' for death or bodily injury or damages to property. This salutary jurisdiction and the content of its glorious power cannot be denuded by inhibiting factors obtaining in other fields of substantive law. There is no warrant for undermining the said provisions or policies enshrined therein.

(Paras 74, 113)

The incorporation of law of torts detracts from the plain and unambiguous language of Section 110-B or whittles down the sweep of Tribunal's power thereunder. It renders the expression "compensation which appears to it to be just", otiose. There is no reason why the Legislature could not have used the expression such compensation 'as is payable in law' if law of Torts or other substantive provisions were intended to apply to cases of compensation under the Act., AIR 1971 SC 1624 and AIR 1973 Mad 83, Relied on; AIR 1976 SC 237, Distinguished; AIR 1962 Punj 540 and AIR 1971 Madh Pra 5 (FB) and 1974 Acc CJ 182 (Mad), Dissented from.

(Para 95)

(B) Motor Vehicles Act (1939), Section 110-B — Negligence — Lorry crossing the road dividers, going on wrong side and virtually mounting on car coming from opposite direction — Held principle of *res ipsa loquitur* was rightly applied by the Tribunal.

(Para 30)

(C) Motor Vehicles Act (1939), Sec. 110-B — 'Compensation which appears to it to be just' — 'Just' compensation in the context of a professional man — How to be determined.

A professional man cannot be given a compensation at the rate of 'unearned' income, such as, interest on fixed Deposits in banks. His loss must be determined having regard to his skill, ability, popularity and harm caused to his efficient functioning. In cases before the

Tribunal under Section 110-B, the Tribunal is required by law to determine an amount of compensation which appears to be "just". The word "just" in the case of a professional man cannot mean just interest on Fixed Deposit which may be alright for a temple or a dargah or even a public and charitable institution or an old infirm or invalid man or woman incapable of functioning in life and earning by working with brain or hand.

(Para 28)

Cases Referred: Chronological Paras

AIR 1976 SC 237 = 1976 Acc CJ	128
	42, 59, 101, 102
AIR 1976 Cal 2 = 1976 Acc CJ	58 42
AIR 1976 Guj 37 = 1976 Acc CJ	156 42
AIR 1976 Him Pra 24 = 1975 Acc CJ	420 42
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(1971) 3 All ER 581 = (1971) 3 WLR	370 111, 112
(1970) 2 All ER 294 = 1970 AC	1004 109
1969 Acc CJ 286 = ILR (1969) Delhi	603 42
AIR 1969 Punj 172 = 1968 Acc CJ	401 42
(1969) 3 All ER 756 = 1970 AC	282 111
AIR 1967 Mad 123 = 1966 Acc CJ	349 91, 97
AIR 1967 Mys 11 = 1966 Acc CJ	178 = 1967 Cri LJ 216 38
AIR 1963 Punj 125 = 64 Pun LR	912 42
AIR 1962 Punj 540 = 64 Pun LR	448 42, 92
(1935) 1 KB 75 = 104 LKJB	153 52, 114
(1934) 50 ULR	88 77
1932 AC	562 109
(1892) P 179 = (1891-94) All ER	396 111
(1703) 92 ER 126 = 2 Ld Raym	938 52

V. H. Gumaste, for Appellants; R. D. Hattangadi with N. D. Hombalkar, for Respondent.

VAIDYA, J.:— The above First Appeal is filed by the Insurer M/s. Marine and General Insurance Co., Ltd., Appellant No. 1, the insured owner of the

motor lorry, bearing No. MRT 8615 Minu D. Mehta.— Partner, Cawasji Behramji and Co., Appellant No. 2 and the said partnership firm, Appellant No. 3, under Section 110-D of the Motor Vehicles Act, 1939, against the award passed against them in the sum of Rs. 1,43,400/- on an application for compensation made to the Tribunal by Respondent Dr. Balkrishna Ramchandra Nayan.

2. By the award a sum of Rupees 500/- was also awarded to Smt. Malati M. Deshmukh, nurse and a further sum of Rs. 1,000/- was awarded as costs to Dr. Nayan. It is not in dispute that the appeal filed by the Insurance Co. against the award passed in favour of Smt. Malati M. Deshmukh for Rs. 500/- and costs at Rs. 100/- has been dismissed summarily on August 14, 1975.

3. The award in favour of Dr. Nayan is challenged on two grounds by the appellants; Firstly, on the ground that the negligence on the part of the driver of the lorry was not established in the case by Dr. Nayan; and secondly on the ground that the quantum of damages was wrongly calculated as Rs. 1,400/- for nursing expenses, Rs. 300/- for medicines and other expenses, Rs. 73,779/-, as the loss sustained for 4 years since the year of the accident and Rs. 63,000/- as 50% of Rs. 1,26,000/-, which would be the expected loss, which the claimant had to suffer for the remainder of his life, calculated at 7 years.

4. It was further contended on behalf of the Insurance Co., — appellant No. 1 — that in any event having regard to the provisions of Section 95 (2) (a), the liability of the insurance company under the policy cannot exceed the limit of Rs. 20,000/-.

5. The relevant facts may be briefly stated as under: Dr. Nayan was driving motor car MRC 4450 (Fiat Car) from Worli towards Haji Ali by the correct side of the road. Smt. Malati Deshmukh, a nurse, was sitting by his side. At about 1.00 P.M., on April 14, 1969, as the vehicle was thus proceeding, the motor lorry, belonging to the Appellants Nos. 2 and 3, came from the opposite direction, in an uncontrollable speed, crossed over the central road dividers, went to the wrong side of the road and dashed against the car driven by the Respondent, at a place situated on Dr. Annie Beasant Road, Opposite Lotus Cinema.

6. As a result of this accident, the Respondent Dr. Nayan and nurse Malati

Deshmukh both sustained injuries. They were removed to the Park Nursing Home, Bombay.

7. Dr. Nayan submitted that the driver of the said vehicle was rash and/or negligent while driving the same, inasmuch as:—

(i) the lorry came on the wrong side of the road crossing the road dividers,

(ii) the driver drove the said vehicle at a high, excessive and improper speed,

(iii) the driver drove the said vehicle without any control over the same,

(iv) the driver drove the said vehicle without keeping proper lookout.

(v) the driver failed and neglected to apply the brakes and/or failed to apply the brakes effectively and/or in sufficient time so as to prevent the accident,

(vi) the driver failed and neglected to manoeuvre the vehicle so as to avoid the accident,

(vii) the driver was having the last opportunity to avoid the accident, which he has not availed of.

8. Dr. Nayan further submitted in his application in the prescribed form under Section 110-A of the Motor Vehicles Act, 1939, that he was undergoing great and unbearable pain and suffering in consequence of the injuries sustained by him since the date of the accident. He was unable to perform the natural and routine functions of life independently since the date of the accident. His expectation of life was shortened. His earning capacity is likely to be substantially and adversely affected.

9. He is a surgeon having a nursing home and consulting rooms. Since the date of the accident he is not able to attend to the nursing home and consulting rooms. He has, therefore, lost income from his profession. He has to pay for the establishment charges of the nursing home. He has engaged the services of one Dr. (Miss) Vatsala S. Kalewar to look after the patients in the nursing home. He, therefore, claimed compensation of Rs. 3,00,000/- or such other sum as the Tribunal may deem fit and proper as and by way of general and special damages with interest thereon from the date of the application till payment.

10. The claim of Dr. Nayan was resisted by filing a written statement on behalf of Appellants Nos. 2 and 3. They contended that they had taken all precautions to keep the truck in road-worthy condition; but at the material time the "axle brake ring" of the motor lorry

came out and hence the driver lost control of the lorry. According to the said appellants such defect in the car could develop in a running vehicle all of a sudden and the driver would, as a result, lose control on the steering wheel. They also contended that the lorry was going at a moderate speed prior to the accident. They denied that the accident occurred on account of rash and negligent driving on the part of the driver of the motor lorry.

11. They also denied that the expectation of life was shortened or the injury caused any loss in the income of Dr. Nayan and submitted that the application was false and frivolous and untenable in law and should be dismissed with costs.

12. In view of these contentions, no other contentions were raised on behalf of the Insurance Co.-Appellant No. 1, and the Tribunal framed four issues; and took evidence on those issues, of Dr. Nayan, Smt. Malati Deshmukh, Smt. Nalima Nagesh Arekar, who attended to Dr. Nayan, Dr. Arvind Vinayak Bavadekar, who attended to Dr. Nayan and who also proved the medical certificate of Dr. K. V. Chaubal, M. S. (Bom.) F. R. C. S. (Eng.) M. Ch. Orth. (L'pool), who were all examined on behalf of the claimant.

13. The report of Dr. K. V. Chaubal, was put in by consent of the parties. It reads as follows:—

"Dr. Balkrishna Ramchandra Nayan gave history of an accident in April 1969. He was treated by Dr. A. V. Bavadekar. His present complaints are as follows:—

1. Pain at the right wrist.

2. Pain, restriction of movements and locking of the right elbow joint.

3. Weak grip on the right side.

4. Inability to do operative work.

Examination of the cervical spine revealed terminal restriction of movements. His right shoulder has restriction of external and internal rotation. Other movements of the right shoulder are normal.

The right elbow is swollen. There is thickening of the synovial membrane which is easily felt. There is tenderness over the olecranon process and the head of the radius. The range of movements is between 60 degrees and 130 degrees. There is crepitus felt with all the movements. Pronation and supination are only restricted in the last few degrees. The right wrist has a full range of movements. There is minimum tenderness over the styloid process of the ulna. The

grip of the right hand is weaker than the left. There is no sensory loss in the right arm or the right hand.

X-rays of the right elbow show good healing of the fractures and changes of osteoarthritis. The head of the radius is broad and thickened. There are no significant changes in the right shoulder and wrist joints.

The restriction of range of movements at the elbow is a direct result of the injuries sustained. This would be a permanent disability to the patient. I would assess this disability at thirty per cent.

The disability is not in any way due to improper treatment. In fact I would say this is an excellent surgical result.

It is unlikely that there would be any further deterioration in the joint function nor would there be any further improvement.

This restriction of movement of the elbow would no doubt affect Dr. Nayan's operative work. I feel, he would be able to perform routine operations not lasting over an hour or so. However, prolonged operations and those demanding finer skill would be difficult to perform. I am sure he would not be required to give up totally his operative work."

14. As against this evidence, the appellants examined the motor vehicle Inspector Chavan; Appellant No. 2 Minu Mehta; one K. S. Riani, the driver of the offending lorry on the date of the incident; Dinkar Shankar Jawkar, who was sitting at the relevant time in the lorry and who was an officer of the New Customs House; one Gangadharam Bhotia, partner of Veena Automobiles Service Station; and one Jimmy Dara Engineer, Surveyor, inspecting motor vehicles.

15. The learned Member of the Motor Accidents Claims Tribunal for Greater Bombay, very carefully and exhaustively considered the evidence led by the parties in the light of the various contentions raised before him. He came to the conclusion that the plea of mechanical breakdown put forward by Appellant No. 2 was false because the evidence led by the Appellants was not sufficient to show that there was any mechanical breakdown, firstly because, although in the written statement it was contended that "axle brake ring" came out, as already stated, the same was a cock and bull story, inasmuch as, the witness on behalf of the Appellants, Jimmy Engineer, had never heard of a part like "Axle brake ring."

16. A theory was put forward at the hearing that "drag link end", also known as "tie rod" had come out. The words "axle brake ring" appears to have figured in the written statement because of an entry in the police diary, which appears to have been made on the basis of a statement given by the driver. Even Appellant No. 2 Minu Mehta had to admit that he did not know any part of the lorry known as "axle brake ring". The Tribunal was, therefore, constrained to remark that it was really painful that a businessman like Minu Mehta who is a partner of Cawasji Behramji and Company had fallen to such an extent and given false evidence on oath.

17. The learned Member further disbelieved the theory of the coming out of the "drag link end", as the expert examined by the Appellants, viz., Engineer, who had inspected the lorry on April 22, 1969, at Veena Automobiles Service Station, stated in his cross-examination:

"..... I found that tie rod broken. According to me, 'tie rod' and 'drag link' end' would mean same. The drag link or the tie rod are first attached with a nut. And these parts are made of steel alloy. So that normally they should not break. There is also a quarter pin which acts as a lock. I do not remember having inspected the quarter pin or not. I do not remember if nut was there. If there is anything wrong with the drag link end the driver would be able to feel the difference and could stop the vehicle by the side of the road immediately."

18. To the Court's question he further stated:

"A small hair like crack may develop and result in the snapping of the tie rod or drag link in resulting the loss of control for which there is no prior signal to the driver. It will depend on the momentum of the vehicle, the load it carries and the weight of the vehicle and for the driver it would take four to five feet to bring the vehicle to a dead stop. It will cover 5 ft. or so after the driver puts his leg on the brakes, and it depends on the presence of the mind of the driver and it is for the driver to take split second decision."

It is thus clear that even the plea about the breaking of the "tie rod" was not proved satisfactorily by the Appellants.

19. The learned Member of the Tribunal, therefore, came to the conclu-

sion, after careful consideration of the evidence of the driver, the Customs Officer and other evidence in the case, that there was no mechanical defect at all with the lorry; and the defect was in driving dangerously and negligently. He also held that the principle of *res ipsa loquitur* applied to the facts of the case because the lorry hit Dr. Nayan's car going on the right side; and this itself shows that the driver was negligent and rash, concluding his discussion as follows, in paragraph 36 of his judgment;

"Lastly assuming for the sake of arguments that there was breakdown and Drag Link End came out or whatever part Opposite Party feels came out and there was mechanical breakdown although evidence is entirely contrary to such assumption but taking it for the sake of arguments only then also the Customs Officer does not know driving nor he found that any part of the vehicle had come out and it was the driver who felt that 'Buffing' and wobbling started from Haji Ali and yet he covered more than 2 1/2 furlongs when according to their surveyor vehicle could have been and should have been stopped within 4 to 5 ft. This itself proves negligence."

20. In view of this conclusion, the learned Member proceeded to consider the evidence regarding nursing expenses given by Dr. Bavdekar, Miss Meena and Miss Arekar and concluded that the nursing expenses came to Rs. 1,400/- and medical expenses came to Rs. 300/-. This item of Rs. 1,700/- is not challenged before us.

21. The learned Member further took into consideration the income-tax returns submitted by Dr. Nayan from April 1, 1965 to March 31, 1969, from year to year; and came to the conclusion that prior to the accident the annual average income was Rs. 20,400/- and on that basis awarded damages for four years from the date of the accident. The learned Member worked it at Rs. 81,760/-. Since the accident, the total income for 3 years was Rs. 11,511/- and there was further loss of Rs. 3,530/- in the year of the accident. He thus deducted Rs. 11,511/- Rs. 3,530/- Rs. 7,981/- from Rs. 81,760/- and arrived at the figure of the loss of income sustained during four years at Rs. 73,779/-.

22. It may at once be stated here that the figures in the returns of income-tax were not challenged before us and could not be challenged by Mr. Gumaste, the learned Counsel appearing for the appellants. All that he could urge was that

the average should not have been taken as Rs. 20,440/- but as Rs. 18,000/- which was stated to be the average by Dr. Nayan in his evidence. What was contended was that the learned Member was wrong in calculating the average at Rs. 20,440/-, inasmuch as, it was admitted that something could be earned by Dr. Nayan even after the accident; and, in calculating the average loss at Rs. 73,779/- for four years the member was wrong.

23. Having regard to the fact that Dr. Nayan appears to have been a busy surgeon with a maternity home and consulting rooms it cannot be said particularly, when he could not stand operation for more than an hour, as reported by Dr. Chaubal that the basis of the actual calculations was unreasonable or bad. We do not find any error in the learned Member calculating the loss on the basis of the average of the income-tax returns for 4 years prior to the accident and deducting therefrom the average income for 4 years subsequent to the accident.

24. The learned Member further added to this a sum of Rs. 63,000/-, being 50% of Rs. 1,26,000/-, expected loss for 7 years and the remainder of the life of Dr. Nayan who was, when the award was given, 63. The learned Member has correctly said that as lump sum amount was to be given to Dr. Nayan, the loss of 7 years must be reduced to 50%. As this is also calculated on the basis of the average loss calculated on the formula adopted by the learned Member, stated above, we find no error in principle therein.

25. All that Gumaste could submit in respect of this calculation was, firstly that even a very efficient surgeon cannot be expected to continue to be efficient after 63 for 7 years and secondly it was wrong on the part of the learned Member to award Rs. 63,000/- in addition to the other sum making a total of Rs. 1,38,479/- which at the current Bank interest rate would work out to nearly Rs. 18,000/- average loss per year as calculated by the learned Member.

26. The argument is no doubt arithmetically attractive but life is not all arithmetic. The learned Member who had the advantage of seeing the doctor, had come to the conclusion that he was fit enough to live for another 7 years to function like a professional man as a Doctor. There is no reason why this estimate should be considered to be wrong or against commonsense or common experience.

27. Although everyone, having regard to the medical facilities available to-day, wish to live longer than even 70, as the law has cast upon the Tribunal and the Courts the duty to determine compensation on the basis of estimate of life, which both wisdom and experience often show to be incorrect or futile in such matters, the Tribunal tried its best and fixed it at 7 years. We cannot capriciously or arbitrarily interfere with the estimate made by the Tribunal.

28. A professional man cannot be given a compensation at the rate of 'un-earned' income, such as, interest on fixed deposits in banks. His loss must be determined having regard to his skill, ability, popularity and harm caused to his efficient functioning. In cases before the Tribunal under Section 110-B, the Tribunal is required by law to determine an amount of compensation which appears to be "just". The word "just" in the case of a professional man cannot mean just interest on Fixed Deposit which may be alright for a temple or a dargah or even a public and charitable institution or an old infirm or invalid man or woman incapable of functioning in life and earning by working with brain or hand.

29. The Tribunal, in our opinion, has made the best efforts and tried to determine compensation in as "just" a manner as is possible in all the facts and circumstances of the case. We are, therefore, of the view that the Tribunal was quite right in awarding the quantum of compensation of Rs. 1,700/- for nursing and medical expenses plus Rs. 73,779/- for the loss sustained for 4 years plus Rs. 63,000/-, expected loss of 7 years income, making a total of Rs. 1,38,479/-.

30. Turning now to the first ground urged in support of the appeal that the plea of negligence set up by Dr. Nayan was not proved by him and that the accident was caused by mechanical defect of the lorry, on the facts, we find ourselves in complete agreement with the learned Tribunal as it was for the lorry driver and owner to establish in this case how the lorry crossed the road dividers, went on the wrong side and virtually mounted on the fiat car coming from the opposite direction. The principle, *res ipsa loquitur*, was rightly applied by the learned Tribunal. The evidence clearly shows that the plea of the appellants Nos. 2 and 3 in the written statement was reckless, if not a false one; and the Tribunal rightly disbelieved the plea and held that it

was the driver who was negligent. We fully concur in the reasons and the findings of the learned Member of the Tribunal.

31. It would not have been necessary for us to say anything more but for the fact that it was represented to us by Counsel on respective side that the users of motor cars and lorries and the claimants of compensation before the Motor Vehicles Tribunal ought to know what they should plead and establish before they are entitled to avoid payment of compensation under the provisions of Section 110-B of the Motor Vehicles Act, 1939, which runs as follows:—

"110-B. On receipt of an application for compensation made under Section 110-A, the Claims Tribunal shall, after giving the parties an opportunity of being heard, hold an inquiry into the claim and may make an award determining the amount of compensation which appears to it to be just and specifying the person or persons to whom compensation shall be paid; and in making the award the Claims Tribunal shall specify the amount which shall be paid by the insurer or owner or driver of the vehicle involved in the accident or by all or any of them, as the case may be."

32. As the point is very important and was argued at length by Counsel, each of us has begun to feel that public interest requires that some sort of certainty in law should develop in this recently much used branch of law in the interest of safety and security of citizens in modern urban industrial society where lorries, buses and cars are killing more persons than, perhaps, all the wars that were fought by man-kind at various stages in the world's history and also in the interest of justice which must mean guidelines to the Public Sector Insurance Companies and other Insurance Companies. This problem has already attracted the attention of industrial organisations and democratic countries following common law. Each of us, therefore, feel like expressing our views on the basis of the law for compensation and insurance and the right to compensation under Section 110-B of the Motor Vehicles Act.

33. A sound advice has already been delivered by Mr. Justice V. R. Krishna Iyer, as he then was, in Kerala High Court, in his judgment, in *Kesavan Nair v. State Insurance Officer*, 1971 Acc CJ 219 at p. 221, para. 4:—

"It is not altogether irrelevant to observe that motor vehicle accidents in

the State are increasing at an alarming rate but there is hardly any serious check by the concerned authorities to ensure careful driving. The innocent victim is faced with legal difficulties, in recovering damages. On account of the legal position laid down in *Mangilal v. Parasram*, (AIR 1971 Madh Pra 5) (FB) the insurer is liable to pay only if the insured is liable to pay. It often times happen that a prosecution precedes a civil case and since the prosecution is in the control and direction of the police if it ends in an acquittal on account of the indifference in the conduct of the prosecution the insured pleads non-liability and the insurer also sometimes escapes. Out of sense of humanity and having due regard to the handicap of the innocent victim in establishing the negligence of the operator of the vehicle a blanket liability must be cast on the insurer, instead of its being restricted to cases where the vehicle operator has been shown to be negligent. This is more a matter for the legislature and not for the court. But this is a lacuna in the law which I think it would be just to rectify." (Underlining supplied). In that case compensation was claimed in respect of a tragic bus accident in the High Ranges of Kerala which resulted in the loss of 7 lives and injuries to many others.

34. The lower Courts had come to the conclusion that the driver was negligent; and the negligence was the cause of death of Kuruvilla Joseph and Joseph Varkey in respect of which the lower Court had granted a compensation of Rs. 2,700/- and Rs. 2,000/- respectively, directing the said insurance department to pay Rs. 2,000/- to each life lost. While confirming the decrees of the lower Courts Mr. Justice Krishna Iyer made the above observations and suggestions, which, unfortunately, do not, appear to have attracted the attention of the law makers till to-day.

35. In *New India Assurance Co. Ltd. v. Sumitra Devi*, 1971 Acc CJ 58, the Patna High Court, considered the provisions of Section 110-A of the Motor Vehicles Act which provides for the application for compensation and Section 95 of the Act. The claimant in that case was a young girl aged about 6 years. While she was coming from her school in the evening on March 12 1963, she was knocked down by a motor truck in front of the State Bank in the town of Ramgarh. As

a result of the grievous injuries she had suffered on her right leg, it had to be amputated from near her thigh above the knee region.

36. The owner of the truck did not contest the claim. The Insurance Co. had resisted on various grounds. The Tribunal held that the claimant was involved in the accident, on the day, place, time and by the truck, as alleged by her and hence the claimant was permanently deformed and therefore, she was entitled to receive a compensation of Rs. 20,000/-. The Division Bench of the Patna High Court confirmed this finding.

37. The Patna High Court overruling, inter alia, the contention that the claimant had failed to prove negligence, observed as follows:—

"Section 95 of the Act provides requirements of insurance policy and the limitation of liability of an insurer. The insurance policy is on the record and has been marked exhibit A. We have not been shown either from Section 95 of the Act or any other provisions, or from the insurance policy (Exhibit A) whether the contention now raised has any justification. The liability is absolute but is only limited to the extent provided by the insurance policy in a particular case."

38. Distinguishing the facts before them from the facts in *Seethamma v. Benedict D'Sa*, 1966 Acc CJ 178 = (AIR 1967 Mys 11), the Division Bench of the Patna High Court, laid down:

"..... In the instant case, as I have stated, no case of negligence was made out in the application nor was any evidence adduced on behalf of the claimant, though the father claimant Mulchand Agarwala (A. W. 2) was asked in cross-examination about negligence and he said that 'the accident must have taken place because of the negligence and rashness of the driver. This is my impression'. It is thus clear that there is no evidence of negligence in the case nor was the claim founded on the basis of the negligence of the driver who drove the vehicle in question. As such, the point decided in the Mysore case is of no assistance to the appellant in the present case."

39. In other words, although the Division Bench of the Patna High Court has not stated so, they confirmed the decision of the Tribunal awarding compensation to the girl merely on the ground that the girl was involved in the accident and suffered damages. Mr. Hattangadi, the learned Counsel appearing for the res-

ponent Dr. Nayan therefore, relying on the Kerala High Court decision, Patna High Court decision and the wording of Section 95 and Section 110-B and also the form prescribed under Section 110-A under the Bombay Motor Vehicle Rules, viz., Form Comp. A, submitted that none of these sections or the form requires negligence or any other fault on the part of the driver of the offending lorry to be pleaded. He submitted that the Tribunal has jurisdiction to determine the compensation "which appears to it to be just" under Section 110-B.

40. Under Section 110-A an application for compensation arising out of an accident of the nature specified in subsection (1) of Section 110 may be made by the persons mentioned therein. Section 110 refers to the Claims Tribunal to be constituted by the State Government for the purpose of adjudicating upon claims for compensation in respect of accidents involving the death of, or bodily injury to, persons arising out of the use of motor vehicles, or damages to any property of a third party so arising, or both, etc. etc.

41. Mr. Hattangadi submitted that whatever may be the position before the Civil Court, so far as the Motor Vehicles Tribunal was concerned, the Act is self-contained and exhaustive relating to injuries to persons and property, arising out of the use of the motor vehicle. He submitted that it was, therefore, wrong to assume that the claims must be claims on the basis of negligence or culpable negligence or that it should be based on the principle of tort as defined by the common law of England and applied by Indian Courts.

42. To repel this argument Mr. Gumaste relied on several decisions: Shri Ram Pratap v. General Manager, Punjab Roadways, Ambala, AIR 1962 Punj 540; State of Punjab v. V. K. Kalia, 1968 Acc CJ 401 = (AIR 1969 Punj 172); Amarjit Kaur v. Vanguard Insurance Co. Ltd., 1969 Acc CJ 286 (Delhi); State of Punjab v. Phool Kumari, AIR 1963 Punj 125; Sabita Pati v. Rameshwar Singh, 1973 Acc CJ 319 (Orissa); Motor Owner's Insurance Co. Ltd. v. Smt. Sharda Thacker, 1974 Acc CJ 239 (Orissa) and Mangilal v. Parasram, AIR 1971 Madh. Pra 5 (FB). He also relied on New India Insurance Co. Ltd. v. Shanti Misra, AIR 1976 SC 237, Calcutta State Transport Corporation v. Kamal Prakash De, AIR 1976 Cal 2, Rehana Rahimbhai Kasambhai v. Trans-

port Manager, Ahmedabad Municipal Transport Service, AIR 1976 Guj 37 and Mrs. Rita Aurora v. Saligram, AIR 1976 Him Pra 24.

43. It is unnecessary to discuss these cases in detail. In none of these cases, the question as to whether the law of torts requires any fault to be the basis of liability or the question as to whether it was necessary to read the law of torts as supplementing Section 110-B was really agitated. Negligence was pleaded and denied in these cases and the question was whether negligence was established in accordance with the law of torts as applied by the Indian Courts.

44. The Division Bench of the Orissa High Court in Oriental Fire and General Insurance Co. Ltd. v. Kamal Kanini Das, 1972 Acc CJ 92 = (AIR 1973 Orissa 33), appears to have considered the point, with respect, in a somewhat indirect way and has observed in paragraph 8:

"..... The objective factors which would constitute the basis of compensation appearing as just have not been indicated in the section. The expression 'which appears to it to be just' however vests a wide discretion in the Tribunal in the matter of determination of compensation. Despite the wide amplitude of such power, the determination cannot be arbitrary and must be based on certain data establishing reasonable nexus between the loss incurred and the compensation to be awarded."

45. Similarly, in M. A. Rahim v. Sayari Bai, 1972 Acc CJ 470 = (AIR 1973 Mad 83) a somewhat detailed discussion is to be found at the end of which the Division Bench of the Madras High Court observed in paragraph 6 as follows:—

"We are therefore of the view that there is no warrant for literally importing the provisions of the Fatal Accidents Act into Section 110-B of the Motor Vehicles Act so as to read both the provisions as part and parcel of the provision. By this we should not be understood as saying that the Tribunal can adopt any method which is arbitrary or capricious or in disregard of well-established principles. The decisions rendered under the general law of torts and under the Fatal Accidents Act will undoubtedly be relevant and constitute broad guidelines, but they would not be binding upon the Tribunal in the sense that the method of approach should be the same and identical as in the cases arising under the Fatal Accidents Act."

It is not necessary to discuss all these cases because, in my view, in none of those cases was the question agitated as to what exactly was meant by tort in the context of automobile accidents and injuries resulting therefrom, for which more often than not human minds, hands or legs are not always accountable, in the later half of the twentieth century. The question has engaged the minds of jurists all over the common law world.

46. The evolution of this law is discussed lucidly by Prof. Edward Veitch and David Miers in their article, "Assault on the Law of Tort" in 1975 Modern Law Review pp. 139 to 152. They have concluded at page 146:—

"The brief re'sumé above of the men and their theories reveals that there is no single coherent set of ideas either about the existing law of tort or about the statutory schemes to replace it. The resulting problem is obvious: if there is no complete understanding of what exactly the law of tort is all about and equally no real insight as to what the schemes ought to be achieving then any change may well be constructed on somewhat insecure foundations. Immediately it must be admitted that the existing administrative and welfare systems have multiple aims and these vary with the nature and origin of the injury to the particular individual. To aid confusion the systems tend to overlap on occasions. If we take social security first: the various arrangements set up by legislation can be said to attempt to give an adequate standard of living to those who have contracted diseases, lost their employment, fallen on hard times and who have grown old. But in addition the state financed benefits beyond the provision of money or services to secure an adequate standard of living since lump sums are payable for permanent disability and so approach the tort purpose of compensation."

47. Legislative attempt to give compensation irrespective of fault when the injuries are caused or death is caused by automobile accident is discussed in a very exhaustive manner in an article titled as "Accident Compensation in New Zealand; A Comprehensive Insurance System" in 1974 Modern Law Review from p. 361 to p. 376. Under that Act discretion is given to the Commission which was set up for determining compensation arising out of the automobile accident irrespective of fault as a basis of report made by Royal Commission whose chairman was Mr. Justice Wood-

house. This Act provides that no claim, either at common law or under a statute, may be brought for damages arising out of personal injury or death suffered by accident in New Zealand and the Accident Compensation Commission is entrusted with the power to determine the compensation after hearing the insurance company stated to be appellant as provided under the Act.

48. This is referred to only to indicate how the very valuable suggestion of Mr. Justice Krishna Iyer for enacting a proper law in this connection required to be followed by the law makers of the country, rather than compel the litigants to find out the interpretation of law by different Courts and possibly after unnecessary, lengthy and costly litigation by different claimants by what is alarmingly tending to be an "Alice through Wonderland" process of litigation.

49. In the meanwhile, I would like to interpret the sections of the Motor Vehicles Act, viz., Sections 110 to 110-F as creating a special machinery for adjudicating upon the claims for compensation for injuries to persons and property sustained as a result of the "use" of the motor vehicle. Section 110 uses the words "arising out of the use of motor vehicles" not out of improper, negligent or faulty use of motor vehicles. It is, therefore, not necessary for the Court to interpret the word "use" as necessarily implying improper use or negligent use or faulty use.

50. The moment a motor vehicle is used and injury is caused, a liability to pay compensation arises; and the Tribunal can adjudicate upon that liability and determine 'just' compensation. This can be on the general basis of *ubi jus ibi remedium* in respect of which, we find the following comment in Broom's Legal Maxims, 10th Edition, page 119:—

"The principle adopted by Courts of law accordingly is, that the novelty of the particular complaint alleged in an action on the case is no objection, provided that an injury cognisable by law be shown to have been inflicted on the plaintiff; in which case, although there be no precedent, the common law will judge according to the law of nature and the public good."

51. In my opinion, public good requires that everyone injured, viz., by the use of a motor vehicle, must immediately get compensation for the injury. Every person has a right to safety and security of his person irrespective of

fault or negligence or carelessness or efficient functioning of the motor vehicle. Every person has a right to claim compensation as that is the only way of remedying the injury caused to him in a modern urbanized, industrialised and automobile ridden life.

52. It is useful to recall in this connection the following observations of Holt, C. J. in *Ashby v. White Et. Alios*, (1703) 92 ER 126 (Lord Raymond 2) at page 136:

"If the plaintiff has a right, he must of necessity have a means to vindicate and maintain it, and a remedy if he is injured in the exercise or enjoyment of it; and indeed it is a vain thing to imagine a right without a remedy; for want of right and want of remedy are reciprocal."

53. Moreover a look at the latest standard books on the law of Torts also reveals that when and even if importing the notion of torts in determining the just compensation it is not necessary for the Tribunal to award damages only if the plaintiff proves negligence or any other tort recognised by well known books as species of tort.

54. In "*Salmond on Law of Torts*", 16th Edition, at page 16, there is a discussion as to whether Salmond's theory that just as the criminal law consists of a body of rules establishing specific offences, so, the law of torts consists of a body of rules establishing specific injuries, has been discussed as follows:—

"But it is very doubtful whether Salmond's theory is true now, or ever has been true. There is not a single case in the reports in which an action has been refused on the sole ground that it was new. It has been clearly established ever since the memorable judgment of Sir John Holt C. J. in *Ashby v. White* that mere novelty is no bar to an action. 'I wish never to hear this objection again,' said Sir Charles Pratt, C. J., sixty years later, 'This action is for a tort: torts are infinitely various, not limited or confined, for there is nothing in nature but may be an instrument of mischief.'"

Continuing the discussion, Professor Hauston, Regius Professor of Law at Oxford University, has commented:—

"Winfield said that he preferred the theory that 'all injuries done to another person are torts, unless there is some justification recognised by Law'. But this thesis did not find general acceptance and he later modified his opinion to the ex-

tent of admitting that 'from a narrow practical point of view' Salmond's view 'suffices', though he still thought that 'from a broader outlook' his own theory was valid. To some extent the critics seem to have misunderstood Salmond. He never committed himself to the proposition certainly untenable now, and probably always so, that the law of torts is a closed and inexpensible system. 'To say that the law can be collected into pigeon holes does not mean that those pigeon holes may not be capacious, nor does it mean that they are incapable of being added to' Salmond merely contended that these changes were not exclusively referable to any single principle. In this he was probably right. The factors relevant to a decision to impose, or not to impose, liability are many and varied."

55. In "*Winfield and Jolwicz on Tort*", 9th Edition, in Chapter I, dealing with the Meaning of Law of Tort and the Foundation of Tortious liability, the discussion is as follows:—

"..... Salmond had asked, 'Does the law of torts consist of a fundamental general principle that it is wrongful to cause harm to other persons in the absence of some specific justification or excuse, or does it consist of a number of specific rules prohibiting certain kinds of harmful activity, and leaving all the residue outside the sphere of legal responsibility?' and had chosen the second alternative. Winfield preferred the other view, but latterly he modified it as follows: From a narrow practical point of view, the second theory will suffice, but from a broader outlook, the first is valid. If we concentrate attention on the law of tort at the moment (which is what most practitioners do), entirely excluding the development of the law, past and future, then it corresponds to the second theory. If we take the wider view that the law of tort has grown for centuries and is still growing, then the first theory seems to be at the back of it. It is the difference between treating a tree as inanimate for the practical purposes of the moment (e.g., for the purpose of avoiding collision with it, it is as lifeless as a block of marble) and realising that it is animate because we know that it has grown and is still growing. The caution and slowness which usually mark the creation of new rules by the judges tend to mask the fact that they have been created; for they have often come into existence only by a series of analogical extensions spread over a long period' of

time, to vary the metaphor, the process has resembled the sluggish movement of the glacier rather than the catastrophic charge of the avalanche. But when once a new tort has come into being, it might fairly seem to have done so, if the whole history of its development is taken into account, in virtue of the principle that unjustifiable harm is tortious.

Where the courts hold that the harm is justifiable, there is, of course, no tort. And they may hold that it is justifiable for any one or more of several reasons. The plaintiff may be asking them to do what they think Parliament is more fitted to do; or he may be alleging a particular tort, without giving proof of some essential requisite of it; or he may be taking an exaggerated view of what is necessary to his own comfort or prosperity; or he may be demanding the creation of a remedy which would throw out of gear other parts of the law. But subject to these restrictions and looking at the law of torts in the whole of its development, Winfield is still inclined to the first theory.

"Evidence", in the sense of judicial dicta, can be found to support either view, but, so far as is known neither forms the ratio decidendi of a single case. Furthermore, since the supporters of the second view do not deny that the law of tort is capable of development, or even that new heads of liability can come into existence, and since the supporters of the first view admit that no action will lie if the conduct which caused the harm was justifiable, the difference between them is perhaps less than is sometimes supposed.

Summing up his investigations into the controversy, Professor Glanville Williams says this:— "The first school has shown that the rules of liability are very wide. The second school has shown that some rules of absence of liability are also very wide. Neither school has shown that there is any general rule, whether of liability or of non-liability, to cover novel cases that have not yet received the attention of the Courts. In a case of first impression that is, a case that falls under no established rule or that falls equally under two conflicting rules — there is no ultimate principle directing the court to find for one party or the other. Why should we not settle the argument by saying simply that there are some general rules creating liability and some equally general rules exempting from liability. Between the two is a stretch of disputed territory with the

courts as an unbiased boundary commission. If, in an unprovided case, the decision passes for the plaintiff, it will be not because of a general theory of liability but because the court feels that there is a case in which existing principles of liability may properly be extended."

56. The time has now come when instead of involving the insurance company, which now, so far as this country is concerned, is in the public sector, and the citizens injured in automobile accidents, in costly and lengthy litigation, what is needed is a sure position in law. There is generally prolonged litigation in such cases. In the absence of any words used by the legislature to underpin the liability as a liability with respect to negligence or any other specific tort or tort generally that liability must be held to be in respect of injuries done or caused as a result of the "use" of motor vehicle unless there is some reason recognised by law for exempting the user from that liability.

57. It is true that there are cross-currents of thoughts in the matter. Even in England judges have taken different views with regard to the necessity for proof of fault in actions for personal injuries caused by accidents. Salmond's Law of Torts has summed up this discussion with the following words:—

"It is reasonable to conclude that there is still room for the law of torts. Basic cover against disasters may be provided by national insurance, but there is a popular feeling that those who have intentionally or carelessly caused harm to others should pay for the damage which they have caused. Tort law is concerned not only with cash, but also with appeasement, justice and fairness. Experience with industrial accidents shows that social welfare and common law damages may well co-exist. Perhaps torts should not be abolished, but amended and supplemented; it can deal better than insurance with property damage and mental suffering, and can also provide for the restoration of earnings above the minimal level. For statutory benefits have the disadvantage that they are not in any way related to the loss suffered, as common law compensation is, however, inadequately. There is room for much more inquiry as to the relationship between the law of torts and the welfare state. The whole problem of alternative remedies needs to be re-examined."

58. In the light of this fundamental and basic nature of the law of torts,

I am of the view that whether we apply the law of torts or not, the liability to pay 'just' compensation arises when the injuries are caused by the use of the motor vehicle. The Tribunal has power to determine what is 'just' compensation irrespective of whether the defendant was at fault or was negligent or careless or not. When a person is injured by use of a vehicle, that itself is an infringement of a right. That person must, therefore, have a remedy of recovering compensation from the person whose vehicle has caused injury. That, according to me, is the scheme of the provisions contained in Sections 110 to 110-F of the Motor Vehicles Act. Principles of law of negligence were relevant for determining the quantum of damages and the person liable to pay it like any other principle to be followed in the administration of justice.

59. It was contended by Mr. Gumaste that these were only procedural sections as held by the Supreme Court recently in *New India Insurance Co. Ltd. v. Shanti Misra*, AIR 1976 SC 237 and in some other decisions of other High Courts; but, with respect, that case was concerned with and arose out of the facts of those cases where the point as to whether the law was substantive or procedural arose in the context of the plea of bar of limitation.

60. Except when such distinction is relevant, in interpreting the law, one should not approach the law as if the law was intended to be labelled or christened as procedural or substantive law. It is clear from Section 110-B that the law requires the Tribunal to decide not only what is "just" compensation but also to whom it should be paid and by whom it should be paid. Some of those sections will have to be interpreted as substantive law if at all it is necessary to interpret them to be so. In my view, it is unnecessary to go into semantics of the words "substantive and procedural law" in the present case. It is enough to say that Dr. Nayan was inflicted injuries by use of the motor lorry belonging to the Appellants Nos. 2 and 3 and they are, therefore, liable to pay compensation to Dr. Nayan as awarded by the Tribunal.

61. Mr. Gumaste contended that, having regard to Section 95, which lays down the requirements of policies and limits of liability in respect of policy of insurance against third party risks, the words used are "any liability which may be incurred"; and, therefore, it must be a

liability under the general law of torts or under the Civil Law. But it is not necessary or proper to read that section in such a way because liability could be any liability. It may be civil or it may be criminal. It may be contractual or based on tort or a statute. Merely because the word "liability" is used in that section, it cannot be said that the Tribunal's jurisdiction under Section 110-F is limited to considering and applying the law of torts in a claim for compensation.

62. Mr. Gumaste also referred to the word "liability", used in Section 96 and contended that word "liability" would also mean liability which will be recognised by a Civil Court. It may be so. But that section again does not limit the power of the Tribunal under Section 110-B which has to determine while making the award, as stated above, not only what is "just" compensation but also specify the amount which shall be paid by the insurer or owner or driver of the vehicle involved in the accident or by all or any of them, as the case may be. Section 96 in my opinion, applies only to the judgment obtained in a Civil Court which has no jurisdiction where the Claims Tribunal is constituted in view of the provisions of Section 110-F.

63. In any view of the matter, therefore, whether negligence is taken into consideration or not, the award passed by the Tribunal in the present case is just and legal. There is nothing therein which requires interference at our hands. Mr. Gumaste submitted that under Section 95 (2) the policy of the insurance in the present case limits the liability of the insurance company to Rs. 20,000/- as that was the limit prescribed under sub-section (2), as it was in force at the time of the accident; and, therefore, insurance company-appellant, should be held liable only to the extent of Rs. 20,000/-.

64. As can be seen from the record and particularly the roznama, no point appears to have been raised on behalf of the insurance Co. to limit the liability under the policy to Rs. 20,000/-, by Mr. J. M. Patel, who filed the written statement on behalf of the opposite parties. The policy is not before us. Not only that but when Mr. Gumaste, who filed the appeal on behalf of all the opposite parties, the appellants, raised this point, Mr. Patel, who was present in the Court, interrupted and said that it was the practice or convention of the insurance companies not to raise such a point before the Tribunal

if the insurance company represented the assured as in the present case. Mr. Patel, therefore, contended that the insurance company should not be allowed to raise this point for the first time before us on behalf of Appellants Nos. 2 and 3.

65. But he had not filed any vakalatnama on behalf of Appellants Nos. 2 and 3 before us. He had filed his vakalatnama before the Tribunal. In the absence any vakalatnama filed by Mr. Patel on behalf of Appellants Nos. 2 and 3, it is not open to us to take into consideration his submissions on their behalf. On behalf of Dr. Nayan, the claimant, Mr. Hattangadi submits that the insurance company should not be allowed to raise the point of limiting the liability of Rs. 20,000/- for the first time in this Court as they have not raised a contention in the written statement filed before the Tribunal that the policy did not cover the entire liability which the assured may incur under the award.

66. There is considerable force in the argument of Mr. Hattangadi. But having regard to the fact that Mr. Patel represented the assured as well as the insurance company in the lower Court, it may be that as the contention of liability available to the insurance company under Section 95 (2) was not raised before the Tribunal, in fairness, an opportunity should be given to the insurance company to raise such a point if it is open to it at law to do so subject to the payment of costs and also subject to depositing the amount which according to them is payable under the award, viz., Rs. 20,000/-, with interest from the date of the application as awarded by the Tribunal.

67. If and when the certificate of execution is to be issued by the Tribunal under Section 110-E of the Motor Vehicles Act the question may be raised by the Insurance Company. At present we are not bound to interfere with the award of the Tribunal. There was no material or argument before the Tribunal about it. There was nothing before the Tribunal to show that the insurance company's liability was limited to Rs. 20,000/-.

68. In the result, I would confirm the award and dismiss the appeal subject to the modification that it is open to the insurance company Appellant No. 1, to deposit Rs. 20,000/- with interest from the date of the application to the date of the deposit as per the award passed by the Tribunal and contend that the award is binding under Section 95 (2) of the Motor

Vehicles Act but only to the extent of Rs. 20,000/- or the sum which may be mentioned in the insurance policy.

69. If and when the insurance company deposits the amount as directed above and applies for determination of this question, the Tribunal may proceed to determine that question after hearing all the parties concerned and then issue the certificate for recovery of the balance of the awarded money under Section 110-E of the Motor Vehicles Act from the Insurance Co. So far as others are concerned, the Tribunal is at liberty to issue certificate of execution forthwith. As an extraordinary indulgence is given to the insurance Company on a plea which it has raised for the first time before us, the insurance company Appellant No. 1, should pay the costs of all parties to this case so far incurred and to be hereinafter incurred.

MRIDUL, J.:— 70. I respectfully agree with the findings and the conclusions of my learned brother. The question as to whether gist of cause of action, in a claim arising out of a motor accident is negligence, is of great importance. This question also arises in appeal No. 81 of 1975, which has been heard with this appeal. In view thereof as also because of a slightly different process of reasoning adopted by me, I think it necessary to deal with this important question relating to interpretation of the provisions of Section 110-B and cogent sections of the Motor Vehicles Act, 1939, (hereinafter referred to as "the Act").

71. Shri Gumaste, the learned counsel for the 1st appellants — (Insurance Company) — (hereinafter referred to as 'the insurer'), submits that in all cases of compensation arising out of accidents contemplated by Chapter VIII of the said Act, the basis of liability is negligence as known to the law of Torts. His submission is that provisions of Chapter VIII, particularly those relating to the constitution of Motor Accidents Claim Tribunal, are procedural sections. The said provisions do not provide for the basis of liability or the principles governing the exercise of power vested in the Tribunal for awarding compensation. In order to ascertain the liability the Tribunal, of necessity, must look to what are called the substantive provisions of Law of Torts and the Fatal Accidents Act. It is a submission of the learned counsel that there is nothing in the provisions of Chapter VIII which touches the basic question of liability arising out of acci-

dents and that the provisions of the said Chapter have not changed the law which existed prior to the bringing into force of the relevant provisions. The learned counsel asserts that the provisions of the Act cannot be held to override the law of Tort or of Fatal Accidents Act and the liability for compensation must be determined with reference to the said substantive provisions alone.

72. Shri Hattangadi, the learned counsel for the Respondent (hereinafter referred to as 'the injured') submits that upon a true construction of provisions of Chapter VIII and more particularly, Section 110-B, negligence is not the basis of the liability. The cause of action in cases of injury in accidents is the loss and damage sustained by reason of death or bodily injury caused by or arising out of the use of a vehicle in a public place.

73. In order to resolve these controversies it will be necessary to see the language in which the relevant provisions are couched as also the scheme, intendments and the purpose thereof. It will have to be seen whether the relevant provisions of the Act provide for a basis of liability in connection with accidents wherein motor vehicles are involved or that said provisions merely lay down the mode and the forum through which the rights and liabilities which are claimed to arise only under the substantive provisions of law as aforesaid, are enforced or adjudicated.

74. The Act is an Act "to consolidate and amend the law relating to Motor Vehicles". As a Consolidation Act, it therefore, merely reduces into a systematic form the whole of the law that existed prior to its enactment. A Consolidation Act by itself cannot be said to intend a change in the pre-existing law but the Act is not merely a Consolidated Act. It is also an Act which seeks to amend the law relating to motor vehicles. The controversies in this appeal therefore will have to be determined by interpreting the relevant provisions of the Act read within the setting of the Scheme, intendments and purposes thereof.

75. Chapter VI of the said Act deals with 'Control of traffic'. It makes elaborate provisions for regulating use of a motor vehicle in public places. Section 71 provides for limits of speed. Section 72 deals with limits of weight and limitation on use. Section 74 empowers State Government to prohibit or restrict

driving of motor vehicles 'in the interest of public safety or convenience or because of the nature of road or any bridge'. Section 75 provides for placing or erection of traffic signs. Section 76 authorises State Government or other authority designated by the State Government in that behalf, to determine 'places at which motor vehicles may stand' or places at which public vehicles may stop. Section 77 provides for designation of certain roads as main roads for the purposes of regulations contained in the tenth Schedule. The said Tenth Schedule enumerates driving regulations to be observed by a driver of a motor vehicle. Section 78 casts obligations for safe driving of the motor vehicles. It provides that a driver of motor vehicles 'shall drive the vehicle in conformity with traffic signs and regulations set forth in Tenth Schedule. Section 79 provides for signals and signalling devices and for the directions that a driver of a motor vehicle is obliged to follow. Section 81 casts an obligation upon the person in-charge of a motor vehicle to ensure that the vehicle is not left in a dangerous position so as to cause 'danger, obstruction or undue inconvenience to the other users of the road'. The other sections need not be noticed. Mention however, may be made of Section 91 which empowers the State Government to make rules. Clause (i) thereof authorises the State Government to make rules providing for "generally, the prevention of danger, injury or annoyance to the public or any person or of danger or injury to property or of obstruction to traffic". The provisions of Chapter VI leave no shadow of doubt that the said provisions impose liabilities and obligations on drivers of motor vehicle and that the provisions enacted therein are conceived with a view to protecting the persons who might be using a public road from "danger, injury or annoyance to their persons or properties". Even in England before statutory provisions were made, there existed what was called a High Way Code. The English judgments show that a failure on the part of any person to observe any provisions of the High Way Code, gave rise to actionable wrongs or to civil liabilities. In civil proceedings such failures were permitted to be relied upon as "tending to establish or negative any liability which may be in question" (Halsbury's Laws of England, 3rd Edn. Vol. 28, page 66). This non-observance was treated as a specie of negligence in relation to High ways. Stronger

becomes the case when the statutory provisions are made and they set forth obligations upon the driver of a motor vehicle so as to prevent mischief "of danger or injury or annoyance to the public or persons or of danger or injury to property" of others. Breaches of these statutory obligations, *ex hypothesi* must predicate liabilities enforceable at law. Chapter VIII relates to insurance of Motor Vehicles against third party risks. It comprises of Section 93 to Section 111-A. Some of the salient provisions thereof may however, be noticed.

76. Section 94 (1) ordains that no person shall use (except as a passenger) or cause or allow any other person to use a motor vehicle in a public place, unless there is in force in relation to the use of the vehicle by that person or that other person as the case may be a policy of insurance complying with the requirements of Chapter VIII. Section 94 (1) is modelled on Section 35 (1) of English Roads Traffic Act, 1930. There is considerable judicial opinion to show that Section 35 (1) of the English Roads Traffic Act, 1930, provides for a statutory duty enforceable at law.

77. In *Monk v. Warbey* (1935-1 KB 75), one Monk was injured in a car accident. The car belonged to one Warbey. Warbey's friend one Knowles had borrowed the car from Warbey and had asked one May to drive it for him. May and Knowles were not covered by 3rd party liability insurance. Warbey's policy also did not cover the use of a car by Knowles and May. Monk sued Warbey basing his claim against Warbey upon the alleged breach by Warbey of his statutory duty under Section 35 (1) in having caused or permitted his motor car to be used in breach of the sub-section. Charles, J., upheld the claim on the grounds that Section 35 imposed a duty and that injury to any person on road in breach of the said section could be relied upon as a cause of action. In appeal Judgment of Charles, J., was affirmed. The Court of Appeal held that the owner can be sued for breach of statutory duty and the injured need not first sue to uninsured person who caused the accident. (1935) 1 KB 75. The dicta in Monk's case was followed by Goddard, J., in *Richards v. Port of Manchester Ins. Co.*, reported in (1934) 50 Ll LR 88. Shaweross on Motor Insurance, 2nd Edn. writes at page 164 as follows:—

"It was held in *Monk v. Warbey* and in several later cases, that a breach of this statutory duty is a wrongful act giving rise to claim for damages by a third party who is injured through the use of a motor vehicle in breach of the duty."

78. By the same token therefore, the provision of Section 94 (1) of the Act must be held to cast a statutory obligation, the breach whereof is enforceable by an appropriate action in an appropriate forum constituted in that behalf.

79. Section 95 (1) lays down 'requirements of policies and limits of liabilities'. Clause (b) of sub-section (1) requires that a policy of insurance must "ensure the person or classes of persons specified in the policy to the extent specified in sub-section (2) — (i) against any liability which may be incurred by him in respect of the death of or bodily injury to any person or damage to any property of a third party caused by or arising out of the use of the vehicle in a public place; and (ii) against the death of or bodily injury to any passenger of a public service vehicle caused by or arising out of the use of the vehicle in a public place. The provisions of Section 95 (1), more particularly, clauses (b) (i) and (ii) thereof delineate the extent of the liability which is considered minimum that should be ensured to a third party involved in an accident caused by or arising out of the use of the vehicle in a public place. The key-concept in the provisions of sub-sec. 95 (1) (b) is a liability in respect of death or an injury "caused by or arising out of the use of the vehicle in a public place". That the said concept is a cardinal one, is the inference that must be drawn because in the first place it is the common streak which runs through both the sub-clauses (i) and (ii) of clause (b) of Section 95 (1) and sub-clause (i) has to be read as '*Noscitur a sociis*'. These two sub-clauses of Section 95 (1) must get their colour from each other. These sub-clauses are part of the same scheme relating to minimum insurable risk that must be covered and cannot therefore be interpreted differently. Secondly, the word, "arising out of or caused by" are the words of widest amplitude specifying the critical event. They clearly indicate that the liability must be such as pertains to death or bodily injury or damage to the property caused by or arising out of the use of the vehicle in a public place. In other words, a causative factor postulated by the aforesaid provision, is the use of a vehicle in a public place. This is so be-

cause in the focus of the provisions of the Act, particularly Chapter VI and Chapter VIII is the use of a motor vehicle and its proper regulation in order to ensure safety to the people and their property.

80. There is yet reason to hold that the emphasis in Section 95 (1) (b) is on the liability pertaining to an accident resulting in death or bodily injury or damage to the property of the third party by reason of the use of the vehicle in a public place. Section 95 (1) is a provision relating to insurance. The law of insurance contemplates coverage of perils or events resulting in injuries. These perils and events are insurable factors. In the language of insurance, these perils or insurable events or factors are called "risks". Halsbury (Laws of England, 3rd Edn., Vol. 22, page 229) classifies these perils, events or factors in the following words:

"There are three broad topics to be considered in relation to what in commercial parlance is called the risk, namely (1) the risk in the sense of the contractual definition of the peril insured against; (2) the risk in the sense of the subject-matter insured against the stipulated peril; (3) the risk in the sense of the circumstances in which the stipulated peril has to affect the assured, either in relation to a defined subject-matter or in relation to his incurring a particular liability or loss".

81. Under Section 95 (1) insurable contingency which is the minimum that has got to be provided for in accordance with the provisions both of clauses (i) and (ii) is "the death or bodily injury, caused by or arising out of the use of the vehicle in a public place". Clause (i) further adds damage to the properties also. The subject-matter of the insurance is the motor vehicle; circumstances covered are the use of motor vehicle in a public place and the peril insured is the loss arising out of death or bodily injury. These are the factors or events in respect whereof there has got to be a policy of insurance if the provisions of Section 95 (1) (b) are to be complied with.

82. The learned counsel for the insurer, however, submits that the liability as contemplated by Section 95 (1) (b) (i) is a liability which 'may be incurred by' the insured. He emphasises the expression "incurred by him" and submits that the Court should hold that this incurring of a liability has to be determined not with reference to the provisions of the Act but with reference to the rules of

Law of Tort or other substantive laws. The contention is untenable. The expression liability "which may be incurred by him" is used to identify the liability, not to qualify or restrict the liability. It merely answers 'Whose liability and not, what liability'. The perimeters of liability in clauses (i) and (ii) must be held to be the same because in both the events the liability of the owner or the driver exists and is made compulsorily insurable. The only difference is that clause (i) deals with vehicles other than 'public service vehicles' where passengers are gratuitous invitees as contradistinguished from passengers in public service vehicles who are carried for 'hire and reward'. The latter cases require specific reference to exclude defences of 'volenti non fit injuria' or persons not entitled to compensation as being contractees to the contract of conveyance. It is inconceivable that the legislature would intend absolute liability only in cases covered by clause (ii) and not in cases covered by clause (i).

83. It may also be stated that the liability of the insurer is for indemnification of the insured. This liability is co-extensive with the liability of the insured. Consequently insurable events must be same for both and their respective liabilities must be conterminous. Inferentially therefore the delineations of liability for minimum insurable cover must also denote the contours of liability of the insured. If that is so, the minimum contemplated by the said provision also indicates the basis of insured's liability.

84. Sections 97, 99, 101 and 102 show that the Act makes a departure from Law of Torts. The principles enshrined in the said provisions are different from those relating to the law governing the joint tort-feasors. The liability arising out of a joint tort carries with it certain well defined legal consequences. The liability of joint tort-feasor abates with that of the other joint-tort-feasor. The joint-tort-feasors can make a settlement between themselves to limit their inter se liability, that is to say, contribution to be made by each in regard to the joint torts. The discharge of one of joint tort-feasors operates as the discharge of the liability of the other tort-feasors. None of these features obtain in cases covered by the said sections. Section 97 passes on the right of the insured in the event of his insolvency or if it is a corporation, its winding up, to the third parties. Section 99 prohibits any settlement between an in-

suror and the insured unless the third party is a party to such a settlement. Section 101 in terms provides that insolvency of the insured will not affect the claim of the third party once a certificate of insurance is issued. Section 102 is more tale-telling. Contrary to the well-settled principles of tort to the effect that the tort does not survive the demise of the tort-feasor, Section 102 provides that death of a person in whose favour a certificate of insurance is issued if it occurs after the happening of an event which has given rise to a claim under the provisions of said Chapter VII "shall not be a bar to the survival of any cause of action arising out of the said event against his estate or against the insurer". These departures from the principles of Law of Tort, clear on the plain and unambiguous language of these sections, establish that the Legislature intended to lay down a different law in the matters governed by the provisions of the Act.

85. Argument of the counsel for the insurer that an insurance is merely an indemnification to the insured breaks down when it is seen that departure has also been made from the principle that the liability of the insurer should be co-extensive with that of the insured. It is a normal rule of law that in cases of principal-debtors and sureties, their liabilities are co-extensive. The surety is entitled to defend a claim *intra alia* upon the grounds available to the principal debtors but that is not so under the provisions of the said Chapter VIII. Section 96 (2) gives a very limited right of defence to the insurer. The provisions of Section 96 (1) contemplate hearing on the merits only between the third party claimant and the insured. The injunction of sub-section (1) of Section 96 is that the insurer is liable to the extent of the sum assured on a judgment in respect of the liability covered by the policy under clause (b) of sub-section (1) of Section 95 upon the judgment being obtained against the insured. This is different from a situation where a claim against a principal debtor and a surety is made under the general law. In my opinion, the provisions referred to above, clearly establish the legislative intent to make departures not only from the law of torts, but also the Law of Contract in so far as the insurer and the insured in the matter of claims for compensation arising under the said Chapter are concerned.

86. The provisions of the Act are different from those of Fatal Accidents

Act which in term provide for 'actionable wrongs' and for compensation arising therefrom. Section 1-A of the Fatal Accidents Act provides for compensation to the family of a person for loss occasioned to it by death 'caused by wrongful act, neglect or default'. The preamble also indicates the same things. The Legislature having not used the same language in the Act clearly shows that the scheme thereof is different from that of Fatal Accidents Act.

87. Before I go to the most material section viz., 110-E, it is necessary to notice expressions used in Sections 109, 110, 110-A and 110-AA. In these sections legislature has used the expressions "claim compensation in respect of an accident arising out of the use of a motor vehicle" (Section 109); "claims for compensation in respect of accidents involving the death of, or bodily injury to persons arising out of the use of motor vehicles". Sub-section (1) of Section 110: "for compensation arising out of an accident of the nature as specified in sub-section (1) of Section 110", and "a claim for compensation under this Act" (Sec. 110-AA). These expressions clearly demonstrate that the compensation that is payable is a compensation which arises out of an accident and which is payable under the provisions of the Act. There are no words of limitation. There is nothing in the provisions of the Act or Scheme thereof which can justify the importation of limiting factors to restrict plain meaning and amplitude of these expressions. In my opinion, reading down of all these sections will be an unjustified departure from canon of literal construction. There are no compelling reasons to induce me to do so. In my view, a mere surmise or conjecture that the law of Torts is all comprehensive and must therefore govern all cases of compensation, is no ground to strain the language of these provisions or read implied limitations in them. Moreover, such restrictions or limitation besides being repugnant to the natural meanings of the said expressions, also defeat the salutary purpose of Chapter VIII which is to benefit third parties and indemnify them against loss and injury arising out of Motor accidents.

88. Section 110-B has a marginal note which summarises 'the effect of the section.' The marginal note reads "award of the claims Tribunal." Thus the section deals with the jurisdiction of the Tribunal to make award granting compensa-

tion. Undoubtedly, this section creates a forum and therefore to the said extent it is a procedural provision. But it is well-settled proposition of Law that a procedural section may contain in itself substantive provisions. Legal semantics apart, there is no dichotomy between a substantive provision and a procedural provision. The intent of the law has to be gathered from the language of the law, the scheme of the law and the purpose of the law. The crucial words in Sec. 110-B are "the Claims Tribunal may make an award determining the amount of compensation which appears to it to be just and specifying the person or persons to whom compensation shall be paid". This section in other words authorises the tribunal to award such compensation 'as appears to it to be just'. There are no words of limitation in this section whittling down the scope of the authority of the tribunal to award such compensation as appears to it to be just. In *M/s. Shikhu-pura Transport Co. Ltd. v. Northern India Transporters Insurance Co. Ltd.*, reported in AIR 1971 SC 1624, the Supreme Court considered the ambit of power conferred by this section. The Supreme Court observed in paragraph 6, page 1626 as under:—

"Under Section 110-B of the Motor Vehicles Act, 1939, the tribunal is required to fix such compensation which appears to it to be just. The power given to the tribunal in the matter of fixing compensation under that provision is wide."

89. Implicit in the observations of the Supreme Court is the assumption that the width of the power under Section 110-B is not subject to any implied limitations. This would be so because all judicial powers carry with them an implication of a corresponding right in the persons entitled to invoke the jurisdiction of such an authority. Juristically speaking power is correlative of a corresponding right in the aggrieved person. Thus the tribunal being empowered to award such compensation 'as it may deem fit', connotes a corresponding right, as a jural correlative, in the person injured to have, other things being a satisfied, such compensation awarded to him. This compensation has to be such as appears just to the tribunal in the circumstances of the case. I am unable to read any limitations either of express or implied character, into the sweep of the power which is conferred upon the tribunal by the plain and unambiguous language of Section 110-B.

90. The provisions of Chapter VIII noticed above interlace and intertwine. They produce a matrix which is clear. The scheme is that certain perils or risks have got to be compulsorily provided for by an insurance cover. These perils are those which arise out of the use of motor vehicles on a public road and which result in the injury of the description specified by the said provisions. This minimum compulsory insurable coverage is buttressed by the legal sanction under Section 95 (1) of the Act, which prohibits persons from using a motor vehicle without an insurance policy which provides for a minimum injury coverage contemplated by Section 95 (1) (b). The minimum insurance coverage carries with it an explicit obligation in the person involved to pay compensation, otherwise the whole meaning or the purpose or the intentment of minimum insurable coverage will be rendered nugatory. There is, thus, in my opinion, no warrant either in the language of the law or purpose of the law to whittle down the scope of the liability contemplated by the provisions of Chapter VIII of the said Act.

91. Several authorities were cited by Counsel for the insurer in support of his submissions. The learned counsel for the injured also called attention to several authorities which held to the contrary. The authorities cited at the Bar are the authorities for the propositions, whether the provisions of the Act are procedural in character or are substantive in character, and whether the provisions of the Act, particularly Chapter VIII thereof, are a Code contained in themselves. The said judgments reveal a cleavage of judicial opinion. The view taken by the High Courts of Punjab, Orissa and Madhya Pradesh is that the provisions relating to the constitution and the powers of tribunal contained in Chapter VIII are procedural in character and are not a complete Code in themselves. In the view of the said High Courts, the basis of liability under Section 110-B is to be found in the substantive provisions of Law of Torts or the Fatal Accidents Act. The two Division Benches of the Madras High Court in *Mohammed Habibullah v. K. Seethammal*, reported in 1966 Acc CJ 349 = (AIR 1967 Mad 123) and in *Perumal v. G. Ellusamy Reddiar*, reported in 1974 Acc CJ 182 (Mad), have also taken a similar view. As against it, the view of the Delhi High Court is that the said provisions are a self-contained Code. This view of the Delhi High Court is shared by a Division Bench

of the Madras High Court in *M. A. Rahim v. Sayari Bai*, reported in 1972 Acc CJ 470 = (AIR 1973 Mad 83).

92. It is unnecessary to refer to all the authorities or analyse observations made therein. It would however, be sufficient to consider a few which are comprehensive and are representative of the trends referred to above. In *Ram Pertap v. General Manager, Punjab Roadways, Ambala*, reported in AIR 1962 Punj 540, the single Judge of the Punjab High Court took the view that in a claim arising out of a motor accident before the Claims Tribunal, the tribunal has to determine the question of liability with reference to the Law of Torts. The learned Judge observed at page 542 as under:—

"It is true that Section 110-B of the Motor Vehicles Act does not in terms lay down that it is only when negligence on the part of the driver of the vehicle concerned is established that compensation can be awarded, but then it should be borne in mind that this bunch of Sections (110 to 110-F) merely deal with the subject of the substitution of Accidents Claims Tribunal in place of Civil Courts for the purpose of adjudicating on claims for compensation in respect of accidents involving the death or bodily injury to persons arising out of the use of motor vehicles. They do not deal with the question as to who is to be held liable and in what circumstances, if any injury results from an accident. In order, therefore, to discover the criterion or test for fixing liability, we have, in the absence of any statutory provisions fixing liability irrespective of negligence, to turn to the law of Torts according to which indisputably negligence in causing the accident in question is generally speaking essential to hold the negligent person liable."

93. It is not very clear from the judgment as to whether the Court in that case was called upon to decide the connotation of the expression "may make an award determining the amount which appears to it to be just" or whether attention was drawn to the scheme of the Act as unfolded by the relevant provisions of Chapter VIII or of the provisions of Chap. VI. There is no discussion as to the intendments or purpose of the Act or the pattern disclosed by the said provisions. The judgment proceeds on the assumption made that the fasciculus of the Sections 110 to 110-F merely deal with 'subject of substitution' of one forum for the other.

94. In *Mangilal v. Parasram*, reported in AIR 1971 Madh Pra 5, the Full Bench of the Madhya Pradesh noticed the aforesaid Judgment of the Punjab High Court and other Judgments in which it was followed. The Madhya Pradesh High Court took the view similar to the view taken by the Punjab High Court. The Full Bench of the Madhya Pradesh High Court did examine the provisions of Chapter VIII. It opined that Sections 94 to 96 provide for compulsory insurance of motor vehicles and lay down the liability of the insurer to pay the claimant directly. It also observed that Sections 110 to 110-F lay down the procedure for enforcement of substantive rights of the claimants as enlarged and circumscribed by Section 96. Notwithstanding the fact that the Full Bench noticed the "substantive rights" and 'enlargements', it took the view that the liability had yet to be governed by the principles of negligence of the owner and the driver. This view was taken upon the footing that the said provisions are mere indemnity provisions. The Full Bench then proceeded to observe at page 9 as follows:—

"However, the ingredients of the liability of the insurer are nowhere provided in this special statute. Necessarily, therefore, the aspect of the matter will be governed by the general substantive law, which remains untouched by this special law. We have already shown that it is on the contract of indemnity that the insurer is liable to pay compensation only if the insured is liable to pay damages to the claimant. If the insured is not liable, then the insurer is also not liable. In other words, the liability of the insurer depends upon the liability of the insured. Now, the liability direct or vicarious of the owner of a motor vehicle involved in an accident resulting in injury to, or death of, a third party, to pay damages arises from the law of torts. Under that law, negligence of the owner or driver is the sine qua non for such liability."

95. I respectfully dissent from the view taken by the Full Bench of the Madhya Pradesh High Court. As already seen above, the Scheme of Chapter VIII militates against the incorporation of Law of Torts as inhibiting factors or sole principles governing exclusively the question of compensation payable under the provisions of the Act. Such an interpretation detracts from the plain and unambiguous language of Section 110-B or whittles down the sweep of Tribunal's power thereunder. It renders the expres-

sion "compensation which appears to it to be just", otiose. There is no reason why the Legislature could not have used the expression "such compensation as is payable in law" if Law of Torts or other substantive provisions were intended to apply to cases of compensation under the Act. Furthermore, as will be seen later negligence as the sole basis of liability is a principle which of late has not found favour with several courts in England. In my respectful opinion the observations of the Chief Justice in the order of reference to the Full Bench, are more apposite and accord appropriately with the scheme of the Act as also the legal trends in vogue in the realm of torts.

96. In *Perumal v. G. Ellusamy Reddiar*, reported in 1974 Acc CJ 182, a Division Bench of the Madras High Court also took the view that the provisions of Sections 110 to 110-F, were procedural, and that the substantive provisions of law relating to determination of liability are to be found under the law of torts or the Fatal Accidents Act. The Division Bench dealt with the controversy as to whether the said provisions are complete Code. It referred to the judgment of the Supreme Court in *M/s. Sheikhpura Transport Co. Ltd.*, (AIR 1971 SC 1624) (supra) where the said question was kept open. The said Division Bench held that the said provisions were procedural in character and were not a Code complete in themselves. According to it, the said provisions did not create any new rights. The Division Bench observed in para. 37 at pages 197 and 198 as follows.—

"One of the contentions raised on behalf of the appellants is that as Section 110-B of the Act speaks of the Tribunal making "an award determining the amount of compensation which appears to it to be just", the powers of the Tribunal are independent of the provisions of the Fatal Accidents Act (as well as that under the Legal Representatives' Suits Act) and that therefore the provisions of the Act must be construed as substantive provision and not merely procedural in character. This contention is fallacious. It is true that the Tribunal has to determine "the amount of compensation which appears to it to be just". But the question is, compensation for what. If it is a claim by an injured person, he can certainly claim compensation for the pain, suffering, etc., loss of earning, other pecuniary loss arising out of the injury and shortening of expectation of life, if any,

provided the injury or injuries had been caused by a tortious act by the owner of the vehicle, by himself or vicariously. So, even though the Claims Tribunal is given power to determine the amount of compensation which appears to be just, it has necessarily to look to the law of torts in determining such 'just compensation'. Similarly, in case of death due to injuries just compensation awardable by the tribunal should naturally be only towards loss of benefit, if any, and loss of estate, if any provided again that the death was caused by a tortious act. Therefore, by the mere use of the words "compensation which appears to it to be just" in Section 110-B, the relevant provisions of the Act (Sections 110 to 110-F of the Act) cannot be said to create new rights or liabilities. It can never be contended that these provisions in the Act are in any way meant to alter or amend the pre-existing law relating to substantive rights and liabilities of the parties."

97. Dealing with an earlier Division Bench Judgment of the same High Court viz., *M. A. Rahim*, (AIR 1973 Mad 83) (Supra), the said Bench merely observed that "the learned Judges who decided *M. A. Rahim v. Sayari Bai* would not have made the observations if the decision of the earlier Bench in *Mohammed Habibullah v. Seethammal*, reported in 1966 Acc CJ 349 = (AIR 1967 Mad 123) was brought to their notice". There is no other discussion which goes to throw light on the scheme of the law as discussed above or the purposes and intendments which are disclosed in the relevant provisions of the Act.

98. With great respect I am unable to appreciate riders engrafted in para. 37 of the said judgment referred to above. In my opinion, it does not follow from the expression 'amount of compensation which appears to be just' that such compensation can be given only if "injury or injuries are caused by a tortious act of the owner of the vehicle". This amounts to reading something into Section 110-B, which is not there. It is an unjustified constraint on the width of the power envisaged by the said expression. What is a just compensation depends on the facts of a given case as appreciated by the tribunal. This appears to have been appreciated when it is observed "just compensation awardable by the Tribunal should normally be towards loss of benefit, if any and loss of estate if any". There is, however, no reasoning given as to why this loss has to be compensated subject to

the proviso, "provided again that the death was caused by tortious act."

99. In my respectful opinion, the view taken by the Division Bench of the Madras High Court in *M. A. Rahim v. Sayari Bai*, (AIR 1973 Mad 83) (Supra) appears to lay down the law correctly on the subject. At page 477 the Division Bench considered Section 110-B and more particularly the expression 'the compensation which appears to it to be just'. Giving effect to said expression, the Division Bench in *Rahim's* case ruled that:

"It is enough to hold that the word 'just' in Section 110-B of the Motor Vehicles Act has been used in a very wide and comprehensive sense."

100. With respect, these observations are fortified by the dicta of the Supreme Court in *Sheikhupura Transport Co. Ltd.*, (AIR 1971 SC 1624) (Supra) wherein the Supreme Court characterised jurisdiction under Section 110-B to be wide. That being the position, it is difficult to understand as to how the stubborn text of Section 110 can be bent to accord with an a priori, but fragile concept that all legal injuries can be compensated only upon the ground of negligence and not on the footing of absolute statutory liability or of being an insurable event covered by a policy of insurance in that behalf.

101. Counsel for the insurer calls attention to a judgment of the Supreme Court in *New India Insurance Co. Ltd. v. Smt. Shanti Misra*, reported in AIR 1976 SC 237, as an authority for the proposition that Section 110-B is merely a procedural section. Says the counsel that no substantive provisions can be read therein and that being so, the provisions of law of Torts or of the Fatal Accidents Act must be held to be applicable to cases arising under Chapter VIII of the Act. I am afraid, this is a mis-reading of the judgment of the Supreme Court.

102. In *Shanti Mishra's* case (AIR 1976 SC 237) (supra) an accident took place on 11th September, 1966. On the date of the accident no Claims Tribunal was constituted under Section 110 of the Act. The Claims Tribunal was constituted by a notification published in the gazette dated 18th March, 1967. The injured filed an application under Section 110-A on 8th July, 1967. The owner and the insurer objected to the jurisdiction of the tribunal to entertain the application. The objection having been overruled by the tribunal, the owner and the insurer filed a writ petition

challenging the jurisdiction of the tribunal. The view taken by the High Court was that the tribunal had the jurisdiction to entertain the application. In the appeal therefrom to the Supreme Court the question which arose was as to whether the provisions of Sections 110-A and 110-F were retroactive in operation. No question as to the interpretation of Section 110-B arose before the Court. Dealing with the Section 110-A and Section 110-F the Supreme Court took the view that the said sections merely provided for a change of law of forum. It was in this context that the Supreme Court interpreted the said Sections 110-A and 110-F and held them to be procedural. The observations of the Supreme Court at page 240 para. 6 are as follows:—

"In our opinion in view of the clear and unambiguous language of Sections 110-A and 110-F it is not reasonable and proper to allow the law of change of forum give way to the bar of limitation provided in sub-section (3) of Section 110-A. It must be vice versa. The change of the procedural law of forum must be given effect to. The underlying principle of the change of law brought about by the amendment in the year 1956 was to enable the claimants to have a cheap remedy of approaching the Claims Tribunal on payment of a nominal Court-fee whereas a large amount of ad valorem court-fee was required to be paid in Civil Court. It is legitimate to think that the legislature did not think it necessary to affect the pending suits but wanted the cheap remedy to be available as soon as the tribunal was constituted by the State Government in all cases irrespective of the date of the accident, provided the remedy of going to the Court was not barred on the date of the constitution of the tribunal. Then how is the difficulty of limitation in such cases to be solved is the question."

103. With great respect, that is the exposition of law by Supreme Court relating only to Sections 110-A and 110-F of the Act. These observations are no authority for the propositions canvassed on behalf of the insurer. On the contrary, the dicta of the Supreme Court supports the converse. Respectfully paraphrasing it, it can be that in view of clear and unambiguous language of Section 110-B it must be said that the tribunal is empowered to award such compensation as it deems just. The language being clear and unambiguous, as the Supreme Court itself lays down, effect must

be given thereto. The provisions of Section 110-B provide not merely for a cheap and expeditious remedy but also an effective remedy untrammelled by considerations of law of Tort or other laws.

104. In my opinion, the infirmity of the argument of the counsel for the insurer lies in his ignoring vital and effective distinction between the two concepts of law of compensation or law of liability, viz., the basis of liability and the extent of liability. However, the learned counsel cannot be blamed. McGregor on Damages, 13th Edn, page 51 summarises accurately the whole position in the following words:

"In considering the general problem of the limits of compensatory damages there arises first a difficulty which is never very far away in problem of damages but which is at this point at its most acute. This is the difficulty of distinguishing the question of the existence of a liability to pay damages from the question of the extent of a liability to pay damages. Strictly the first does not concern damages at all, but in dealing with the second it is very difficult to disentangle the two questions. This is the case far more in tort than in contract, and par excellence in the tort of negligence".

"The difficulties are increased by the fact that there is an overlapping of concepts, and the same problem may sometimes be dealt with as a question of existence of liability and sometimes as one of extent".

105. Even so these two concepts have to be treated separately because both in point of fact and as a matter of law they are separate and must always be kept separate.

106. In so far as the liability in regard to the claims arising from the accidents caused by the use of a motor vehicle is concerned, it arises, in my opinion, from the statutory provisions of the Act. This view, based upon a true construction of the relevant provisions of the Act, is also supported by the recent judicial trends in the field of law of Torts in England.

107. The English Law of Torts is not a codified law. It is what may be called a judicial law making. History of English Law of Torts shows the dynamic understanding of the Judges and their inclination to create new forms or categories to meet new situations. The controversy between Salmond on one hand and Winfield on the other, is academic.

Whether one or the other is correct is an issue that need not be gone into. Suffice it to notice that according to Dr. Street (On Torts, 5th Edn. at page 3):

"It is the function and purpose of the law of torts that are of greater import, and these are matters which can be explained in comparatively simple terms. The law of torts is concerned with those situations where the conduct of one party causes or threatens harm to the interests of other parties. It is accordingly the aim of the law of torts to adjust, once it is decided that some adjustment is to be made, those losses which must inevitably result from the ever-increasing activities of those who live in a common society. This adjustment is made by providing compensation for the harm suffered by those whose interests have been invaded owing to the conduct of others."

108. Thus the fundamental objective is to provide compensation for the harm suffered by those whose interests have been prejudiced and breached. This objective is in a large measure fulfilled by the laws of Scotland. In Scots Law this branch of law is known as reparation. It looks at the matter from the point of view of the victim. When the measure of damages is considered, the amount awarded is normally based solely on the extent of plaintiffs loss and the degree of defendants' fault is not taken into account (see Peter Stein and John Shand: Legal Values in Western Society; page 126). In England also the principles of volenti and of contributory negligence have been very much diluted as can be seen from 'rescue cases' (see Windfield and Jolowics on Tort: 9th Edn., pages 635-637).

109. An articulate exposition of these approaches is found in the dicta of Lord Denning M. R., in Dutton v. Bognor Regis United Building Co. Ltd., reported in (1972) 1 All ER page 462. It was a case of negligence. But it was novel in the sense that for the first time a claim was sought to be made against a district council or its surveyor for approval of plans of a building, which collapsed and resulted in an injury to the claimant. At page 475 observed Lord Denning, M. R.:

"This case is entirely novel. Never before has a claim been made against a council or its surveyor for negligence in passing a house. The case itself can be brought within the words of Lord Atkin in Donoghue v. Stevenson, (1932 AC 562); but it is a question whether we should

apply them here. In *Home Office v. Dorset Yatch Co., Ltd.*, (1970-2 All ER 294) Lord Reid said that the words of Lord Atkin expressed a principle which ought to apply in general unless there is some justification or valid explanation for its exclusion. So did Lord Pearson. But Lord Diplock spoke differently. He said that it was a guide but not a principle of universal application. It seems to me that it is a question of some policy which we, as Judges, have to decide. The time has come when in cases of new import, we should decide them according to the reason of the thing." (underlining mine).

110. It was this 'reason of the thing' which was held by Lord Denning *M. R.*, to be the basis of the liability. This is very clear from the following observations found at page 475:

"In short, we look at the relationship of the parties; and then say as a matter of policy, on whom the loss should fall. What are the considerations of policy here? I will take them in order. First Mrs. Dutton has suffered a grievous loss. The house fell down without any fault of hers. She is in no position herself to bear the loss. Who ought in justice to bear it? I should think those who were responsible. Who are they? In the first place the builder was responsible. It was he who had laid the foundations so badly that the house fell down. In the second place, the Council's inspector was responsible. It was his job to examine the foundations to see if they would take the load of the house. He failed to do it properly. In the third place, the council should answer for his failure. They were entrusted by Parliament with the task of seeing that houses were properly built. They received public funds for the purpose. The very object was to protect purchasers and occupiers of houses. Yet, they failed to protect them. Their shoulders are broad enough to bear the loss."

111. Another decision of Lord Denning, *M. R.*, is more apposite to the facts of the present case. (*Nettleship v. Weston*, reported in (1971) 3 All ER 581). This was a case which related to an accident where a learner driver and a passenger who was teaching driving were involved. At page 586, Lord Denning, *M. R.* observed that:

"The high standard thus imposed by the Judges is, I believe, largely the result of the policy of the Road Traffic Acts. Parliament requires every driver to be

insured against third-party risks. The reason is so that a person injured by a motor car should not be left to bear the loss on his own, but should be compensated out of the insurance fund. The fund is better able to bear it than he can. But the injured person is only able to recover if the driver is liable in law. So the Judges see to it that he is liable, unless he can prove care and skill of a high standard. See the *Merchant Prince*. (1892) P 179) and *Handerson v. Henry E. Jenkins and Sons Ltd.*, (1969-3 All ER 756). Thus we are in this branch of the law moving away from the concept, 'No liability without fault'. We are beginning to apply the test; On whom should the risk fall? Morally the learner driver is not at fault; but legally she is liable to be because she is insured and the risk should fall on her". (Emphasis by me).

112. Thus upon the authority of an eminent English Judge it is seen that Courts give effect not only to policy of law but also create new forms of law to meet justice in a given situation. In the *Nettleship's case* (1971-3 All ER 581) Lord Denning rested his judgment not merely on the policy of the Road Traffic Act but also on the principle that 'the Lady being insured and the insurance having covered the said risk,' the liability ought to be determined upon the said footing. Thus the policy of law and the fact of the insurance converged to provide the legal basis for compensation in respect of the accident arising out of the use of the motor vehicle on a public road.

113. In my opinion, if that is the position of the English law, where the principles of Torts of negligence are admittedly applicable, stronger becomes the case where detailed provisions are made by an Act of a competent Legislature. The Act makes detail provisions enumerating duties of a driver of a motor vehicle. It makes elaborate provisions for an insurance coverage. It makes departure in several respects from the law of Torts and other laws. It provides for a cheap and expeditious remedy by tribunals constituted to hear motor accident claims. It must be held to be the policy of the Act that tribunals must award 'just compensation' for death or bodily injury or damages to property. This salutary jurisdiction and the content of its glorious power cannot be denuded by inhibiting factors obtaining in other fields of substantive law. There is

[no warrant for undermining the said provisions or policies enshrined therein.

114. In these circumstances I concur in the view taken by my learned brother that upon a true construction of the provisions of Chapter VIII the fact of an injury resulting from an accident involving the use of a car on a public road is the basis of the liability. It determines the liability. In connection with the said liability, the tribunal has to award a 'just compensation' that is the compensation which appears to it 'just' in the facts and circumstances of the case. In such a case the cause of action is breach of statutory obligations imposed by the Act and the damage that has been caused to the injured. 'The quantification of damages' as observed by Lord Greer 'is not an essential part of the cause of action': *Monk v. Warby*, (1935) 1 KB 75 at p. 83 (supra). This however, would not mean that the principles of law of Torts or the principles enshrined in the provisions of Fatal Accidents Act, are wholly irrelevant. These principles as indeed all other relevant legal principles impinging on the facts of a given case, will enter the judicial mind in the matter of determination of the extent of compensation in cases arising out of accidents. In other words, they along with other relevant principles would be factors which will have to be borne in mind by the tribunal while deciding the extent of liability in cases of accidents involving bodily injury, death or damages to property. This is a conclusion that follows from the interpretation of the provisions of the Act seen in its historical and humanistic perspective. P. C.

115. In view of our above judgment, we pass the following orders.

(1) First Appeal No. 449 of 1975 is dismissed with costs.

(2) The award passed by the Tribunal is confirmed but the appellant-insurance Company is given liberty to apply on depositing Rs. 20,000/- with interest as ordered in the award from the date of the application to the date of the deposit, for not issuing a certificate, against the insurance Company under Section 110-E for the balance of the amount awarded on the ground that the liability of the insurance Company is limited to Rs. 20,000/- under Section 95 (2) or the amount for which the Insurance Company has issued the policy, whichever is higher.

(3) The tribunal to decide the question of the liability of the insurance com-

pany on its application for the said purpose under Section 110-E after giving an opportunity to all the parties.

(4) The Insurance Company to pay the costs of all the parties hitherto incurred and hereafter to be incurred.

(5) Dr. Balkrishna Nayan or his Advocate is at liberty to withdraw Rupees 20,000/- with interest if any when deposited by the Insurance Company as stated above.

(6) What is stated above shall not in any manner prejudice the right of Dr. Balkrishna Nayan to recover the balance of the award amount from the other party or from the Insurance Company subject to what is stated above.

Ordered accordingly.

AIR 1977 BOMBAY 77

(AT NAGPUR)

DHARMADHIKARI, J.

Smt. Vimalabai Govind Juvekar,
Petitioner v. The State of Maharashtra
and others, Respondents.

Special Civil Appln. No. 3615 of 1976,
D/- 8-10-1976.*

Maharashtra Agricultural Lands (Ceiling on Holdings) Act (27 of 1961) (as amended by Amending Act 13 of 1972), Section 8, Explanation and Sections 9 and 10 (1) — Definition of "transfer" — Does not include testamentary dispositions like will.

The transfers which are by act of parties made inter vivos or as a result of a decree or an order of a Court, Tribunal or authority etc., alone are covered by the said term as defined in Explanation to Section 8 of the Ceiling Act. It will not include the testamentary disposition of the property not made inter vivos, AIR 1959 J and K 62 (FB) and AIR 1962 SC 1722 and 1965 Mah LJ (Note) No. 6, Relied on. (Paras 8, 9, 10 and 12)

Cases Referred: Chronological Paras

1976 Mah LJ 727	8
1965 Mah LJ (N) 6	12
AIR 1962 SC 1722 = (1963) 1 SCR 20	11
AIR 1959 J & K 62 (FB)	11
AIR 1944 Oudh 65 = 1943 Oudh WN 442	11

*(To quash order of Surplus Land Determination Tribunal, Malkapur, Nandura Block in Ceiling Case No. 480 of 75-76, D/- 31-3-1976.)

AU/AU/A11/77/CWM

AIR 1922 Mad 457 = 43 Mad LJ 486 (FB)
11

L. Mohta, for Petitioner; M. A. Garud, Asstt. Govt. Pleader (for Nos. 1 to 3) and B. N. Mohta (for No. 4), for Respondents.

ORDER:— The Petitioner's husband died in the month of June 1975. He had no issue. The agricultural property which the petitioner's husband had was his self-acquired property. The total holding was about 81 acres 3 gunthas. During the lifetime of late Govind Juvekar, the husband of the petitioner, he executed a registered will on 25-4-1973. By the said will the deceased bequeathed 35 acres of land to his nephew Prabhakar Narayan Juvekar, respondent No. 4 to this petition. After the death of deceased Govind Juvekar in June, 1975, the said nephew became owner of the said property and is also in possession thereof. Thus it is the case of the petitioner that even before the commencement date i.e., 2-10-1975, of the Maharashtra Agricultural Lands (Lowering of Ceiling on Holdings) and (Amendment) Act, 1972, referred to hereinafter as the Amending Act, 35 acres of Land was in possession of his nephew, namely, Prabhakar Narayan Juvekar. In spite of this, the said land was counted in the holding of the petitioner by the Surplus Land Determination Tribunal as well as the Maharashtra Revenue Tribunal.

2. It appears that Prabhakar Narayan Juvekar had filed his independent return under Section 12 of the Maharashtra Agricultural Lands (Ceiling on Holdings) Act, 1961, referred to hereinafter as the Ceiling Act. He included this land in his holding. The said proceedings were ultimately dropped, because it was found that he was not holding land in excess of the ceiling area. So far as the case of the petitioner is concerned, such a plea in specific terms was raised before the Surplus Land Determination Tribunal. However, the Surplus Land Determination Tribunal came to the conclusion that the will was executed by the deceased after 26-9-1970 and, therefore, the same is invalid in the eyes of law in view of Section 10 of the Ceiling Act. Ultimately, therefore, the said land was counted in the holding of the petitioner and the land measuring 23 acres 13 gunthas was declared as surplus out of her total holding.

3. Being aggrieved by this order, the petitioner filed an appeal before the Maharashtra Revenue Tribunal. The

learned Member of the Maharashtra Revenue Tribunal agreed with this finding recorded by the Surplus Land Determination Tribunal. In this view of the matter, the appeal filed by the petitioner was dismissed. It is these orders which are challenged before me.

4. Shri L. Mohta, the learned counsel for the petitioner, contended before me that the will executed by deceased Govind Juvekar on 25-4-1973 is not a 'transfer' within the meaning of the said term as defined in Explanation to Section 8 of the Act. According to Shri Mohta, the same meaning will have to be given to the said term even in Section 10 of the Ceiling Act. If this is so, it being not a transfer effected after 26-9-1970 and prior to the commencement date, it was not obviously covered by Section 10 (1) of the Ceiling Act. He, therefore, further contended that this land could not have been included in the holding of the petitioner, more so when late Govind Juvekar died on 20th June, 1975, even before the commencement date of the Amending Act.

5. On the other hand, it is contended by Shri Garud, the learned Assistant Government pleader, that the words used in Explanation to Section 8, namely, 'any other disposition' will obviously cover even the testamentary dispositions. According to him, all types of dispositions are included in the definition as given in this Explanation to Section 8 of the Ceiling Act. Therefore, the disposition of the property by virtue of a will is also covered by the said definition. In this view of the matter, the authorities below were right in ignoring the said transfer, it being hit by Section 10 (1) and thereby including the said 35 acres of land in the holding of the petitioner. He further contended that there is no material on record to record a finding that after the death of deceased Govind on 30th June, 1975, respondent No. 4 Prabhakar Juvekar was put in possession of the said land and it is he who was holding the said land on the commencement date.

6. In the present case I am concerned with a will which was executed and became operative by virtue of the death of testator prior to the commencement date itself, namely 2-10-1975. The cases where a person comes into possession of land under a will, that is, by testamentary disposition, are covered by the provisions of Section 10 (2) of the Ceiling Act. However, in this case I am not concerned with such a controversy, because petitioner Vimalabai has not acquired this

land by virtue of a will. The will is executed in favour of Prabhakar and it is he who is claiming the said land and in fact has shown it in his holding. The case of the petitioner is that the said land cannot be included in her holding, because she was not holding the same on the commencement date.

7. For properly appreciating the controversy raised before me, it will be necessary to make a reference to the relevant provisions of the Ceiling Act. Section 3 of the Ceiling Act deals with prohibition on holding land in excess of the ceiling area. Then Section 4 of the Ceiling Act deals with the land held by a family unit. Section 5 lays down the ceiling area and then comes Section 8 which lays down restrictions on transfers. Section 3 as a whole reads as under:

"8. Where a person, or as the case may be, a family unit holds land in excess of the ceiling area on or after the commencement date, such person, or as the case may be, any member of the family unit shall not, on and after that date, transfer any land, until the land in excess of the ceiling area is determined under this Act.

Explanation — In this section 'transfer' means transfer, whether by way of sale, gift, mortgage with possession, exchange, lease, assignment of land for maintenance, surrender of a tenancy or resumption of land by a landlord or any other disposition, whether by act of parties made inter vivos or by decree or order of a court, tribunal or authority (except where such decree or order is passed in a proceeding which is instituted in such court, tribunal or before such authority before 26th day of September, 1970), but does not include transfer by way of sale or otherwise of land for the recovery of land revenue or for sums recoverable as arrears of land revenue, or acquisition of land revenue, or acquisition of land for a public purpose under any law for the time being in force."

Then comes Section 9 of the Act which deals with the restriction on acquisition of land in excess of ceiling area. Section 9 lays down that no person or a member of a family unit shall at any time, on or after the commencement date, acquire by transfer any land if he or as the case may be the family unit already holds land in excess of the ceiling area or land which together with any other land already held by such person, or as the case may be, the family unit, will exceed in the total

the ceiling area. By an Explanation to this section it is clarified that in this section also the word "transfer" has the same meaning as in Section 8. Then comes Section 10 which deals with the consequences of certain transfers and acquisitions of land. Section 10 of the Ceiling Act reads as under:—

"10 (1) If—

(a) any person or a member of a family unit, after the 26th day of September 1970, but before the commencement date, transfers any land in anticipation of or in order to avoid or defeat the object of the Amending Act, 1972, or

(b) any land is transferred in contravention of Section 8, then in calculating the ceiling area which that person, or as the case may be, the family unit, is entitled to hold, the land so transferred shall be taken into consideration, and the land exceeding the ceiling area so calculated shall be deemed to be in excess of the ceiling area for that holding, notwithstanding that the land remaining with him or with the family unit may not in fact be in excess of the ceiling area.

If by reason of such transfer, the holding a person, or as the case may be, of the family unit is less than the area so calculated to be in excess of the ceiling area, then all the land of the person, or as the case may be, the family unit shall be deemed to be surplus land; and out of the land so transferred and in possession of the transferee unless such land is liable to forfeiture under the provisions of sub-section (3), land to the extent of such deficiency shall, subject to rules made in that behalf, also be deemed to be surplus land, notwithstanding that the holding of the transferee may not in fact be in excess of the ceiling area.

Explanation — For the purposes of clause (a) 'transfer' has the same meaning as in Section 8. All transfers made after the 26th day of September, 1970, but before the commencement date, shall be deemed (unless the contrary is proved) to have been made in anticipation of or in order to avoid or defeat the object of the Amending Act, 1972.

Explanation — For the purposes of this sub-section, a transfer shall not be regarded as made on or before 26th September, 1970, if the document evidencing the transfer is not registered on or before that date or where it is registered after that date, it is not presented for registration on or before the said date.

(2) If any land is possessed on or after the commencement date by a person, or as the case may be, a family unit in excess of the ceiling area, or if as a result of acquisition (by testamentary disposition, or devolution on death, or by operation of law) of any land on or after that date, the total area of land held by any person, or as the case may be, a family unit, exceeds the ceiling area, the land so in excess shall be surplus land.

(3) Where land is acquired in wilful contravention of Section 9, then as a penalty therefor, the right, title and interest of the person, or as the case may be, the family unit or any member thereof in the land so acquired or obtained shall subject to the provisions of Chapter IV, be forfeited, and shall vest without any further assurance in the State Government.

Provided that, where such land is burdened with an encumbrance, the Collector may, after holding such inquiry as he thinks fit and after hearing the holder and the person in whose favour the encumbrance is made by him, direct that the right, title and interest of the holder in some other land of the holder equal in extent to the land acquired in wilful contravention of Section 9, shall be forfeited to Government."

From the bare reading of this section, it is also clear that for the purposes of clause (a) of sub-section (1) of Section 10 of the Ceiling Act, the word 'transfer' has the same meaning as in Section 8. Then the section also raises a statutory fiction as well as a statutory presumption, relating to transfers effected between 26-9-1970 and the commencement date. Therefore, from the bare reading of these various provisions of the Ceiling Act it is quite obvious that the ceiling area of a person or a family unit is to be fixed with reference to the commencement date, i.e., 2-10-1975. The prohibition or restriction imposed by Section 8 or Section 9 of the Ceiling Act becomes operative from the commencement date, namely 2-10-1975. Even a sale or a transfer by a member of a family unit is intended to be brought within the mischief of Section 10 of Ceiling Act, though for a limited purpose. In the present case, the will was executed by the husband of the petitioner on 25-4-1973 in favour of Prabhakar and he became the holder of 35 acres of land with effect from 30th June, 1975 itself when the husband of the petitioner died. Therefore, the only question which requires consideration in this petition is to find out

as to whether the definition of the word 'transfer' as given in Explanation to Section 8 of the Ceiling Act will include in its import testamentary dispositions like a will.

8. While defining the term 'Transfer' in the Explanation to Section 8 of the Ceiling Act, all types of transfers are sought to be included in the definition. The words used, namely, 'any other disposition' will obviously mean all types of dispositions of land and cannot be read as ejusdem generis. I had an occasion to deal with this aspect of the matter in Gulabrao v. State of Maharashtra, (Special Civil Application No. 3525 of 1976 decided on 30th September, 1976/1st October 1976*). But it does not appear to be the intention of the legislature that it wanted to include in this definition even the involuntary or testamentary dispositions of property which are not made by act of parties inter vivos. It is no doubt true that while defining the word 'transfer' the legislature has in its import included sale, gift, mortgage with possession, exchange, lease, assignment of land for maintenance, surrender of a tenancy or resumption of land by a landlord or any other disposition, whether by act of parties made inter vivos or by decree or order of a court, tribunal or authority though the transfers otherwise for recovery of land revenue etc., have been excluded from the said import. Therefore, if this definition of word "transfer" as given in the Explanation to Section 8 is read as a whole and in its context it is quite obvious that only those assignment or dispositions of property which are the result of act of parties and are made inter vivos or the decree or order of the Court alone are covered by definition.

9. We also get an internal evidence in this behalf from other provisions of the Ceiling Act itself. By Section 9 of the Ceiling Act a restriction is imposed on the acquisition of land in excess of the ceiling area. In Section 9 also the legislature has used the words "acquire by transfer." By Explanation to this section the word "transfer" is given same meaning as is given to the said word in section 8 of the Ceiling Act. If any person or a member of a family unit acquires land by transfer on or after the commencement date, and if the said person or family unit is already holding land in excess of the ceiling area, or by this acquisition will hold land in excess

*Reported in 1976 Mah LJ 727.

thereof then the consequences as laid down by sub-section (3) of Section 10 must follow by necessary implication. In sub-section (2) of Section 10 the Legislature has only used the word "acquisition" and then in the bracket the position is clarified by using the words testamentary disposition or devolution on death, or by operation of law. In this sub-section the word "transfer" is not used by the legislature. This clearly indicates that though a person can acquire land by testamentary disposition or devolution on death, or by operation of law, it cannot be termed to be an acquisition by transfer as contemplated by Section 9 or Explanation to Section 8 of the Ceiling Act. This position is further clarified by the legislature in Section 18 of the Ceiling Act. Section 18 of the Ceiling Act reads as under:

"18. On the day fixed for hearing under Sec. 14, or on any other day or days to which the inquiry is adjourned, the Collector shall, after hearing the holder and other persons interested and who are present and any evidence adduced consider the following matters, that is to say.

(a) What is the total area of land which is held by the holder on the 26th day of September 1970;

(b) Whether any land transferred between the period from the 26th day of September 1970 and commencement date, or any land partitioned after the 26th day of September, 1970, should be considered or ignored in calculating the ceiling area as provided by sub-section (1) of Section 10 or Section 11;

(bb) whether the holder has any share in the land held by a family or held or operated by any co-operative society or held jointly with others or held as a partner in a firm; and the extent of such share;

(c) what is the total area of land held by the holder on the commencement date;

(d) whether any transfer or partition of land is made by the holder in contravention of Section 8 or 11 and if so, whether the land so transferred or partitioned should be considered or ignored in calculating the ceiling area under the provisions of sub-section (1) of Section 10 or Section 11?

(e) whether any land has been acquired or possessed on or after the commencement date by transfer or by partition?

(f) whether any land has been acquired on or after the commencement

date by testamentary disposition, devolution on death or by operation of law?

(g) what is the total area of land held at the time of the enquiry, and what is the area of land which the holder is entitled to hold?

(h) whether any land is held by the holder as tenant, and if so, whether his landlord has a subsisting right of resumption of the land for personal cultivation under the relevant tenancy law applicable thereto?

(i) whether any land held by the holder is to be forfeited to Government under sub-section (3) of Section 10, or of Section 13, or should be deemed to be surplus land under any of the provisions of this Act?

(j) whether the proposed retention of land by the holder is in conformity with the provision of Section 16?

(k) which particular land out of the total land by the holder should be delimited as surplus land?

(l) any other matter which in the opinion of the Collector, is necessary to be considered for the purpose of calculating the ceiling area, and delimiting any surplus land."

Clause (e) of Section 18 enjoins a duty upon the collector to verify as to whether any land has been acquired by the person or family unit as the case may be, on or after the commencement date by transfer or by partition. Then by clause (f) the Collector is further enjoined to find out as to whether any land has been acquired on or after the commencement date by testamentary disposition, devolution on death or by operation of law. In clause (f) the word "transfer" is not used. Therefore, this acquisition of property by virtue of the testamentary disposition, or devolution on death or operation of law is not equated by the legislature with the acquisition of property by transfer. This clearly indicates the legislative intention.

10. Normally the testamentary disposition is not included in the word "transfer" as used in Section 5 of the Transfer of Property Act. Section 5 of the Transfer of Property Act deals with the transfers of properties which are by act of parties made inter vivos. If Sec. 9 of the ceiling Act is read in this context it appears that if the meaning as attributed by Shri Garud is given to the word "transfer" as defined in Explanation to Section 8, it will obviously result in hardship and inconvenience not intended by the legislature. If by testamentary disposition a person acquires a land and to

such acquisition Section 9 was to apply, then the result will be that under subsec. (3) of Section 19 of the Act the said land can be forfeited of course subject to the provisions of Chapter IV, and consequently shall vest without any further assurance in State Government and that too for no fault of the person who gets this land under a will. The will or testamentary disposition being not a transfer of disposition of the property by act of parties made inter vivos, a person will be penalised for the act of somebody else to which he was never a party. In my opinion, this was never the intention of the legislature. If this was the intention of the legislature, the legislature would not have used a different phraseology in Sec. 10 (2) and (3) of the Ceiling Act or Section 18 (e) and (f) of the said Act. As already observed, the phraseology used in these sections is indicative of the legislative intention.

11. As to what is the nature of the disposal of immovable property by a will is by now well settled. In this context a reference could be usefully made to the Full Bench decision of Jammu and Kashmir High Court in *Lala Devi Dass v. Pannalal*, (AIR 1959 J. & K. 62). After making a detailed reference to a Full Bench decision of Madras High Court in *Jamindar of Bhadrachalam v. Venkatadri Appa Rao*, (AIR 1922 Mad 457) and to a decision of Oudh High Court in *Surendra Vikram Singh v. Munia Kunwar*, (AIR 1944 Oudh 65), the Full Bench of the Jammu and Kashmir High Court ultimately observed as under:

"Disposal of immovable property by will would not amount to a transfer inasmuch as the property does not pass on to the donee at the time the will is executed. It is merely an intention expressed by the testator with respect to his property that after his death it should devolve on the donee. In my opinion, therefore, there is no specific provision in law prohibiting the disposal of immovable property other than the land as defined in the Land Alienation Act, by will in favour of a non-State subject and such a will cannot be held to be invalid."

In this context reference could usefully be made to the following observations of the Supreme Court in *Mohd. Ismail v. Sabir Ali*, (AIR 1962 SC 1722):

"Incidentally we may add that use of the words 'inter vivos' in the definition of the word 'transfer' merely emphasises that the transfer must be effective during

the lifetime of the transferor as contrasted with a transfer by will which takes effect on the death of transferor." In my opinion, these observations will apply to the present definition also.

12. This Court had also an occasion to consider this aspect of the matter in the context of the provisions of the Bombay Tenancy and Agricultural Lands (Vidarbha Region) Act, 1958, in *Daulat Awachit v. Maharashtra Revenue Tribunal*, (1965 Mah LJ (Note) No. 6). While construing the word 'transfer' used in Section 38 (7) of the said Act, the Division Bench of this Court held that the word 'transfer' as occurring in Section 38 (7) does not include acquisition of interest under a testamentary disposition like a will. In my opinion, as already observed, the transfers which are by act of parties made inter vivos or as a result of a decree or an order of a Court, Tribunal or authority etc., alone are covered by the said term as defined in Explanation to Section 8 of the Ceiling Act. It will not include the testamentary disposition of the property not made inter vivos.

13. In the present case the will was executed on 25-4-1973 and deceased Govind died on 30th June, 1975, even before the commencement date. The certified copies of the crop-statements were produced before me by the learned counsel for the respondent No. 4 relating to the land in question from which it appears that the respondent No. 4 entered into possession of the land immediately after the death of late Govind and was holding the same on the commencement date. In the return filed on behalf of the respondent No. 4 he had further stated that besides the aforesaid agricultural property some house property was also given to him and he came in possession of the said property and become owner thereof in his own right. He has also clarified the position that he was the head of his family. He filed a return under Section 12 of the Ceiling Act and had shown the said land in his holding as it was held by him on commencement date, but as the total members in his family unit were more than 5, in the said proceedings it was decided that he was not a surplus holder and, therefore, ultimately the proceedings were dropped. Thus in fact this land was shown in the holding of the respondent No. 4 and was counted in his holding in the proceedings instituted under the Ceiling Act qua his family unit.

14. In this view of the matter, in my opinion, the authorities below com-

mitted an error in coming to the conclusion that in spite of the fact that the lands were in possession of the respondent No. 4 by virtue of a will executed by deceased Govind on 25-4-1973 even before the commencement date, the same could be counted in the holding of petitioner Vimalabai, who inherited the other property of Govind under the Hindu Succession Act. On the commencement date an area of 35 acres was obviously in lawful and actual possession of the respondent No. 4 as an owner thereof and, therefore, it could not have been counted in the holding of the petitioner.

15. It is not disputed before me that if this area of 35 acres of land is excluded from the holding of the petitioner, then she was obviously not the surplus holder.

16. In this view of the matter, the Special Civil Application is allowed. The rule is made absolute and the orders passed by the authorities below are quashed and set aside. However, in the circumstances of the case there will be no order as to costs.

Application allowed.

AIR 1977 BOMBAY 83
(AT NAGPUR)
DIGHE, J.

Kundlik Tukaram Fatangale, Petitioner v. The State of Maharashtra, Respondent.

Spl. Civil Appln. No. 3746 of 1976,
D/- 3-9-1976.*

(A) Maharashtra Agricultural Lands (Ceiling on Holdings) Act (27 of 1961), Section 4 — "Family unit" — Spouses — All living spouses are to be looked upon as individual members. (Para 9)

(B) Maharashtra Agricultural Lands (Ceiling on Holdings) Act (27 of 1961), Section 4 — "Family unit" — Child in the womb on commencement date — Is a member of the family unit. 1975 Mah LJ 603, Rel. on. (Para 4)
Cases Referred: Chronological Paras 1975 Mah LJ 603 4

N. S. Munshi, for Petitioner; R. R. Deshpande for Addl. Govt. Pleader, for Respondent.

*(To quash order of Maharashtra Revenue Tribunal, Nagpur, in ceiling Appeal No. ALC-A-1140 of 1976.)

LT/AU/E805/76/SSB/WNG

ORDER:— The only point that arises for determination in this petition is regarding the number of members in the family falling under the definition of 'family unit' as given under Section 4 (1) of the Maharashtra Agricultural Lands (Ceiling on Holdings) Act, 1961 as amended, (hereinafter called the New Act). The petitioner was taken as holding in all the lands measuring 84 acres and 23 gunthas. Pot Kharab of 4 acres was allowed so that the land for the purposes of determining the ceiling area was taken as 80 acres 23 gunthas. On the basis of 6 members in the family he was allowed to retain 60 acres so that 15 acres 23 gunthas was declared as surplus.

2. The decision of the Surplus Land Determination Tribunal was maintained by the Revenue Tribunal, but on a slightly different reasoning as will be evident later on. In challenging the decision of the Maharashtra Revenue Tribunal, the petitioner had taken two points, one about the members in the family unit and other about the pot kharab. It was contended that pot kharab was 18.97 acres. However, at the time of hearing the point regarding the pot kharab was not pressed.

3. As regards the members in the family unit, the petitioner has two wives, two minor daughters, one minor son on the date the return was filed and one more minor son was born to his wife on 2-2-1976. According to the petitioner, therefore, the family unit consisted of 7 persons inclusive of the child in the womb so that there were four minors, two spouses and the petitioner himself. The Surplus Land Determination Tribunal proceeded on the basis of the unit consisting of 6 persons disallowing the submission of the petitioner that the child born on 2-2-1976 ought to be counted as a member of the family unit. In deciding the appeal the contention of the petitioner that the child in the womb should be looked upon as a member of the family unit was accepted but the Tribunal has taken the unit as consisting of 6 members only because in the estimation of the Tribunal the two wives are to be counted as one member for the purposes of family unit. It appears that in appeal a specific objection was not raised on behalf of the State contending that the Surplus Land Determination Tribunal erred in counting the two wives but since the Tribunal has given the decision, that point also will have to be looked into.

4. Although in the judgment of the learned Tribunal dated 10th of June, 1976, the child born on 2-2-1976 has been looked upon as a member of the family unit in accepting the same a useful reference could be made to the decision in *Raghunath v. State of Maharashtra*, (1975 Mah LJ 603) where a child born in a joint family subsequent to the appointed day, namely, 26-1-1962 and therefore, the child who was in the womb on the appointed day was considered as a member of the joint family. The principle of this ruling applies to the amended Act also. That is because under the unamended Act the return was to be filed under Section 12 of the unamended act where the relevant period was 4th August, 1959, and the appointed day as per the definition in the definition in cl. 2 (4) was 26th of January, 1962. Under the New Act the return is to be filed under the amended Section 12 and the relevant period is 26th day of September 1970 and the commencement date, namely 2-10-1975 as per the definition contained in Section 2, clause (6A). The finding given by the Revenue Tribunal for counting the son born on 2-2-1976 as a member of the family unit is, therefore, unassailable.

5. So far as the question regarding the two wives being counted as one, discussion could usefully be prefaced by the citation of the two clauses in Section 4 (1) which runs as follows:

"(4) (1)"

Explanation: A "family unit" means,—
(a) a person and his spouse (or more than one spouse) and their minor sons and minor unmarried daughter if any; or

(b) where any spouse is dead, the surviving spouse or spouses, and the minor sons and minor unmarried daughters; or

(c)

Clause (c) may not be looked into. The learned Honorary Assistant Government Pleader Mr. Deshpande maintained that the Tribunal was right in looking upon the two wives as one because in the contemplation of the Act a person and his one spouse only are to be looked as members of the family unit. He invites my attention to the bracket covering the words "or more than one spouse". According to him, therefore, a spouse or more than one spouse are as if equated so that between themselves they can be looked upon as one member only. He contends that if the spouses who are more than one were to be counted as individual members, the object could very

well have been achieved without the bracket. I am not inclined to accept this construction. In the first place, if more than one spouses were not to be counted as separate individual members, the effect could have been achieved without mentioning the words which occur in the bracket. Secondly, if we try to construe clause (a) without the bracket, there is a possibility of the clause, as it would then stand, including a minor son of a spouse brought to the family but born from some other husband having been looked upon as member of the family, and that too by reason of the express mentioning of it. In order to do away with such a possibility and in order to indicate that the minor son should be their son that is born of the person and his spouse the bracket may well have been introduced.

6. Thirdly it can also be seen that under clause (b) of Section 4 (1) the surviving spouse or spouses and the minor sons and minor unmarried daughters are looked upon as members of the family. If the contention of Mr. Deshpande is correct we should have expected a similar bracket in clause (b) for covering the words "or spouses". Since such a bracket is absent it seems more than one living spouses could be separately looked upon as members of the family unit under Section 4 (1) (b) of the Act.

7. This conclusion can be supported on another reasoning also. Under clause (1) of Section 4 land held by each member of the family unit has to be clubbed together in counting the holding of the family unit. Now if there are two spouses each owning land separately, nay in fact being the separate property of each such spouse, it cannot be suggested that since the spouses are one member, property of this or that spouse, or of both in certain proportion can alone be clubbed. The property of both would have to be reckoned for calculation thus illustrating that they are to be regarded as separate individual members.

8. In this context perhaps it would be useful to observe that the situation where more than one spouse are living would not be one of frequent occurrence among Hindus who are presumed to be majority of land holders in Maharashtra by reason of the Bombay Prevention of Hindu Bigamous Marriages Act (Act No. 25 of 1946) and the subsequent Act of 1955 (Act No. 25 of 1955). A Hindu would not be having 2 spouses by marriage after 1946. The application of the clause relating to two spouses could therefore only be to

those individual spouses who had married before 1946 and who could, therefore, be in a pretty advanced age. It does not appear that the Legislature could have intended to exclude such of those spouses who may now be living. The same would be the result among the landholders who by reason of their personal law are subjected to monogamy.

9. In the circumstances, I feel all living spouses are to be looked upon as individual members and the benefit of Section 6 of the Ceiling Act if any will have to be given to the family unit if thereby the number of members in the family exceeds five. In view of it the construction put by the Revenue Tribunal cannot at all be accepted. The petitioner must get the benefit of calculations on the basis of the 7 members in the family unit so that his surplus to be surrendered would be much less than what is at present estimated. If this is so, he will have to give a fresh choice for surrendering the requisite land. Hence I pass the following orders.

10. The rule is made absolute. The order passed by the Maharashtra Revenue Tribunal on 10-6-1976 is quashed. The matter is remanded back to the Surplus Land Determination Tribunal for making calculations on the basis of 7 members of the family unit of the petitioner and for declaring the surplus on that basis. In the circumstances of the case, no order as to costs.

Case remanded.

AIR 1977 BOMBAY 85

(AT NAGPUR)

DHARMADHIKARI AND DIGHE, JJ.

Kisan Baban Raut, Petitioner v. The Collector, Akola and others, Respondents.

Special Civil Appln. No. 3280 of 1976, D/- 26-8-1976.*

(A) Maharashtra Zilla Parishads and Panchayat Samitis Act (5 of 1962), Section 68-A — Election of Chairman — Dispute as to validity — Collector can raise such a dispute suo motu.

It is obvious from the bare reading of Section 68-A of the Act that in the event of a dispute as to the validity of the elec-

* (To quash order of Commr., Nagpur Dv. Nagpur in Ref. No. 1 of 1975, D/- 11-12-1975.)

tion of a Chairman or Deputy Chairman of Panchayat Samiti, not only any member of the Panchayat Samiti, but even the Collector or any officer authorised by him in this behalf can refer the said dispute within 30 days from the date of election to the Commissioner for decision. Therefore, in terms, this section confers a power upon the Collector to refer a dispute in this behalf to the Commissioner. (Para 4)

(B) Maharashtra Zilla Parishads and Panchayat Samitis Act (5 of 1962), Ss. 75 (2), 67 and 112 — Casual vacancies in the offices of the Chairman and Deputy Chairman of Panchayat Samiti — Meeting called for electing Chairman — Provisions of Section 67 (and not of Section 75 (1)) apply — Meeting called by Block Development Officer under the direction of Chief Executive Officer of Zilla Parishad — Election whether valid.

It is clear from the various provisions of the Act that to the meeting convened for the purpose of electing a Chairman of the Panchayat Samiti, it is the provisions of Section 67 which shall apply and not the provisions of the Section 75 (1) of the Act. (Para 5)

As per provisions of Section 67 it is the Collector or the Officer authorised by him, who alone can convene the meeting. Where the meeting was not convened by the Collector or the Officer authorised by him, but it was convened by the Block Development Officer, who had acted under the direction of the Chief Ex. Officer of the Zilla Parishad who is not a Collector of the district, obviously the meeting was not called by the person authorised to call the meeting, namely, the Collector or the Officer authorised by him. The meeting called is illegal ab initio and the election held at such a meeting is also illegal. (Paras 6, 13, 14)

The meeting contemplated by Section 67 of the Act is special in nature.

(Para 12)

When the statute itself indicates the authority which must call such a statutory meeting, then that authority alone is competent to convene the meeting. If the meeting is not convened by the competent authority then it is not merely a defect or irregularity in calling the meeting but is an illegality which goes to the root of the matter. It involves a question of authority, power and jurisdiction. If the person calling the meeting has no jurisdiction to call it, then the meeting called by him is illegal ab initio. Such an illegality is not covered by Section 112 of the

Act, Case law discussed,

(Paras 13, 14)

Cases Referred: Chronological Paras

1966 MPLJ 1014 = 1966 Jab LJ 930 10

1964 Mah LJ 536 = 66 Bom LR 442 6

ILR (1957) Raj 1041 = 1957 Raj LW 536 9

AIR 1954 SC 217 = 1954 SCR 833 10

(1904) ILR 28 Bom 66 = 5 Bom LR 689 8

B. R. Mandlekar, for Petitioner; V. P. Salve, Asstt. Govt. Pleader, for Respondents 1 to 3; M. N. Ingle, for the Objector.

DHARMADHIKARI, J.:— The petitioner in this case was elected as a Chairman of the Panchayat Samiti, Balapur, in an election held in the meeting of the Panchayat Samiti on 4th April, 1975. One Shri J. H. Sarap, who was the Chairman of the Panchayat Samiti, tendered his resignation on 6-3-1975 and Vice-Chairman Shri Idhol also tendered his resignation on 5-3-1975. On account of these resignations vacancies in the offices of Chairman and Vice-Chairman were declared and thereafter the Chief Executive Officer, Zilla Parishad, Akola by exercising his powers under sub-section (1) of Sec. 75 of Maharashtra Zilla Parishads and Panchayat Samitis Act, 1961, referred to hereinafter as the Act, had chosen one Shri G. P. Patil, who was then working as the Chairman of the subject committee of the Zilla Parishad, to exercise the powers and perform the duties of the Chairman of the Panchayat Samiti till the election of the Chairman takes place. Thereafter it appears from the record that the Chief Executive Officer directed the Block Development Officer, Panchayat Samiti, Balapur, to convene a meeting to fill in the vacancy of the Chairman of the Panchayat Samiti. According to the petitioner, this was done by the Chief Executive Officer by virtue of the power vested in him under Section 75 read with Section 64 of the Act. In pursuance of this notice issued by the Block Development Officer a meeting took place on 4th April, 1975. All the members of the Panchayat Samiti participated and voted in the said meeting and the petitioner was declared elected as the Chairman of the Panchayat Samiti, as he obtained majority of votes. According to the petitioner, none of the members objected to the validity of convening of the meeting, nor they raised any dispute in this behalf. After the election was over, the Block Development Officer, Balapur requested the Collector, Akola to notify

the name of the petitioner as per provisions of Section 9 of the Act. However, the Collector raised a dispute in this behalf and ultimately made a reference to the Commissioner, Nagpur Division, Nagpur under Section 68-A of the Act. The Commissioner, Nagpur Division, Nagpur, vide his order dated 11-12-1975 came to the conclusion that the meeting held was illegal and consequently the election of the petitioner as the Chairman of the Panchayat Samiti held in the said meeting is also illegal. He, therefore, set aside the said election and directed the Chief Executive Officer, Akola to report the vacancy in the office of the Chairman of the Panchayat Samiti, Balapur, to the Collector, Akola.

2. Being aggrieved by this order passed by the Commissioner, Nagpur Division, Nagpur, the petitioner filed an appeal before the State Government under Section 68-A of the Act. The said appeal was dismissed by the State Government vide its order dated 1st June, 1976. Against these orders the present writ petition has been filed by the petitioner.

3. Shri Mandlekar, the learned counsel for the petitioner, contended before us that the order passed by the Commissioner, Nagpur Division, is without jurisdiction as nobody has raised a dispute challenging the election of the petitioner and the Collector had no power, authority or jurisdiction to raise such a dispute suo motu. He also contended that the meeting convened by the Chief Executive Officer by virtue of the power vested in him under Section 75 (1) of the Act is perfectly legal and valid. Even otherwise, even if it is assumed that there was any defect or irregularity in convening of the meeting then also the said defect or irregularity cannot vitiate the proceedings of the meeting in which the petitioner was elected as the Chairman of the Panchayat Samiti, in view of the provisions of Section 112 read with S. 118 of Act. According to Shri Mandlekar, the said defect or irregularity in convening the meeting had not affected the merits of the case, because all the members eligible to participate and vote at the meeting were present and the petitioner was elected by majority. Nobody had ever raised any objection in this behalf. Therefore, according to the learned counsel, both the authorities below have committed an error in setting aside the election of the petitioner as the Chairman of the Panchayat Samiti.

4. So far as the first contention raised on behalf of the petitioner is concerned, it is quite obvious from the bare reading of Section 68-A of the Act that in the event of a dispute as to the validity of the election of a Chairman or Deputy Chairman of Panchayat Samiti, not only any member of the Panchayat Samiti, but even the Collector or any officer authorised by him in this behalf can refer the said dispute within 30 days from the date of election to the Commissioner for decision. Therefore, in terms this section confers a power upon the Collector to refer a dispute in this behalf to the Commissioner. This is what has been done by the Collector, Akola in the present case. On a reference being made by the Collector, Akola, raising a dispute in this behalf the Commissioner has decided the question. Therefore, in our opinion, the Commissioner was perfectly justified in entertaining the dispute referred to him by the Collector and deciding the same. In this view of the matter, there is no substance in the first contention raised by Shri Mandlekar.

5. So far as the second contention raised by Shri Mandlekar is concerned, for properly understanding the object and the scheme of the Act, it will be useful to make a reference to the relevant provision of the Act. Section 75 deals with the question as to how casual vacancies in the office of Chairman and Deputy Chairman are to be filled in Section 75 of Act, as it read at the relevant time, was as under:

"75. Casual vacancies in office of Chairman and Deputy Chariman to be filled up—

(1) In the event of a vacancy in the office of the Chairman or Deputy Chairman by reason of death, resignation, removal or otherwise, the vacancy shall, subject to the provisions of Sections 64 and 73, be filled as conveniently as may be by election of a new Chairman or Deputy Chairman;

Provided that, if for any reason the offices of the Chairman and Deputy Chairman become vacant simultaneously, the Chairman of a Subject Committee chosen by lot drawn by the Chief Executive Officer in such manner as he deems fit shall, pending the election of the Chairman exercise the powers and perform the duties of the Chairman.

(2) Where on account of any of the reasons aforesaid, the office of the Chairman becomes vacant or the offices of the

Chairman and the Deputy Chairman become vacant simultaneously, the provisions of Section 67 shall be applicable, so far as may be, to the calling of a meeting and the procedure to be followed at such meeting for the election of a chairman; and after the election of a Chairman, in the next meeting of the Panchayat Samiti, the Deputy Chairman shall be elected." In the present case we are mainly concerned with sub-section (2) of Section 75 of the Act, which lays down that where on account of any of the reasons stated in sub-section (1) of Section 75 the offices of the Chairman and the Deputy Chairman become vacant simultaneously then the provisions of Section 67 shall be applicable so far as may be, to the calling of a meeting and the procedure to be followed at such meeting for the election of a chairman. In the present case also the offices of Chairman and Deputy Chairman became vacant simultaneously as both of them tendered resignations. Therefore, obviously the present case is governed by Section 75 (2) read with Section 67 of the Act. Therefore, the meeting for electing the Chairman could have been called under Section 67 of the Act alone, Section 67 of Act reads as under:

"67 (1) After a general election under sub-section (1) of Section 10 and clause (f) of sub-section (1) of Section 57, the Collector or any officer authorised by him by general or special order, shall, at least three days before the date fixed for the first meeting of the Parishad under sub-section (2) of Section 11, call upon the person falling under clauses (a) and (f) of sub-section (1) of Section 57, to elect a Chairman of the Panchayat Samiti.

(2) The chairman elected under sub-section (1) shall be entitled to attend the first meeting of the Parishad called under sub-section (2) of Section 11 as ex officio Councillor, and as soon thereafter as possible take charge of office of Chairman of the Panchayat Samiti from the outgoing Chairman.

(3) The meeting called under sub-section (1) shall be presided over by the Collector or the officer authorised by him as aforesaid. The Collector or such officer shall, when presiding over meeting have the same powers as the chairman of a Panchayat Samiti, when presiding over a meeting of the Panchayat Samiti has, but shall not have the right to vote;

Provided that, notwithstanding anything contained in Section 118, the Collector or such officer may, for reasons recorded in writing which in his opinion

are sufficient, refuse to adjourn such meeting, or as the case may be, adjourn such meeting.

(4) If in the election of the Chairman there is an equality of votes, the result of the election shall be decided by lot to be drawn in the presence of the Collector or officer presiding in such manner as he may determine."

Section 67 confers a power of convening a meeting for this purpose upon the Collector. Sub-section (3) of Section 67 then lays down that the meeting called under sub-section (1) of Section 67 shall be presided over by the Collector or the officer authorised by him in that behalf. It further lays down that the Collector or such officer shall, when presiding over such meeting, have the same powers as the Chairman of a Panchayat Samiti when presiding over a meeting of the Panchayat Samiti has, but shall not have the right to vote. The proviso to sub-section (3) of Section 67 then lays down that notwithstanding anything contained in Section 118, the Collector or such officer may, for reasons recorded in writing which in his opinion are sufficient, refuse to adjourn such meeting, or as the case may be, adjourn such meeting. Therefore, it is quite obvious from the bare reading of the various provisions of the Act that to the meeting convened for the purpose of electing a Chairman of the Panchayat Samiti, it is the provisions of Section 67 which shall apply and not the provisions of the Section 75 (1) of the Act.

6. The question as to what is the scheme of the Act in this behalf came for consideration before a Division Bench of this Court in *Awantikabai v. V. T. Jagtap*, (1964 Mah LJ 536). After making a reference to the relevant provisions of the Act, in para. 7 of the said decision this Court observed as under:

"Sub-section (2) of Section 75 states that where on account of any of the reasons aforesaid, the offices of the Chairman and the Deputy Chairman become vacant simultaneously, the provisions of Section 67 shall be applicable, so far as may be, to the calling of a meeting and the procedure to be followed at such meeting for the election of a Chairman, and after the election of the Chairman, at the next meeting of the Panchayat Samiti, the Deputy Chairman shall be elected. This sub-section, therefore, provides for the procedure to be followed when the offices of the Chairman and Deputy Chairman are both vacant. In such a case

the provisions of Section 67 shall apply, so far as may be, to the calling of a meeting for the election of the Chairman. Under Section 67 only the persons falling under clauses (a), (c) and (f) of Section 57 (1) can be called upon to elect the Chairman of the Samiti. It has therefore, been urged on behalf of opponents Nos. 4 to 7 and 10 to 13 that only the persons who fall under clauses (a), (c) and (f) of Section 57 (1), can be summoned to attend the meeting convened to elect a Chairman under sub-section (2) of Section 75. A co-opted member does not fall under these clauses and it has, therefore, been contended that a co-opted member cannot be called to attend a meeting held to elect the Chairman, when both the offices of the Chairman and the Deputy Chairman are vacant. As pointed out above, a co-opted member can take part in and vote at a meeting held to elect a Chairman, when the office of Chairman only is vacant. He can also exercise the right of vote when a motion of no-confidence in the Chairman is moved. It could not have been intended by the legislature that while a co-opted member should be able to participate in the election of a Chairman when there is a casual vacancy in the office of Chairman and also in his removal, he should not have this right when in addition to the office of Chairman the office of Deputy Chairman is also vacant. No logical reason for making such a distinction has been suggested. The words "the calling of a meeting" in sub-section (2) of Section 75 will, therefore, have to be so construed as to avoid a result which could not have been contemplated by the legislature. We must so read the various provisions of the Act as to bring about harmony between them. Although, therefore, having regard to the language used in sub-section (2) of Section 75, there may at first sight appear to be some force in the arguments advanced on behalf of the opponents, a careful consideration of the various provisions of the Act shows that there is not much merit in them. Neither the Chairman nor the Vice-Chairman can call a meeting when both these offices are vacant. It is consequently necessary to authorise some other authority to convene a meeting for electing a new Chairman. If this object is borne in mind along with the fact that unlike an associate member a co-opted member enjoys a right to vote at the meeting of the Samiti, it will be clear that the words "the calling of a meeting" in sub-section (2) of Section 75 have re-

ference only to the manner in which and the person by whom the meeting is to be called. The fact that the meeting is to be called in the manner provided in Section 67 would not, therefore, justify the exclusion from the meeting of members who are otherwise entitled to take part in it. In our opinion, therefore, a co-opted member is entitled to attend and vote at a meeting called by the Collector or the officer authorised by him to elect the Chairman, when the offices of the Chairman and the Deputy Chairman are both vacant."

Therefore, it is quite obvious that it is Section 67 of the Act which will apply to such a meeting and as per said provisions it is the Collector or the Officer authorised by him, who alone can convene the meeting. It is an admitted position that in the present case the meeting was not convened by the Collector or the Officer authorised by him, but it was convened by the Block Development Officer, who had acted under the direction of the Chief Executive Officer, of the Zilla Parishad. The Chief Executive Officer of the Zilla Parishad is not a Collector of the district. Therefore, obviously the meeting was not called by the person authorised to call the meeting, namely, the Collector or the Officer authorised by him.

7. However, it is contended by Shri Mandlekar that this defect or irregularity in convening the meeting will not invalidate the proceedings, namely, the election held in the said meeting. By virtue of the provisions of Section 118, Sections 111, 112 and 115 are made applicable to meetings of Panchayat Samiti. Section 112 of the Act reads as under:

"112 (1) During any vacancy in a Zilla Parishad, the continuing Councillors may act as if no vacancy had occurred.

(2) The Zilla Parishad shall have power to act notwithstanding any vacancy in the Councillorship, or any defect in the constitution, thereof; and such proceedings of the Parishad shall be valid notwithstanding that it is discovered subsequently that some person who was not entitled to do so sat or voted or otherwise took part in the proceedings.

(3) No act or proceeding of a Zilla Parishad shall be deemed to be invalid on account of any defect or irregularity in any such act or proceeding not affecting the merits of the case or on account of any irregularity in the service of notice upon any Councillor or for mere informality."

Shri Mandlekar is strongly relying upon sub-section (3) of Section 112 of the Act and according to him this is a case of mere defect or irregularity in convening the meeting and it cannot invalidate the election in view of the said provision. It is not possible for us to accept this contention.

8. It is well-settled principle that to constitute a valid meeting, it must be properly convened. If the Statute designates the authority who is competent to call a meeting, then that authority alone can convene the meeting. Generally the power to call the meeting rests with the Chairman or the President of the Body Corporate and convening of a meeting is always regarded as a statutory function. The statutory provision in this regard must be strictly followed as it is mandatory provision and any illegality in convening or calling the meeting would normally vitiate the decision taken at such a meeting as the transactions which take place in such a meeting are liable to be declared as ultra vires or illegal. In this context a reference could be made to a decision of this Court in *Abaji Sitaram v. The Trimbak Municipality*, (1904) ILR 28 Bom 66 wherein it was observed by a Division Bench of this Court that if the meeting is not called by the person authorised, then the defect is not cured by Section 27 (17) of the District Municipal Act. The said provision was somewhat similar to the provision of Section 112 of the present Act.

9. Rajasthan High Court had also an occasion to consider such a question in *Vishwanath v. Pt. Jhamanlal* (ILR (1957) Raj 1041). Somewhat similar contention was raised before Rajasthan High Court. Negating that contention, Rajasthan High Court observed in the judgment as under:

"It was urged on behalf of the opposite parties that this was merely an irregularity and that as all the members were present at 4 p. m. on the 25th of July, we should hold that the proceedings of the meeting were valid in fact. It is urged that Rule 3 is merely directory and not mandatory and as all members were present when the meeting was held, there has been no prejudice to the applicants. All that we need say in this connection is that we are of the view that Rule 3 is mandatory and it is the duty of the District Magistrate to follow it strictly. There must be reasons which led the Legislature or its delegate to give this power only to the District Magistrate and some of these

reasons are well known and need not be mentioned here by us. It seems to us in these circumstances that the Legislature meant that Rule 3 should be strictly followed, and that a meeting for the election of Chairman should be called by the District Magistrate and District Magistrate only and by nobody else. If a meeting of this kind is called by anybody else, it is not in accordance with Rule 3 and no election of Chairman can take place at a meeting called by anybody other than the District Magistrate. Rule 3 provides that the District Magistrate may preside at such a meeting himself or may nominate someone else to preside for him, but it does not provide that a District Magistrate, if he does not call such a meeting himself, may authorise somebody else to call it. Obviously, therefore, Rule 3 contemplates that only the District Magistrate will call such a meeting. It must, therefore, be held to be mandatory and if a meeting is not called in accordance with Rule 3, it is not meeting at which the election of Chairman can be held."

10. Somewhat similar view was taken by the Madhya Pradesh High Court in *Tejla v. Nandkishore*, (1966 MPLJ 1014). Before the Madhya Pradesh High Court also a contention was raised in the above referred case that mere irregularity in the convening of the meeting cannot vitiate the meeting itself. Negativating this contention a Division Bench of the Madhya Pradesh High Court held that the provisions in that behalf, namely, the provisions of Section 47 (2) of the M. P. Municipalities Act, being mandatory, their strict compliance is necessary. The Madhya Pradesh High Court further relied upon the observations of the Supreme Court in the case of the Vice-Chancellor, Utkal University v. S. K. Ghosh, (AIR 1954 SC 217) and ultimately held that when the statute lays down the manner in which a meeting should be called for deciding any specific question, the meeting must be called in that manner and in no other.

11. From the various provisions of the Act it is quite obvious that the power to convene the meeting is conferred by the Act on the various authorities. Normally under Section 111 it is the President of the Zilla Parishad or the Chairman of the Panchayat Samiti, who is authorised to convene the meeting. Under Section 72, which deals with moving of motion of no-confidence against Chairman or Deputy Chairman of Panchayat Samiti it is the Collector who is authorised to

convene a meeting similar is the provision relating to motion of no-confidence against President or Vice-President of Zilla Parishad, namely, Section 49 of the Act. Under Section 67 also a power to convene a meeting is conferred upon the Collector or the officer authorised by him. It seems to be the intention of the legislature that so far as these matters are concerned, an independent and impartial authority should be given the power to convene a meeting and to preside over it. The Collector is the head of the district, but is not concerned with Zilla Parishad or its administration. In that sense he is an independent authority. There are obvious reasons for choosing such an independent authority. This is one of the methods carved out by the Legislature for achieving the goal of free and fair election. It is the Collector or such officer authorised by him, who alone can preside over such a meeting.

12. Maharashtra Zilla Parishads (President and Vice-President) and Panchayat Samitis (Chairman and Deputy Chairman) (Election) (Amendment) Rules, 1965 lays down the definition of the term "Officer Presiding" which reads as under:

"2 (b) "Officer Presiding" means, in relation to any meeting of a Zilla Parishad or a Panchayat Samiti, the person empowered or competent to preside over such meeting as provided by or under the Act."

Then Section 67 (3) of the Act lays down that while presiding over such a meeting he has all the powers of the Chairman of the Panchayat Samiti, except the right of vote. A meeting cannot be validly constituted unless it is presided over by proper authority. Normally the person entitled to preside over the meeting derives his authority under the concerned enactment or from the meeting itself. The Collector or the officer authorised by him derive their authority in this behalf under Section 67 of the Act. He has to carry out a statutory function. Therefore, the meeting contemplated by Section 67 of Act is special in nature.

13. In this case we are not dealing with the normal meetings of Panchayat Samiti, but with the statutory meeting. The meeting contemplated is for a special and specific purpose, namely, the election of Chairman. The members can validly act in a meeting which is duly convened. The power conferred upon the Collector or person authorised by him regarding call-

ing of meeting and presiding over it is in terms imperative. The said power is conferred upon a public authority which is coupled with duty. The requirement that a proper authority must convene the statutory meeting is normally held to be mandatory. When the statute itself indicates the authority which must call such a statutory meeting then that authority alone is competent to convene the meeting. The election of the Chairman as per Section 67 of the Act can be held only in a meeting which is duly convened by Collector or person authorised by him. In a given case the authority competent to call the meeting might ratify the act of somebody else, before the meeting takes place. But in the case before us, Collector has not ratified the act of Chief Executive Officer, but on the contrary has himself raised a dispute about its validity by making a reference under Section 68-A of the Act. It is well-settled general rule that an absolute enactment must be obeyed or fulfilled exactly. If the meeting is not convened by the competent authority then it is not merely a defect or irregularity in calling the meeting but is an illegality which goes to the root of the matter. It involves a question of authority, power and jurisdiction. If the person calling the meeting has no jurisdiction to call it, then the meeting called by him is illegal ab initio. In our opinion such an illegality is not covered by Section 112 of the Act.

14. Therefore, having regard to the object of the Act as well as the intention of the Legislation, it is quite obvious that the provisions in this behalf are mandatory. If this is so, then, in our opinion, it was the Collector or the officer authorised by him in that behalf alone, who could have convened the meeting. The Block Development Officer, who was acting under the directions of the Chief Executive Officer of Zilla Parishad had no authority, power or jurisdiction to convene the meeting for electing the Chairman of the Panchayat Samiti. He had also no authority to preside over the said meeting. Therefore, the meeting convened by the Block Development Officer being wholly illegal and void ab initio, the election of the petitioner which took place in the said meeting was also illegal. Therefore, it was rightly set aside by the Commissioner, Nagpur Division, Nagpur.

15. Even otherwise from the copy of the proceedings produced before us, it appears that the Block Development Officer who was also the Secretary of the

Panchayat Samiti had taken some decisions in the matter of rejection and acceptance of ballot papers. A grievance is also made on behalf of the respondent No. 3 that he had wrongly issued second ballot paper to one of the voters. Thus while presiding over the said meeting, the Block Development Officer had taken certain decisions, which had some effect on the voting pattern. Therefore, obviously having regard to the facts and circumstances of this case, it will have to be held that the convening of the meeting by the Block Development Officer and his presiding over the same has materially affected the merits of the case.

16. In this view of the matter, in our opinion, the orders passed by both the authorities below are perfectly legal. Therefore, there is no substance in this writ petition. The petition fails and is dismissed. However, in the circumstances of the case there will be no order as to costs.

Petition dismissed.

AIR 1977 BOMBAY 91

(AT NAGPUR)

MASODKAR AND DIGHE, JJ.

Pyase Saheb Gulsar Chhotumiya Sawasi etc., Petitioners v. Dashrath Wasudeo Daff and others, Respondents.

Special Civil Applns. Nos. 1253 and 1337 of 1976, D/- 25-6-1976.*

(A) City of Nagpur Corporation Act 1948 (2 of 1950), Sections 15 (i), 63 and 348 — Election of Councillors — Disqualification — Contract with Corporation — "Contract" need not satisfy the provisions of Sections 63 and 348.

The election of the returned candidate was challenged on the ground that he was disqualified in view of the provisions of Section 15 (i) of the Act having directly a share or interest in the contract with the Corporation on all the relevant dates. It was alleged that he had since 1972-73 taken a licence of 5 Otas at Rs. 60/- per month and he continued to be under the licence and as such owned an interest or share in the contract with the Corporation, the Otas being the property of the Corporation. It was contended by the

*(To quash order of C. U. Bora, Dist. J., Nagpur in Ele. Petn. No. 7 of 1975, D/- 13-1-1976.)

returned candidate that the term "contract" must necessarily mean a contract executed and in writing in accordance with the provisions of Sections 63 and 348 of the Act.

Held, that there was enough and sufficient material before the trial Court to infer that there existed a relationship under a contract of licence between the Corporation and the returned candidate and that clearly established the disqualification contemplated by Section 15 (i) of the Act. (Para 8)

The provisions with regard to the disqualification have been made in the interest of purity of public administration and so as to avoid the possible conflict of interest and duty attached to the public office. A pedantic approach or a literal meaning which will defeat the said provision is not postulated. The provisions of Section 63 are regarding the procedure for making contracts on behalf of the Corporation and there is nothing in terms of this section which will affect the relationship referable to a contract which may not strictly comply with the requirements of Section 63. Provisions of Section 348 mainly deal with the procedure regarding licences and written permission and are declaratory in nature. On the evidence in the case an inference could be drawn that, for the Corporation for all purposes the returned candidate was treated to be the licensee with regard to the property given in licence initially for the years 1972-73 and he was continued to be treated as the licensee of the Otas for the relevant period. (Para 7)

(B) City of Nagpur Corporation Act (1948) (2 of 1950), Section 428 (2) — Election set aside on ground of disqualification — Candidates contested more than two — Declaration of second highest candidate to be elected as councillor is not mandatory or automatic.

The scheme of the Rules framed under Section 420 (3) is in consonance with whatever is stated in Section 428 (2). In other words, after holding inquiry if the Court comes to the conclusion that there is a valid election, the statute indicates that the Court has to make an order confirming the declared result of the election. If the Court finds that the returned candidate was disqualified, then it has to declare that his election is null and void. If the Court finds that the election is not valid on any other ground, it has to make an order setting it aside. The Election Court is enabled in any of these cases to make

a further declaration in favour of the candidate in whose favour the next highest number of valid votes is found, to be the elected candidate at such an election subject to any cause not permitting such a declaration. Obvious it is that this further declaration could be made only in a petition seeking such a relief and clearly making of such a declaration is a matter of adjudication and cannot be mechanical or automatic. (Para 15)

It is indeed clear that when there are only two candidates and one is subjected to statutory disqualification, the votes cast in favour of such disqualified candidate may be treated as having been thrown away; but that result would not automatically follow if there are more than two candidates in the field seeking election to one seat. (Para 13)

The phrase as available in the last sentence of sub-section (2) is "against whose election no cause of objection is found" and that has to be read along with the earlier clause "in whose favour next highest number of valid votes is recorded". The power conferred by that sub-section is enabling and is conferred to assess and decide upon the claim of all candidates, who may not, at the election be the next highest to the returned candidate, but yet may upon trial be entitled to such a declaration. In any case, that itself shows that the matter requires consideration and adjudication and it is not as if when the returned candidate is found disqualified, the automatic result is that the next candidates standing below him in the count gets elected in his place. (Para 16)

The deeming introduced or spoken of by sub-section (2) operates to clothe such declared election with all sense of substance and reality. Fiction statutorily enacted would be available to any of the candidates found by the Court to be entitled to such declaration. The construction seeking to have automatic declaration runs counter to the basic concept of election adjudication. Therefore, it can be held that only because the returned candidate has been found to be disqualified sub-section (2) does not indicate that all the votes earned by the disqualified returned candidate are required to be treated as votes wasted away. Those continue to remain valid unless proved to be thrown away and the matter is open for adjudication when the contest was between more than two candidates for single seat and cannot be determined automatically. (Paras 17, 19)

In the circumstances the trial Court having found the disqualification of the returned candidate, the only declaration it could make was that a casual vacancy had occurred and a fresh election be taken according to law to fill that vacancy. (Para 23)

Cases Referred: Chronological Paras
AIR 1969 SC 604 = (1969) 2 SCR 90 13

In S. C. A. No. 1253 of 1976:—

N. S. Munshi, for Petitioner; C. G. Madkholkar (for No 1) H. S. Ghare (for No. 4) and M. L. Vaidya (for No. 11), for Respondents.

In S. C. A. No. 1337 of 1976:—

H. S. Ghare, for Petitioner; C. G. Madkholkar (for No. 1) N. S. Munshi (for No. 2) and M. L. Vaidya (for No. 11), for Respondents.

MASODKAR, J.:— Both these petitions arise out of the election proceedings filed by the respondent No. 1 before the District Judge, Nagpur under Section 428 of the City of Nagpur Corporation Act, 1948 (hereinafter called the Act) read with the Rules framed under Section 420 (3) (xviii) and (xix) of the Act (hereinafter called the Rules).

2. Respondent No. 1 the election-petitioner before the District Judge was the candidate to the election to elect a Councillor from Ward No. 31, called also Juna Motorstand Ward, of the City of Nagpur. There were other ten duly nominated candidates. The poll took place on 29-1-1975, counting on 31-1-1975 and the result was gazetted on 4th of February, 1975. At the counting the petitioner in the first petition Pyare Saheb, having secured 1132 votes being the highest in the number of votes polled, was declared elected. The election-petitioner polled next highest number of votes, being 803. The petitioner in another companion petition i.e., Special Civil Application No. 1337 of 1976 polled 700 votes. The other candidates similarly polled votes, the number of which need not be stated.

3. Election-petitioner claimed by the petition before the District Judge that election of Pyare Saheb from the said Ward should be set aside, he being disqualified in view of the provisions of Section 15 (i) of the Act having directly a share or interest in the contract with the Corporation on all the relevant dates, in that he had since 1972-73 taken a licence of 5 Otas at Rs. 60/- per month and he continued to be under the licence and as such owned an interest or share in the contract with the Corporation, the Otas

being the property of the Corporation. It was also the case of the election-petitioner Dashrath that Pyare Saheb being disqualified and election-petitioner having polled the next highest number of votes should be declared as elected from that Ward. Having prayed for such a declaration he impleaded to the petition all the contending candidates as is required by the Rules.

4. At the trial the learned District Judge found upon material placed by the parties that in fact there existed a licence of 5 Otas the possession of which was taken initially by the returned candidate in the year 1972-73 and though the initial licence was in writing and stipulated a period of one year and thereafter there was no written licence executed, there was ample material to hold that the licence continued during the relevant period and that even on the date of evidence the returned candidate was in possession of the licensed property. He thus found that the returned candidate was disqualified to be the Councillor and adjudged his election as void. Having so found, because of the provisions of Section 428 (2) to which a little later on we will make a detailed reference, he purported to make a declaration in favour of the election petitioner solely on the basis that he was the candidate who had next highest number of votes polled.

5. By the first petition the returned candidate questions the validity of the first part of the order and by the second petition, original respondent No. 4 who was himself a duly nominated candidate and who has polled as stated earlier 700 votes, questions the validity of the latter declaration in favour of the election-petitioner. As we proceed to deal with these petitions and the several submissions made at the Bar, we will indicate the exact scope of the submission.

6. Taking the petition filed by the returned candidate before this Court, i.e., the first petition, it is indeed difficult to find any merit in the same. Mr. Munshi, the learned counsel appearing for the petitioner in this petition, argues that because of the provisions of the statute, particularly provisions of Section 63 and Section 348, upon true construction the provisions of Section 15 (i) which speak of any contract with, by or on behalf of the Corporation, must necessarily mean a contract executed and in writing in accordance with these provisions. Any other type of contract will not be enforceable against the Corporation and as such, according to

the learned counsel, it is not a contract within the meaning of clause (i) providing for disqualification. The learned counsel, therefore, submits that the provisions regarding the making of the contract which should necessarily bind the corporate authority should be impliedly governed by the meaning of the word "contract" as laying down the disqualification.

7. The provisions with regard to the disqualification have been made in the interest of purity of public administration and so as to avoid the possible conflict of interest and duty attached to the public office. A pedantic approach or a literal meaning which will defeat the said provision is not postulated. The provisions of Section 63 are regarding the procedure for making contracts on behalf of the Corporation and we do not see anything in terms of this section which will affect the relationship referable to a contract which may not strictly comply with the requirements of Section 63. Provisions of Section 348 mainly deal with the procedure regarding licences and written permission and are declaratory in nature. There is hardly any dispute in the present case that for the initial year i.e., 1972-73 a written agreement of licence existed between the parties which was to expire on 31-3-1973 (See documents Exhs. 49 and 50 in the trial). What is being relied upon is the omission to execute the document for the period till the year 1974-75. It was urged that for renewal of the original licence no written application was made and, therefore, because of sub-section (6) of Section 348, there would be no licence as contemplated by Section 348 itself and if there was no licence as such, logically, the submission is, there is no contract. Sub-section (6) of Section 348 only states what will be the consequences if after the period of the licence has expired the licence is not renewed as far as the licensee is concerned. Sub-section (7) of Section 348 further makes it clear that such licensee pending decision on the application for renewal is entitled to act as if the licence has been renewed and sub-section (8) clarifies the position that mere acceptance of the fee will not clothe the licensee paying the fee with the right or entitlement, as a licensee. These provisions are of little assistance to the petitioner if we look to the evidence from which an inference can be drawn that, for the Corporation, for all purposes, the petitioner was treated to be the licensee with regard to the property given in licence initially for the year 1972-73. As the

facts are, under Exh. 53 which is of 7-9-1974, on behalf of the Corporation, demand was made for all the balance of the rent including the period upto December 1974. Under Exh. 54 the petitioner applied that for making the payment of the lease-money two months' time should be given. Under Exh. 52 the Corporation accepted the payment of Rs. 720/- at the rate of Rs. 60/- per month till the year 1974-75. The receipt conclusively shows that Corporation accepted the petitioner to be the licensee with regard to Otas Nos. 19 to 23 which were initially given under the licence agreement Exh. 50, which document in no uncertain terms raises an inference that the petitioner continued to be the licensee of 5 Otas taken by him in the year 1972-73. Even on the date of the evidence, i.e., 13-12-1975, the petitioner, who has been examined at Exh. 59 as witness No. 1 for respondent No. 1 admitted that he had paid rent upto 31-3-1975. He further admitted that though he could have paid the rent and surrendered the possession even when he had decided to contest the election, he did not desire or intend to leave the possession of the Otas and, therefore, he paid the rent. On behalf of the election-petitioner, evidence of Corporation agent as P. W. 1 is clear enough to show that for the corporation rent was accepted till the year 1974-75 and the petitioner was continued and treated as the licensee of the Otas.

8. Thus we find that there was enough and sufficient material before the learned District Judge to infer that there existed a relationship under a contract of licence between the Corporation and the returned candidate and that clearly established the disqualification contemplated by Section 15 (i) of the Act. It is not possible to take any other view of the matter.

9. The election, therefore of the returned candidate was rightly set aside.

10. Coming to the question of the declaration that the election-petitioner, who had secured 803 votes, should be declared having been duly elected, the learned Judge has relied on the terms of sub-section (2) of Section 428 of the Act, observing that there is no cause for objection against the election of the election-petitioner. The order further states that admittedly the election-petitioner got second highest number of votes and therefore, because of the wording of sub-section (2), he has to be dec-

lared elected. It appears that it was urged before the learned Judge that having set aside the election on the ground of disqualification, the only course open was to direct fresh election. That submission was turned down presumably because the learned Judge thought that there is a mandate in sub-section (2) to declare the second highest candidate to be elected as the councillor from the ward.

11. Before us this part of the approach and this part of the declaration is strenuously challenged by the counsel appearing for the petitioner in this petition. It is submitted that such a declaration is not contemplated by the words of sub-section (2) of Section 428 and the matter has to be adjudicated by the election Tribunal. There is no automatic declaration available to the person who has polled the second highest number of votes, for the result of disqualification of the returned candidate will be to find out what would happen to the votes polled by the disqualified candidate at such an election. The burden that the election-petitioner or any other candidate is entitled to be so declared is always on the petitioner to show that the votes polled by the disqualified returned candidate were in fact thrown away or wasted votes and are not available for consideration. There being no evidence it is urged the declaration made by the learned District judge is entirely erroneous.

12. As against this, for the original election-petitioner it is contended that sub-section (2) of Section 428 posits a definite scheme of the statute and it should not be permissible to introduce an addition of words to its terms. What is contemplated by the Legislature is that in case the election of a returned candidate is found to be null and void because of the disqualification, there is automatic election of the candidate who has polled second highest number of votes. The enquiry as to the votes polled by the disqualified returned candidate in the wisdom of the Legislature has been ruled out and what remains is the declaration to be given in favour of the second candidate who has polled the highest number of votes. This process, according to the submission of the learned counsel, is mandatory and can be indicated by stages, first being finding out whether the election of a returned candidate can be declared null and void because of the disqualification. Having so found out, statute declares the candidate who has polled next

highest number of votes as the duly elected Councillor in his place. This declaration can be put in jeopardy like any other challenge to election by pointing out the grounds on which such election can be set aside, like disqualification, corrupt practice or non-compliance with the procedure etc. In other words, the enquiry as to the validity of the votes earned by the disqualified candidate is excluded in the scheme of this type of adjudication. Reference was made by the learned counsel to the Rules also and particularly, to Rule 9, where the discrimination proceedings (sic) of counter-election petitions can be filed. From that it was submitted that unless such petition is filed and the election Judge upholds the ground in such a petition, the statutory declaration in favour of the second next candidate as a matter of course must be made.

13. Now to clear the ground before we proceed to consider the scheme of Section 428 and the powers of the election Court thereunder, we may at once state that more or less the election adjudication with regard to a finding that a particular returned candidate was disqualified, raises a question to be always adjudicated by the Election Tribunal in respect of the votes cast in favour of such disqualified returned candidate. Election by itself is a process to find out the choice of the majority from the given constituency. When the majority returns a candidate, he represents the whole constituency. The votes polled at such an election could be treated to be validly cast unless it is shown that these votes are just thrown away or wasted. The doctrine of "wasted vote" is known to Election Jurisprudence since the concept of finding the futility of exercise of that vote is in vogue. The voter or elector, consciously or with knowledge, may cast a vote in favour of a person who by reason of the disqualification attached to him and which is known to the voter could not in law be entitled to be elected or the vote may be treated as tainted or thrown away if it is procured by exercise of corrupt practice. Excepting these two types of cases, for which proof would be necessary, the normal legal presumption would be that a voter validly acts in exercise and in furtherance of his right and the vote cast by him is a valid one. The offshoot of this doctrine often creates the problem of consideration as to whether the votes earned by a given candidate who is found at the trial to be disqualified should be treated

as entirely thrown away or should be available yet for the purpose of consideration in such an election adjudication. We may only refer to the decision of the Supreme Court in *Vishwanath Reddy v. Konappa*, (AIR 1969 SC 604) where the exception as well as the rule is indicated by all qualifications in a case where there were only two contesting candidates and one of them was found to be statutorily disqualified. The Court observed:

"..... When there are only two contesting candidates, and one of them is under a statutory disqualification, votes cast in favour of the disqualified candidate may be regarded as thrown away, irrespective of whether the voters who voted for him were aware of the disqualification and no fresh poll is necessary. This is not to say that where there are more than two candidates in the field for a single seat, and one alone is disqualified, on proof of disqualification all the votes cast in his favour will be discarded and the candidate securing the next highest number of votes will be declared elected. In such a case, question of notice to the voters may assume significance, for the voters may not, if aware of the disqualification have voted for the disqualified candidate."

Though undoubtedly the case arose under the provisions of the Representation of the People Act, that highlights the principal doctrine which governs the exclusion of the votes from the consideration by the Election Tribunal. It is indeed clear that when there are only two candidates and one is subjected to statutory disqualification, the votes cast in favour of such disqualified candidate may be treated as having been thrown away; but that result would not automatically follow if there are more than two candidates in the field seeking election to one seat.

14. Turning to the provisions of Section 428 of the Act, we may proceed to extract sub-sections (1) and (2) which read as follows:

"428. (1) If the qualification of any person declared to be elected for being a Councillor is disputed, or if the validity of any election is questioned, whether by reason of the improper rejection by the Commissioner of a nomination or of the improper reception or refusal of a vote, or for any other cause, any person enrolled in the municipal election roll may, at any time within fifteen days from the date on which the election of Councillor is notified under Sec. 16, apply to the

District Court. If the application is for a declaration that any particular candidate shall be deemed to have been elected, the applicant shall make parties to his application all candidates who, although not declared elected, had contested the election from the same ward.

(2) If the District Court, after making such inquiry as it deems necessary, finds that the election was a valid election and that the person whose election is objected to is not disqualified, it shall confirm the declared result of the election. If it finds that the person whose election is objected to is disqualified for being a Councillor, it shall declare such person's election null and void. If it finds that the election is not a valid election it shall set it aside. In either cases it shall direct that the candidate, if any, in whose favour next highest number of valid votes is recorded after the said person or after all the persons who were returned as elected at the said election, and against whose election no cause of objection is found, shall be deemed to have been elected." Along with this we may indicate that rules have been framed which lay down the procedure regarding the contents of the petition, its presentation, its conduct and also the matters to be taken into account by the Court upon several challenges and the reliefs prayed for in such an election dispute.

15. These rules and the provisions of Section 428 permit any elector to question the validity of election on the grounds mentioned in sub-section (1) inter alia being improper rejection of a nomination or improper reception or refusal of a vote or any other cause which may include the cause regarding disqualification or want of qualification of the elected Councillor. It further shows that apart from disputing the validity of the election of the Councillor, it is permissible to pray by such petition that after the election is found to be null and void or invalid, any particular candidate should be declared to have been duly elected at such an election. The petitioner may be the nominated candidate or may be simple elector. In both such cases such prayer can be made. When the petition seeks such a consequential prayer, both sub-section (i) and Rule 1 (b) require that all nominated candidates at the election should be joined as parties to that petition. If the declaration is only with regard to invalidity of the election and no further consequential prayer is made, this requirement is not necessary to be fol-

lowed. Having filed such a petition, the scheme of the rule shows that a proper election trial has to be held. Rule 15 goes on to indicate what should be the result if the Court comes to the conclusion upon the matters indicated by clauses (a), (b) and (c) of that rule. In other words, if the election is affected by corrupt practice or if it is affected by the corrupt practice committed by an elected candidate or his agent or the result of the election has been materially affected by any irregularity with regard to the nomination, the election would be declared as void. Rule 15 provides a proviso where the Court may not make a declaration if the conditions of clauses (a) to (d) in the proviso of the rule are satisfied. Rule 16 proceeds to lay down that if an election is declared void, the Court may either declare that a casual vacancy has been created or that the applicant or any other candidate has been duly elected. The scheme of these Rules clearly is in consonance with whatever is stated in sub-section (2) of Section 428. In other words, after holding inquiry if the Court comes to the conclusion that there is a valid election, the statute indicates that the Court has to make an order confirming the declared result of the election. If the Court finds that the returned candidate was disqualified, then it has to declare that his election is null and void. If the Court finds that the election is not valid on any other ground, it has to make an order setting it aside. The Election Court is enabled in any of these cases to make a further declaration in favour of the candidate in whose favour the next highest number of valid votes is found, to be the elected candidate at such an election subject to any cause not permitting such a declaration. Obvious it is that this further declaration could be made only in a petition seeking such a relief and clearly making of such a declaration in our view is a matter of adjudication and cannot be mechanical or automatic.

16. The phrase as available in the last sentence of sub-section (2) is "against whose election no cause of objection is found" and that has to be read along with the earlier clause "in whose favour next highest number of valid votes is recorded". The power conferred by that sub-section is enabling and is conferred to assess and decide upon the claim of all candidates, who may not, at the election be the next highest to the returned candidate, but yet may upon trial be entitled to such a declaration. In any case,

that itself shows that the matter requires consideration and adjudication and it is not as if when the returned candidate is found disqualified, the automatic result is that the next candidate standing below him in the count gets elected in his place.

17. The deeming introduced or spoken of by sub-section (2) operates to clothe such declared election with all sense of substance and reality. Fiction statutorily enacted would be available to any of the candidates found by the Court to be entitled to such declaration. The construction seeking to have automatic declaration runs counter in our view to the basic concept of election adjudication. For all purposes, the Court has to apply its mind to the facts and circumstances so as to further the intention of the voters so as to find out the candidate who could be said to have got next highest valid votes. The term "valid" indicates the intention of the legislature and the votes earned by disqualified candidate are very well within the ken of consideration. That by itself would raise implicit question as to how those votes could have been distributed had disqualification been known or notified to the voters. Sub-section (2) does not render the result by itself to affect those votes so as to exclude them as simply thrown away or wasted.

18. Such an inference in favour of assumption that votes do stand thrown away cannot be deducted for more than one reason.

19. Firstly, such an inference would be against the basic concept of election dispute wherein not only the party but the entire body of concerned electorate is interested and would further work hardship on the constituency as a whole. A person getting a meagre number of votes or even a few votes as compared to the votes polled by the returned candidate, will be entitled to an automatic declaration and by itself that would be contrary to the possible choice of the constituency. Attempt has to be to ascertain the valid and free choice and such an approach would defeat it. Often in this country in ignorance of the disqualification majority of the voters cast their vote. In spite of this reality are we to attribute an intention to the Legislature that even though the candidate at second number having polled meagre number of votes he has to be statutorily declared elected once a disqualification is found against the candidate who has polled large majority of votes? Construction that will

further the ends of justice — and here when we speak of justice, justice to the constituency and to the voter is implicit—should be put on the scheme indicated by the terms of the statute. We are inclined, therefore, to hold that only because the returned candidate has been found to be disqualified sub-section (2) does not indicate that all the votes earned by the disqualified returned candidate are required to be treated as votes wasted away. Those continue to remain valid unless proved to be thrown away and the matter is open for adjudication when the contest was between more than two candidates for single seat and cannot be determined automatically.

20. Secondly, we find that the clause "against whose election no cause of objection is found", is wide enough to take into account the consideration of the fact of the number of votes which were cast in favour of the disqualified returned candidate and possible distribution amongst other contesting candidates. That would include the candidate seeking to have declaration and will be required either to show that votes be treated as wasted or he would have got majority out of those votes upon fair possibility. There is no reason to restrict the term "cause of objection" as referring only to the grounds on which an election of the returned candidate can be challenged under the Act or under the Rules. The compass of this particular phrase in our view, would take in clearly the consideration of the votes that were earned by the disqualified returned candidate and when there are more than two contestants it will have to be shown how those votes would have been cast or as to whether were in fact thrown away by the voters.

21. Thirdly, we find it rather difficult to accept such a mechanical approach in the matters of adjudication of election disputes. We have before us Rule 16 which in terms permits the Election Court to make a declaration that a casual vacancy has been created or to make a declaration that an applicant or any other candidate has been duly elected. If what is contended for is accepted then this rule is rendered nugatory and otiose. For, upon the construction favouring automatic result no such power can be conceived in favour of the Court to declare vacancy in a petition where returned candidate is found to be disqualified and declaration of election in favour of some other candidates is sought. By itself rule throws light on the intention of

the statute and permits alternative reliefs being granted. Provisions being express it is not possible to curtail its scope by such an approach.

22. Finally, we find that such a declaration in favour of the applicant or any other candidate can be made even in those cases where the election is not challenged only on the ground of disqualification of the returned candidate but on any other permissible ground. That itself would indicate that the applicant or any other such candidate to the satisfaction of the Election Court will have to show that he is entitled to a declaration that he should be deemed to have been elected. If the dispute is regarding the corrupt practice either committed at the election or by the returned candidate or his agent, obviously it would raise an issue when the consequential declaration of such a kind is claimed and that to the satisfaction of the Court it will have to be shown that there are tainted votes that are required to be treated as invalid and further that excluding those votes such a declaration is available either to the applicant or to any other returned candidate. Instance of similar type which will call for consideration of the other votes can easily be available and must be treated as present to the mind of the legislature. Further the burden in election dispute is on the petitioner to substantiate the claim for such type of declaration and that is indicated by the very words available in sub-section (1) and sub-section (2) of Section 428 taken together. In other words, before the declaration can be made, the election-petitioner will have to show that at the election in dispute either he himself or the candidate in whose favour such a declaration is sought would have been the returned candidate having earned the majority of the valid votes. It cannot be assumed that this rule is not available in the scheme of sub-section (2) of Section 428 of the Act.

23. For those reasons we do not accept the approach of the learned District Judge, for, he has not at all taken into account the votes polled by the disqualified returned candidate, being 1132 and its character. Indeed before us no material was shown and there is no evidence tendered by the election-petitioner with regard to these votes so as to hold that these can be treated as wasted or thrown away or on fair possibility the majority of it being available to any of the candidates. It was conceded that no

such material has been placed on record. It follows therefore that election-petitioner was not entitled to the declaration that he only by the fact that he had polled at the election next highest number of votes stands elected as Councillor from Ward No. 31. The only declaration having found the disqualification of the returned candidate that could have been made by the learned District Judge was that a casual vacancy has occurred and the fresh election be taken according to law to fill the vacancy.

24. That being our conclusion, we hold that the learned District Judge was right in setting aside the election of Pyare Saheb Gulzar Chhotumiya from Ward No. 31 of the City of Nagpur. However, we find that the declaration granted that the election-petitioner, i.e., Dashrath Wasudeo Daff stands duly elected from that Ward, is made in error and the same is set aside. Instead of that, there would be a direction treating that there has occurred a casual vacancy in Ward No. 31 and fresh election be held according to law.

25. Special Civil Application No. 1253/76 is thus partly allowed, while Special Civil Application No. 1337/76 is allowed in its entirety. In the circumstances, there would however be no orders as to costs in any of the petitions.

Order accordingly.

AIR 1977 BOMBAY 99*

(AT NAGPUR)

MASODKAR AND DIGHE, JJ.

Vithalrao Udhaorao Uttarwar and others, Petitioners v. The State of Maharashtra, Respondent.

Special Civil Appln. No. 1394 of 1975 etc.; D/- 13-8-1976.

(A) Constitution of India, Article 368 — Constituent power — Limitations of basic structures — Principles as laid down by Supreme Court in AIR 1973 SC 1461 and AIR 1975 SC 2299 summarised — Constitution (Fortieth Amendment) Act — Validity.

FIRST: Upon the constituent power having situs in Article 368 there are inherent limitations of the basic structure or framework of the Constitution or constitutional principles which are not indicated in the Constitution itself. The power under Article 368 is not akin to

the original, plenary unlimited constituent power and is not therefore omnipotent.

SECOND: These basic structure principles include the fundamental constitutional contemplation of the permissive judicial review of the Constitutional Amendment Act so as to find out firstly whether in exercise of the constituent powers what is enacted is a law permissible by the premises of Article 368; and secondly whether the amendment in substance does or does not accord with basic structure doctrine or basic framework or basic principles of the Constitution. In the exercise of making an amendatory law by exercise of constituent power, it would be impermissible to render legislative judgments on cases which under the Constitution form part of the jurisdiction of the judiciary and is pre-eminently a judicial function.

THIRD: The law amending the Constitution would be bad if it affects or abrogates the basic structure as enumerated and summarised in AIR 1975 SC 2299 which includes fundamental principles of equality of status and opportunity. The right to property is not part of basic structure nor constitutional amendment laws can be affected by that principle.

FOURTH: The ordinary law either made by the Parliament or by the State Legislature cannot be subjected to challenge on the ground of basic structure or constitutional framework or principle and that there exists no paradox in constitutional theory in arriving at such a position.

FIFTH: Only by reason of the fact that such ordinary legislation is placed in Schedule Nine by the Constitutional Amendment Act, the challenge to that law on the ground of the basic structure or framework of the Constitution is not available. For the purposes of the law it retains the character of a law made by the Legislature with reference to its powers under Articles 245 and 246 of the Constitution. (Para 67)

Applying these summarised principles as are relevant, it is obvious that the Constitution (Fortieth Amendment) Act placing the amended statutes in issue in the Ninth Schedule cannot be questioned nor those Acts can be questioned on the ground of basic structure doctrine which is only applicable to the Constitutional Amendment Laws as such. The same would be position with regard to Presidential Order made under Article 359 (1-A) of the Constitution. (Para 68)

* (Decision of Supreme Court in appeal against this decision is reported in AIR 1977 SC 915—Ed.)

(B) Constitution of India, Article 31-B — Constitutionality — Does not affect the basic structure principles.

Article 31-B does not affect any of the enumerated basic structure principles evolved by AIR 1973 SC 1461. On the other hand, it subserves the constitutional purpose. (Para 73)

There is hardly any doubt that by Article 31-B the matters are left to the high constituent power to be exercised by Indian Parliament in accord with the procedure indicated by Article 368. There being thus a constituent procedure, there being an indication of principles by its very placement in Part III and there being an obvious purpose for which Article 31-B was enacted, there is no reason to doubt the validity of Article 31-B, only because it puts under eclipse the challenges based on Part III to the laws otherwise competently made by the Legislatures. (Para 75)

Merely upon apprehensions of abuse the provisions cannot be questioned as being violative of any basic structure or framework of the Constitution. On the other hand it is apparent that Art. 31-B by its very contemplation has been superimposed to further and to fortify the basic structure of the Constitution. The Constitution (First Amendment) Act, 1951 enacting Article 31-B, therefore, is not open to challenge. (Para 75)

(C) Constitution of India, Art. 359 (1-A) — Constitutionality — Does not run counter to the basic structure of the Constitution.

Original Article 359 (1) permitted suspension of the remedy itself with regard to certain rights to be mentioned in the Presidential Order, the selection being left to the discretion of the President himself. That would have indirect result of rendering possessor of the right disabled to enforce the same by remedy in Court of Law. Now what would have been the indirect effect is clarified by permitting the President to make an order expressly suspending the rights conferred by Part III by specification. That would permit laws and executive actions to be taken which otherwise would have been void, only during the period of emergency. The provision on the face of it being part of the original scheme with regard to emergency matters is merely enabling and it appears is necessary for the exigencies that eventually have to be met by the authority of the President,

Only because such a power is given, Court cannot be asked to strike Clause (1-A) of Article 359 down by stamping it to be running counter to the basic principles of the Constitution. (Paras 85 and 91)

The provisions of Art. 359, Cl. (1-A), are really meant and intended to further fortify the conditions so as to maintain security of India during the period of grave emergency. On the face of it it is reasonable to think that the President who is charged to take steps while the country is engulfed by conditions threatening its integrity would apply his mind and make appropriate selection as may be necessary to meet the challenges emanating from the conditions available about the choice of rights reasonably selected for the purpose of suspension. Only because those rights may include certain fundamental rights like life and liberty or right of equality, the provision cannot be rendered unconstitutional or as running counter to the basic structure of the Constitution. If all those rights were to yield as they must to the security of the country, its reasonableness cannot at all be questioned. AIR 1976 SC 1207, Rel. on. (Para 85)

(D) Constitution of India, Articles 359 (1-A) and 14 — Presidential Order dated 27-6-1975 — Constitutionality.

On the basic framework or basic-feature-theory any challenge to the legality of the Order made by the President of India under Article 359 (1-A) of the Constitution suspending the fundamental right guaranteed by Article 14 along with other rights is not tenable. (Paras 92, 93)

(E) Constitution of India, Article 301 — Enactments fixing the ceiling and acquiring surplus land — Article 301 not violated — Mah. Agricultural Land (Ceiling on Holdings) Act (27 of 1961), Preamble.

Regulatory measures taken by the Statute to control immovable property cannot be termed as having effect on the inflow or outflow of economic concourse in the country. Only because the entitlement to hold land above the ceiling limits is curtailed, it does not follow that the resultant economic venture itself is put in any type of barricade. The concept of "freedom" in the context of land necessarily means the freedom to possess, freedom to enjoy and freedom to deal with it. Providing for the ceiling of such property is only to chisel or limit the extent of these rights in the property. In spite of ceiling, the agriculture which can be said

to be trade and commerce and its intercourse is fully left free. To what extent the land should be available to citizen for the purpose of exploitation by agricultural and allied pursuits can always be defined by law. Once the pith and substance of the law is of such kind it follows that the trade or the commerce and its flow as far as agriculture is concerned, is neither impeded nor in any manner affected, for, within the limits it is free and the limits are permissible.

(Paras 97, 99 and 100)

(F) Interpretation of Statutes — Punctuation — Importance of.

Though undoubtedly punctuation is a minor element in the construction of the statute, sometimes if the statute is carefully punctuated its considerations assume importance and throws light on the intention of the makers of the statute.

(Para 112)

(G) Constitution of India, Art. 31-B — "Inconsistent with any provision of this part" — Construction.

The phrase "inconsistent with any provisions of this Part" is wide enough and need not be specifically controlled by the phrase "takes away or abridges any of the rights conferred by any provisions of this Part". When the inconsistency is spoken of, it is obvious that it is inconsistent with any of the provisions and not only with the rights conferred by Part III.

(Paras 113, 114 and 119)

(H) Constitution of India, Article 25 — Mah. Agricultural Lands (Lowering of Ceiling on Holdings) and Amendment Act, 1972 (21 of 1975), Pre. — Mah. Agricultural Lands (Lowering of Ceiling on Holdings) and (Amendment) Amendment Act (47 of 1975), Pre. and Mah. Agricultural Lands (Ceiling on Holdings) Amendment Act, 1975 (2 of 1976), Pre. — Not violative of Article 25.

The impugned Acts do not in any manner affect the right conferred by Article 25, nor abridge the extent of that right. Even assuming that there is some cloud cast upon that right by the Act in that property which could have been utilised or is meant to be utilised for religious purposes even then the exercise of right to freedom as covered by Article 25 which is subject to other provisions of Part III would not be affected, Article 31-B being the provision contained in Part III of the Constitution and if read with Article 25 of the Constitution would afford protection to such laws placed in Ninth Schedule even if property used for

religious purposes is affected. Therefore, challenge on any such ground on the basis of Article 25 is not well merited. AIR 1976 Bom 94, Rel. on. (Para 125)

(I) Mah. Agricultural Lands (Lowering of Ceiling on Holdings) and Amendment Act, 1972 (21 of 1975), Pre. — Mah. Agricultural Lands (Lowering of Ceiling on Holdings) and (Amendment) Amendment Act (47 of 1975), Pre. — Act No. 47 of 1975 — Cannot be challenged on the ground that it would have no operational field.

On the date Legislature made Act No. 47 of 1975, for its purposes Act No. 21 of 1975 was available and once the same was put into effect it would operate upon the terms of Act No. 21 of 1975 as have become part of the original Act.

(Para 131)

Act No. 47 of 1975 refers for the purpose of amendment to the Act No. 21 of 1975 as 'the Amending Act' and provides by different sections ranging from 2 to 8 how the Amending Act shall stand amended upon the enforcement of Act No. 47 of 1975. That term is intended to mean clearly the provisions of Act No. 21 of 1975 and by reference would operate with all force, wherever Act No. 21 of 1975 is operative. No anomaly is introduced nor any antilogy is raised. For reasons obvious it was left to the power of the State Government so to give effect to Act No. 21 of 1975 and then to make effective Act No. 47 of 1975. The Legislature did not injunct otherwise.

(Para 130)

(J) Constitution of India, Articles 37 and 245 — Directive principles — Relevancy of, in deciding validity of Statute.

The submission that the Court should strike down the laws because some of the directive principles do not appear to have been kept in view by the Legislature cannot be upheld.

(Para 132)

The law cannot be compelled to make the premises of directive principles by judicial interpretation which would mean its enforcement. Nor it would be proper to treat the directive principles in the constitutional scheme as limitations or fetters on the legislative powers. Case law discussed.

(Para 133)

(K) Constitution of India, Arts. 31-C and 39 (b) and (c) — Amendments of the Mah. Agricultural Lands (Ceiling on Holdings) Act (27 of 1961) replete with the principles underpinned by Art. 39 (b) and (c) — Protection from the challenge under Articles 14, 19 and 31 is, therefore, available because of Article 31-C.

(Paras 136, 137, 138)

(L) Constitution of India, Art. 31-A, Second proviso — Mah. Agricultural Lands (Ceiling on Holdings) Act (27 of 1961) (as amended) Section 23 — Section 23 not invalid on ground of violation of Article 31-A, second proviso.

It is well settled that the word "estate" in Article 31-A takes in the acquisition by the State of the rights in agricultural lands. The other conditions of the proviso are that such agricultural estate must be held by a person. The said estate must be under his personal cultivation. The estate must be within the ceiling limit applicable to the person concerned fixed by any law for the time being in force and the acquisition must operate upon such land and the law must provide the payment of compensation at a rate not less than the market value of such estate. All these conditions must co-exist before the injunction of the proviso can be effectively answered. For the purposes of the proviso the lands above the ceiling limit fixed by a law are not part of the right to claim compensation at the market rate as contemplated. If the land or the estate that is being acquired is below the ceiling limit, then and then the proviso enjoins that the law must make a provision regarding the compensation at the market rate. The submission, therefore, that even upon acquisition of the surplus land there must be such a compensation and there is any vice in Section 23 or the scheme regarding compensation for surplus land prescribed by the present law is not available on the basis of this proviso.

(Para 164)

(M) Constitution of India, Art. 31-A, Second proviso — Mah. Agricultural Lands (Ceiling on Holdings) Act (27 of 1961), Section 4 (1) Explanation — Not violative of Art. 31-A, Second proviso — "Family unit" is a person — General Clauses Act (1897), Section 3 (42). AIR 1974 Punj 162 (FB), Diss. from.

As far as the person is concerned as contemplated by second proviso to Article 31-A "family unit" is a person within the meaning of the General Clauses Act, Section 3 (42) and there is no antilogy enacted by the scheme of the Act and further there is equitable, reasonable and workable scheme enacted by laws premises. Therefore, the terms of the second proviso of Article 31-A are fully answered and by reason that Act clearly being a measure of agrarian reform it having received the Presidential assent it

is immune on its own terms being challenged on the basis that there is any violation of the fundamental rights guaranteed under Articles 14, 19 and 31 of the Constitution. AIR 1974 Punj 162 (FB), Dissented from.

(Paras 167, 172, 173 and 204)

(N) Mah. Agricultural Lands (Ceiling on Holdings) Act (27 of 1961), Sections 12, 13 and 40-A — Validity — Criticism that Sections 12 and 13 expose minors to penal consequences without any guidelines, held, not well founded — Penalty under Section 40-A is not imposed as a matter of course but only after prosecution after obtaining sanction of Collector.

(Para 178)

(O) Maharashtra Agricultural Lands (Ceiling on Holdings) Act (27 of 1961), Sections 8, 9 and 10, Explanations 1 and 2 — Provisions cannot be criticised as confiscatory.

(Para 182)

(P) Constitution of India, Arts. 31-A, 31-B and 31-C — Operational difference between protection afforded by Articles 31-A and 31-C on one hand and Article 31-B on the other.

Each of the articles has independent protective potential. Articles 31-A and 31-C operate by their own force upon legislation of the type mentioned in those articles and satisfying the conditions of those articles render attacks emanating from inroads upon Articles 14, 19 and 31 as unavailable. By law either of the State or Union satisfying the conditions of Articles 31-A and 31-C immunity is made implicit in these regards without there being any need or necessity and evoke the constituent power under Article 368 of the Constitution. However, when that power is exercised by Parliament amending Ninth Schedule and the law made is placed there, Article 31-B springs into action to offer total protection and immunity to such law from any challenge whatsoever under Part III of the Constitution. Effects of these independent provisions have to be independently observed and applied. (Para 188)

(Q) Maharashtra Agricultural Lands (Ceiling on Holdings) Act (27 of 1961), Section 3 (1) — Word "person" — Meaning.

The word "person" refers to individual person and not to "the family" as a person. There may however be other juristic persons contemplated by the Act. This is clear because of the provisions of sub-section (2) of Section 3. (Para 195)

(R) Maharashtra Agricultural Lands (Ceiling on Holdings) Act (27 of 1961), Sections 3 and 4 — Validity.

There exists a clear rationale underlining the scheme of both Sections 3 and 4 and no exception can be taken that there is any unfairness introduced affecting concepts of any personal law. Having determined entitlement as far as extent of land is concerned, personal law is free to operate and determine rights of persons under it. (Para 196)

(S) Maharashtra Agricultural Lands (Ceiling on Holdings) Act (27 of 1961), Sections 2 (5) and 5 — Uniform fixation of Ceiling area — There is no vice in such fixation. (Para 201)

(T) Maharashtra Agricultural Lands (Ceiling on Holdings) Act (27 of 1961), Sections 2-A and 44-A — Validity — There is no excessive delegation nor abdication of legislative power — Constitution of India, Article 245.

(Paras 207, 208)

(U) Maharashtra Agricultural Lands (Ceiling on Holdings) Act (27 of 1961), Section 44-B, Proviso — Interpretation of.

Pleaders by themselves are the class of authorised agents and that particular professional is subjected to prohibition. Proviso, however, makes it clear that in a case of disabled persons the authorised agent who may include even a professional would be able to represent the interest of the minor or lunatic or any other person under disability.

(Para 213)

(V) Maharashtra Agricultural Lands (Ceiling on Holdings) Act (27 of 1961), Section 44-B — Validity — Merely because Lawyer is not permitted, the provision cannot be stamped as violating natural justice. (Paras 215, 216)

(W) Maharashtra Agricultural Lands (Ceiling on Holdings) Act (27 of 1961), Section 44-B — Applicability.

The operation of Section 44-B is prospective and restricted to the Act which is amended by Amending Acts Nos. 21 of 1975, 47 of 1975 and 2 of 1976. To the proceedings pending when those Acts came into force obviously Section 44-B would not be applicable and prohibition against "Pleader" would not be available therein. (Para 220)

(X) Maharashtra Agricultural Lands (Ceiling on Holdings) Act (27 of 1961), Section 13 (3) — Validity.

Forfeiture as penalty after full hearing in the very nature of things cannot be questioned as unjust. To lay down

the penalties and its scheme by themselves are the matters within the legislative competence. (Para 225)

(Y) Maharashtra Agricultural Lands (Ceiling on Holdings) Act (27 of 1961), Section 17 (1) (as amended) — Validity — Provision cannot in any manner be said to be unreasonable. (Para 227)

(Z) Maharashtra Agricultural Lands (Ceiling on Holdings) Act (27 of 1961), Section 21-A (1) — Validity.

It is not correct to say that the provisions are confiscatory, unjust and may put premium on the omission of the authorities under the Act to take possession of the land and subject the innocent holders to the pecuniary liability to pay compensation or damages. This provision cannot in any manner be treated as unconnected or unconcerned with agrarian reforms or the main object of the statute. (Paras 229 and 230)

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	L. Mohta, R. B. Pendharkar, V. R. Manohar,	
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	B. P. Jaiswal, M. S. Choudhari, C. P.	
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	Y. S. Dharmadhikari, Advocate, Madh.	
AIR 1964 SC 1515 = (1964) 7 SCR 82	Pradesh with Miss Kantirao and B. N.	
	Mohta, for Petitioners; R. W. Adik, Advocate-General,	
AIR 1962 SC 723 = 1962 Supp 1 SCR 829	with M. M. Qazi and Naik,	
	A. G. P., for the State.	
AIR 1962 SC 1406 = (1963) 1 SCR 491		
AIR 1961 SC 21 = (1961) 1 SCR 191	MASODKAR, J.:— These 2661 cases	
AIR 1961 SC 232 = (1961) 1 SCR 809	have clogged the Court's corridors for	
	considerable time, challenging the provisions	
AIR 1960 SC 1080 = (1960) 3 SCR 887	of the Maharashtra Agricultural	
	Lands (Ceiling on Holdings) Act, 1961	
AIR 1960 Madh Pra 20 = 1960 Jab LJ 388	(Act No. 27 of 1961) as amended by the	
	Maharashtra Agricultural Lands (Lowering	
AIR 1959 SC 452 = 1958 SCR 1355	of Ceiling on Holdings) and (Amendment)	
AIR 1959 SC 1002 = 1959 Supp (2) SCR 601	Act, 1972 (Act No. 21 of 1975)	
	Maharashtra Agricultural Lands (Lowering	
AIR 1958 SC 468 = 1958 SCR 1422	of Ceiling on Holdings) (Amendment)	
AIR 1958 SC 731 = 1959 SCR 629	Amendment Act, 1975 (Act No. 47 of 1975)	
AIR 1958 Bom 68 = 1958 Cri LJ 161 (FB)	and the Maharashtra Agricultural Lands	
	(Ceiling on Holdings) (Amendment) Act,	
AIR 1957 SC 699 = 1957 SCR 874	1975 (Act No. 2 of 1976).	
AIR 1955 SC 23 = (1955) 1 SCR 752	2. The petitioners raised almost	
AIR 1955 SC 47 = (1955) 1 SCR 691	common questions and the petitions can	
	be decided by an order indicating separate	
AIR 1955 SC 367 = (1955) 1 SCR 1234	points urged in support of different	
	petitioners' claims. It is assumed and not	
AIR 1954 SC 282 = 1954 SCR 1005	disputed that the petitioner in each	
AIR 1954 SC 314 = 1954 SCR 1117	petition is aggrieved by the provisions of	
AIR 1954 SC 388 = 1954 SCR 1055	the Maharashtra Agricultural Lands	
AIR 1954 SC 545 = (1955) 1 SCR 448	(Ceiling on Holdings) Act, 1961 (Act No. 27	
	of 1961) as amended and in issue,	

3. At the outset it must be stated that in Special Civil Application No. 49 of 1976, decided by this Court on 22nd and 24th of June 1976 (Madanlal Rupchand Jethalia v. State of Maharashtra), the same said enactments were found to be valid. However, the contention, as we will indicate hereinafter, advanced on behalf of the petitioners at considerable length, is that that decision has not been rendered correctly and there is an obvious possibility of the contrary view on the matter and therefore the matter requires reconsideration. It has also been urged that some of the grounds raised by these petitioners were not raised nor are decided by that decision.

4. We thought it just and reasonable to give full hearing to the petitioners looking to the fact that from the eight districts of Vidarbha more than two thousand land-holders feel themselves aggrieved by the legislative enactment regarding the lowering of ceiling on holdings of agricultural land. Prima facie under the new process contemplated by law they are aggrieved. Indeed in the economic structure of the agrarian society in this country love for land haunts the life of men and sometimes tends to become oppressive means of aggrandisement. Though objectivai premises of the present Act are meant to secure egalitarian economics in the field of agriculture by pre-empting regulatory limits on holdings and further providing for equitable distribution of surplus land to landless, here before us is a mass of men complaining that its terms are unjust, unfair, unreasonable and above all unauthorised by the constitutional contemplation. Judicial scrutiny of such measures is the part of social engineering in a democratic set-up that adds vitality to the rule of law and acts as a balm to the rancouring and brooding sense of injustice.

5. We must observe at the threshold that once the co-ordinate Bench of this Court finds on a point and upholds the validity of the enactment, the issue as far as this Court is concerned clearly stands adjudicated. Unless the petitioners succeed in making out a case that the said judgment requires reconsideration and persuade us to take contrary view, the matter is not open as we are bound by the same.

6. The impugned Acts Nos. 21 and 47 of 1975 and Act No. 2 of 1976 are the Amending Acts to the original Maharashtra Agricultural Lands (Ceiling on Holdings) Act (Act No. 27 of 1961). All these

enactments have been put in the Ninth Schedule to the Constitution of India by the Constitution (Fortieth Amendment) Act, 1976. The original Act as amended from time to time was also put under the protection of the said Schedule by Constitution (Seventeenth Amendment) Act, 1964, followed by Constitution (Thirty-Ninth Amendment) Act, so as to cover the entire body of the Acts along with the Amending Acts. The purpose of these enactments is the agrarian reforms by providing for ceiling on the holdings of agricultural lands and further providing for finding surplus agricultural land and its acquisition for equitable distribution thereof. By Maharashtra Act No. 27 of 1970, in the preamble of the original Act further declaration as to its purpose was provided by the statement that the Act is a measure to provide that the lands taken over from undertakings and the integrity of which is maintained in compact blocks for ensuring the full and efficient use of the land for agriculture and its efficient management through Corporations, including a Company owned or controlled by the State, be granted to such Corporations or Company; and for matters connected with those purposes were also stated to be the part of objectivai statement in the preamble.

7. Under the Constitution the supportive Legislative entries for all these are in List II of Seventh Schedule at Item 14 regarding agriculture, Item 18 regarding land and in List III at Item 42 regarding acquisition and requisitioning of property. Those entries read with Article 245 of the Constitution permit the State Legislature to enact laws regarding land and rights in or over land as well transfer and alienation of agricultural land. Further it enables the State to make laws regarding the acquisition and requisitioning of immovable property like land. In pith and substance, these laws emanate from the powerspring of these entries.

8. In State of Maharashtra v. Madhavrao Damodar Patil, (AIR 1968 SC 1395), original Act as amended by Maharashtra Act No. 13 of 1962 was found to be protected after its insertion in Ninth schedule because of Article 31-B of the Constitution. The question of amending Acts Nos. 16 and 33, 37 of 1969 and 27 of 1970, amending the original Act was eventually decided by the Supreme Court in Godavari Sugar Mills v. S. B. Kamble, (AIR 1975 SC 1193), the same being protected by reason of Article 31-A of the

Constitution. Similarly this Court in *Wasudeo v. State*, (AIR 1976 Bom 94) negatived the challenge to some of the provisions of the original Act on the basis of Articles 14, 19 (1) (f) and 25 of the Constitution because the same had the protection of the Constitutional umbrella erected by Article 31-B of the Constitution.

9. Act No. 21 of 1975 by Section 2 makes a Constitutional statement to the effect that the Act was enacted "for giving effect to the policy of the State towards securing the principles specified in clause (b) and clause (c) of Article 39 of the Constitution of India, and in particular, but without prejudice to the generality of the foregoing declaration, for providing that the ownership and control of the agricultural resources of the community, are so distributed as best to subserve the common good, and also that the operation of the agricultural economic system does not result in the concentration of wealth and means of agricultural production to the common detriment". Thus by its terms it erects a statutory shield under Article 31-C of the Constitution.

10. We may now proceed to indicate the spread of the petitions at this stage and now we propose to deal with the same.

11. There are petitions which question the validity of the whole enactment as well certain specific provisions of the Act itself. Mainly the validity of the enactment is questioned on the ground that these enactments infringe the constitutional injunction with regard to the property and the rights declared and guaranteed in favour of the landholders. Constitutional challenge is a four-fold one. Firstly, it seeks to assert incompetency of the Legislature arising either because law is not made in accordance with the terms of Article 31-A and/or Article 31-C or because it is made contrary to the declared guarantee of Article 301 of the Constitution. Secondly, it is the rampart raised on the base of basic structure of the Constitution. It is said that Article 359 (1-A), Article 31-B or Ninth Schedule cannot protect State Legislation if it affects basic structure doctrine and robs the constitutional premise of this vitality. Thirdly, constitutional incompetency of the Legislature is put in issue because it is submitted that certain provisions run riot beyond the geographical jurisdiction, power and limit of the State Legislature and the doctrine in-

herent in Seventh Schedule that the writ of laws can run effectively within the boundaries of the State, has been infringed. The challenge proceeds to assert that some of the provisions of this law infringe the federal principles of the State autonomy and in fact is a legislation that is made against the doctrine of territorial limits. Fourthly, certain provisions to which reference would be made in the judgment are said to be artificial, unreasonable, unworkable and alien to the object of agrarian reforms contemplated by the law and as such are in fact and in substance made in colourable exercise of legislative power. It is submitted that these provisions be struck down as invalidly enacted.

12. The second group of petitions which have been filed and admitted or are put before us upon the orders of the Single Bench further question the validity of the orders made under the Act by the Maharashtra Revenue Tribunal confirming the orders of the Surplus Land Determination Tribunals as those petitions have been filed after the petitioners were subjected to the process of the present law.

13. The third group of petitions are at the stage of admissions and they have also been put along with these petitions, for, they substantially are covered by either of the group noted above. We have heard the counsel even appearing in those petitions.

14. The fourth group of petitions cover the same said ground but have been filed after the Surplus Land Determination Tribunals made the orders and without filing the appeal as provided for by the Act.

15. We propose to deal with all these cases in the manner hereinbelow indicated and these groups will stand decided by the eventual directions given at the conclusion of the judgment.

16. We would begin by alluding to the well-settled rules of interpretation relevant for the purpose of these petitions upon the debate addressed by the learned Advocates before us on both sides.

17. First and foremost principle is that once a law is made by the competent Legislature, it has to be approached with the presumption that it is constitutionally valid and every doubt has to be resolved so as to uphold its validity. (See *Madhubhai v. Union of India*, (AIR 1961 SC 21) and *V. M. Syed Mahammad and Company v. State of Andhra*, (AIR 1954 SC 314)). The second equally available

principle is that by interpretation the law cannot be rendered invalid and if there are two interpretations equally possible, one that tends to uphold its validity has to be preferred: [See: In re Hindu Women's Right to Property Act, (AIR 1941 FC 72), State of Bombay v. R. M. D. Chamarbaugwala, (1957 SCR 874) = (AIR 1957 SC 699); Jagdish Pandey v. Chancellor, Bihar, (AIR 1968 SC 353); Jothi Timber Mart v. Calicut Municipality, (AIR 1970 SC 264) and State of M. P. v. D. N. C. P. Hill Colliery Co., (AIR 1972 SC 614)].

18. The third vital principle is that we will not be asked to embark upon the task of considering the constitutionality of a law unless the person before us is affected by the same; nor it will be right for this Court to decide the larger questions than deemed necessary by the issue raised in any given petition. [See: Hans Muller v. Superintendent, Presidency Jail, Calcutta, (AIR 1955 SC 367) and Suraj Mall v. A. V. Vishwanatha Shastri, (AIR 1954 SC 545)]. We must with this make it clear that Court cannot be asked to sit in judgment over the wisdom of the Legislature merely upon the premises of justice or injustice flowing from the law questioned. There cannot possibly be any appeal to us on such count once we find law is made with competence and is valid.

19. Keeping in view these basic principles, we propose to deal with the matters raised severally by the learned counsel in support of the petitions. Here we heard several learned submissions advanced by the counsel appearing in support of the petitions and we propose hereinafter to summarise the submissions of all the learned counsel. It may be stated that Mr. R. M. Hajarnavis and Mr. Dharmadhikari, Y. S. learned counsel appearing for the petitioners, mainly argued the matter in various aspects thereof. The other learned counsel M/s. S. N. Kherdekar, J. N. Chandurkar, B. R. Mandlekar, R. N. Deshpande, V. Mohta and L. Mohta, Pendharkar, V. R. Padhye, V. S. Sohoni, R. M. Johrapurkar, B. P. Jaiswal, M. S. Choudhari, C. P. Kalele, S. V. Naik, M. Q. Qazi, S. G. Deshpande, D. K. Khamborkar, V. D. Deshmukh, C. G. Madkholkar and Y. S. Athale either supported the submissions so raised or raised their independent points which will be indicated in the summary of the submissions which we propose to make. At this stage it may be mentioned that Mr. Mandlekar has also moved an application

for sending the case to the Full Bench. That aspect of the matter will also be considered at the appropriate stage. The learned counsel addressed us at considerable length and in their respective petitions with considerable industry tried to demonstrate the effect of the present law on the rights of the petitioners.

20. As the case involved the question of challenge to constitutional amendments, notice was issued to Attorney-General of India in some of the petitions and the learned Advocate-General of the State of Maharashtra Mr. R. W. Adik appeared and addressed us on these matters. In his terse, pithy and profound submissions, the learned Advocate-General countered the several contentions raised in this petition, to which we will make a reference as we proceed to deal with the respective issues involved.

21. The substance of these submissions is that the Maharashtra Act No. 21 and Act No. 47 of 1975 under challenge do not firstly satisfy the requirements of agrarian reforms. Even if these enactments may be treated to be the statutes regarding the agrarian reform, they do not satisfy the test of the second proviso to Article 31-A of the Constitution. Article 31-A of the Constitution protects the laws relating to agrarian reforms from challenges based on Articles 14, 19 and 31 of the Constitution and it is urged is a fetter on the legislative power as contemplated by Article 245 of the Constitution. It is submitted with considerable conviction that legislative power with regard to laws regarding agrarian reforms in this country not only flows from Article 245 of the Constitution, but it is expressly subjected to the stipulations of Article 31-A and the law in its present shape and reach cannot be saved even if protected by Article 31-B unless it is consistent with the second proviso appended to Article 31-A. Only because the law is placed in Ninth Schedule and offered the constitutional protection, the requirements of Article 31-A which are legislative in scope and operate upon the Legislature's competence do not cease to be the part of the Constitution. About the earlier decision of this Court in Madanlal Rupchand's case (S. C. A. No. 49 of 1976, D/- 24-6-1976) (Bom) (supra) it is submitted that the ratio of that judgment treating that the proviso created a negative fundamental right is against the plain reading of Article 31-A which is a fetter on legislative power. Reliance is placed on the decisions of the Supreme Court in

Sudararamier and Co. v. State of A. P., (AIR 1958 SC 468, at para 42). Jeejeebhoy v. Assistant Collector, (AIR 1965 SC 1096 at para 7), State of Bihar v. Kameswar Singh, (AIR 1952 SC 252) and Kesavananda Bharati v. State of Kerala, (AIR 1973 SC 1461).

22. In this aspect of the matter it is further urged that the provisions of Section 4 of the Act, now amended enacting the concept of 'family unit' and its premises are contrary to the second proviso to Article 31-A. The term 'person' in that proviso is referable to natural or juristic person and it was impermissible for the legislature to first constitute a unit of such person and then to prescribe ceiling. Family unit not being a person and being an artificial concept, it is urged, does not satisfy the test of the second proviso. Reliance is placed on the Full Bench decision of Punjab and Haryana High Court in Sucha Singh Bajwa v. The State of Punjab, (AIR 1974 Punj and Har 162) followed in Saroj Kumari v. State of Haryana, (AIR 1975 Punj and Har 353). Section 4 is further attacked on the ground that it is arbitrary, colourable legislation providing for clubbing of persons together and is really a colourable device, confiscatory in character. Reliance is placed on Kshetra Mohan v. E. P. T. Commissioner, (AIR 1953 SC 516); K. Kunhikoman v. State of Kerala, (AIR 1962 SC 723); A. P. Krishnaswami v. State of Madras, (AIR 1964 SC 1515) and Gowli Buddanna v. Commissioner of Income-tax, Mysore, (AIR 1966 SC 1523) and the decision of this Court in Baburao v. State of Maharashtra, (1974 Mah LJ 385) to submit that 'family unit' as contemplated by this law is entirely artificial and is fraught with discriminatory results as indicated in the scheme of the impugned Acts.

23. The ratio of Venkatrao v. State of A. P., (AIR 1975 AP 315) (FB) and Bhaskar v. State of Karnataka, (AIR 1975 Karnataka 55) is being distinguished on the basis that the case in Inder Singh v. State of Punjab, (AIR 1967 SC 1776) has not been correctly applied by those Courts. 'Family unit' according to the submissions cannot be treated as a legal entity nor is a natural person. It is merely a device to club the property of the minors and unmarried daughters and eventually deprives them of the same. The results are invidious, discriminatory.

24. Section 4 read with the provisions of Sections 8, 9, 10, 11, 12, 13, 16, 17,

23 and 43-A of the Act works out unjust, discriminatory vague and hard results. Pertinent attention was drawn to the provisions of Section 4 (2) which operate upon the declarations of dissolutions of marriages made by the Court after September 26, 1970, which are directed to be ignored for the purposes of determination of the ceiling area to be held by the family unit. It is, indeed, submitted that the unreasonableness and irrelevant character of the concept of family unit is writ large and the counsel complains that the device is apparently to club the strangers though they had ceased to be bound by the marriage or family tie and thus is incompetently resorted to. It is urged that the grouping of minors and women in this unknown and unreasonable unit offends the known family group as well as in its working under the Act results are reached quite contrary to the contemplation of Article 15 (3), Article 14 as well Article 31-A of the Constitution. The natural event of a person being major or person being married is sought to be operative in favour of constituting discriminatory approach with regard to the rights of minor and unmarried females. It is also urged that the concept cannot be sustained even by declaration upon the Act No. 21 of 1975 that this is a measure answering the requirements of Article 31-C of the Constitution.

25. Mr. Kherdekar, one of the learned counsel argued that Article 31-B inserted by the Constitution (First Amendment) Act, 1951, itself is invalid. He similarly questions the validity of the Constitution (Fortieth Amendment) Act, 1976, by which the Acts in issue have been placed in the Ninth Schedule of the Constitution. Both these attacks on the constitutional amendments are based on the principles available on the BASIC STRUCTURE i.e., Kesavananda Bharati's case (supra). The submission is that Article 31-B itself is a device which can rob off the total basic structure of the Constitution. It is fraught with disastrous consequences. Some of the learned counsel submitted that Article 31-B is totally limited in scope and reach and it does not cure the defect of the Legislative incompetency. That matter arose because of the provisions contained in Part III of the Constitution. At the most the constitutional umbrella of Article 31-B would protect the laws from the challenges based on fundamental rights as contained in Part III. If each and every provision of Part III is intended, the argument pro-

ceeds, the vice in making of Article 31-B is implicit and on the face of it cannot be said to be a provision made competently by resort to the power under Article 368 of the Constitution. It is urged that in the basic structure, equality of status has now been recognised to be the part of the basic constitutional principles. Equality, therefore, is referable to the premises of Article 14. The citizen or the person cannot effectively enjoy the premises of equality or premises of equal status without the adjunct of property. It is submitted therefore on the strength of the decision available in the election case i.e., *Smt. Indira Nehru Gandhi v. Rajnarayan*, (AIR 1975 SC 2299), that though the law purports to affect the right in property, in effect it is open to question on the ground that it affects the equality principle under the Constitution. Invocation to Article 31-B would not validate the defect on that count. Judicial review is yet available to test the premises of the law on the basis as to whether it satisfies the equal protection as well equality of status contemplated by the basic principles of constitutional theory.

26. Thus in the first part of the submission of the learned counsel there is challenge to the Constitution (First Amendment) Act, 1951 inserting Article 31-B. There is further challenge to the Constitution (Fortieth Amendment) Act putting the present statutes in the Ninth Schedule. Similarly Mr. Dharmadhikari questions the validity of the Constitution (Thirty-eighth Amendment) Act, inserting clause (1-A) to Article 359 of the Constitution, on the same said ground that it affects the basic structure of the Constitution. The point regarding Art. 359 (1-A) of the Constitution is raised because of facts available on record, which may be briefly stated at this stage so as to avoid further repetition.

27. As we stated the original Act, till the stage of several amendments (has affected) by Acts Nos. 16/68, 33/68, 37/69 and 27/70 were found to be protected by Article 31-A as well because of its inclusion by Article 31-B in Ninth Schedule; (See *Godavari Sugar Mills v. S. B. Kamble*, AIR 1975 SC 1193 and *State of Maharashtra v. Madhavrao Damodar Patil*, AIR 1968 SC 1395). Under the original Act, there is no challenge available under Articles 14, 19 and 31 of the Constitution and on the basis of any other fundamental right. The challenge on the

ground of Article 25 i.e., the original Act affected the religious freedom has been negatived by this Court because of the constitutional umbrella erected by Article 31-B; (See *Wasudeo v. State*, AIR 1976 Bom 94).

28. The present Amendment Acts i.e., 21/75 which has substituted amended Chapters II and III for the original Chapters in the principal Act is followed by further amendment to the Amending Act by Act No. 47 of 1975 and there is further Amendment Act being Mh. A. No. 2 of 1976. When these Acts were made, the Presidential order of June 25, 1975 made a proclamation of emergency under Article 352 (1) of the Constitution. On June 27, 1975, the President of India further made order with reference to clause (1) of Article 359 declaring the right of any person to move any Court under Articles 14, 21 and 22 of the Constitution and all proceedings to remain suspended for the period of emergency declared under Article 352 (1) of the Constitution. That order was in addition to the earlier orders made under Article 359 (1) of the Constitution. Constitution (Thirty-Eighth) Amendment Act, 1975, amended Article 352 as well as Article 359 by adding to the former, clauses (4) and (5) and to the latter clause (1-A). That was published in the Gazette on August 1, 1975. The present enactments were put into effect on September 19, 1975 as far as Act No. 21 of 1975 is concerned, on September 20, 1975 as far as Act No. 47 of 1975 is concerned and on January 3, 1976 as far as Act No. 2 of 1976 is concerned, i.e., after the Presidential Order of June 27, 1975.

29. Faced with these facts, it is submitted that the insertion of Cl. (1-A) in Article 359, by Section 7 of the Constitution (Thirty-Eighth Amendment) Act, 1975, cannot have the effect of suspending the basic structure and basic principles of the Constitution. Challenge to laws that affect the basic structure of the Constitution should be treated to be alive. The concept of basic principle cannot be controlled by the state of emergency or by any other declaration made by the President who himself is the creation of the Constitution and the orders made by such office under the Constitution cannot eclipse the challenges based on the basic features of the constitutional statute. If the effect of insertion of clause (1-A) is to affect that basic principle or structure, it is urged that the Constitution (Thirty-Eighth Amendment) Act, 1975, which in-

serted the said clause by Section 7 has been incompetently made.

30. The newly added Article according to the submission operates upon the enforcement of the remedy and affects the basic rights as contained in Part III of the Constitution. That is not a measure to give immunity. Therefore, it is urged that declaratory reliefs that certain laws have been incompetently made because of the fetters operative upon the legislative powers as contemplated by Part III of the Constitution can still be made by the Courts possessing original jurisdiction. To the extent of such a declaration the scrutiny of the law is effectively permissible in spite of the Presidential Order and in spite of Article 359 (1). In fact, Clause (1-A) is a colourable device and the argument proceeds, therefore, to assert that the basic rights including the one of judicial review as contemplated by Art. 32 and Article 226 of the Constitution are affected and, therefore, such a provision cannot stand in the way of the petitioners in seeking the redress against the law that affects obviously his right to hold property and maintain equality of status. After all, the ratio of the Election Case is that equality is the basic principle fundamental to the Constitutional Law, the Presidential Order putting enforcement of Article 14 in eclipse because of the power conferred by Article 359 (1-A) is itself bad. Mr. Dharmadhikari proceeds to classify the laws as being Ordinary Law and the Constitutional Law, the latter being the Constitutional Amendment laws. According to the learned counsel, the principle of constitutional law permits that the constitutional law must satisfy the test of the principles of the basic structure or framework of the Constitution. The law placed in the Ninth Schedule partakes in the nature of the Constitutional Law, because that requires exercise of power for effecting amendment to the Constitution. Therefore, on the principles of basic structure or basic framework of the Constitution, the law will have to be tested. The argument proceeds, such laws though put in the Constitutional umbrella of Article 31-B must be examined and should satisfy the requirements of basic structure or basic framework or basic principle of the Constitution. If, on the scrutiny the laws affect those principles, the Courts are not incompetent to declare them to be void. According to the learned counsel, thus the scrutiny on the basis of Articles 14, 15, 19 (d) (e) and (f) and Article 39 (a)

and (f) to test the validity of the laws in issue is a scrutiny to find the basic constitutional structure and not a scrutiny shut out by the Presidential Order. The argument is that under the constitutional premise, there is an injunction to protect the weaker sections of the society, particularly women and minors. That obligation must be treated as fundamental and basic to the constitutional framework and cannot be violative and the challenge cannot be defeated by merely placing the Act in Ninth Schedule. So is the argument based on equality of status and equal protection of laws though with regard to property. It is indeed contended that if democratic set-up is basic concept, then equality before law is equally basic being the part of democratic set up. That principle is affected clearly by the provisions in issue. Article 31-B is a frail device to protect such laws.

31. As to the directive principles under Article 39 (b) and (c) and Article 31-C, the learned counsel submits that upon the closer scrutiny it will appear that the requirements of Article 39 (b) and (c) are not satisfied. Similar is the position with regard to the Article 31-A of the Constitution.

32. One of the learned counsel appearing in group of petitions raised the question at the foot of Article 301 of the Constitution. It is urged that this law affects the freedom of trade and commerce being the agriculture. According to Mr. Mohota, in various manners this freedom has been barricaded and in fact the law is so unreasonable that after it was so enforced, the matters of equality, price, local conditions of the land etc., all have been swept away and the rights to property have been shrunk to such a low that in a given case it amounts to total confiscation and snatch of any further agriculture. The law being extra-territorial it is urged, the movement of trade on agriculture and/or of commerce, agricultural produce is patently affected. Reliance is placed on *Atiabari Tea Co. v. State of Assam*, (AIR 1961 SC 232), *Automobile Transport Co. v. State of Rajasthan*, (AIR 1962 SC 1406) and the *District Collector Hyderabad v. Ibrahim and Co.*, (AIR 1970 SC 1275).

33. Coming to the law once again the submissions are that the premises of the present laws do not in fact relate to agrarian reforms. The classification of land is fraught with inequality and is totally colourable if it is compared with the earlier scheme of the laws on the

same said principle. It is urged that the provisions of Sections 12, 13 (3), 16, 17, 21-A and 27 are bad being vague, indefinite and unworkable as well having no rational basis. It is submitted that in Indian Society family is not merely a social unit but a religious concept governed by several laws and differing religions. There are laws regarding succession, inheritance and the principles with regard to the appropriation of property which have religious sanction. All that concept is shaken up by the premises of the present law and the religious freedom is seriously affected by the unreasonable and artificial units and grouping of their rights together. The provisions of Sections 2 (a) and 44-A regarding the constitution of Tribunals have been put in issue on the ground that essential legislative function has been abdicated and the vice is of excessive delegation. The very concept of constituting such Tribunal affects the principles of basic adjudication of the property rights. There being no qualifications laid down for the appointment of the members of the Tribunals the Legislature has left it to the sweet fiat of the executive to constitute the Tribunals who have been given immense powers over the property and working of the rights under the Act. This is more so because of the enactment of Section 44-B which prohibits Pleaders from being engaged in proceedings. The provisions of Section 44-B are challenged because it is said that they violate the basic concept of natural justice and there is no reasonable ground to exclude the pleaders who can effectively represent the interest of the person who may face the penalty before the Tribunal and who may not be able to guard his own interest. The requirements of Section 12, Sections 13, 17 and other penal provisions were pressed in aid to point out the obligations of the proceeding. It is urged that the provision on the face of it is colourable in nature and deprives the party from being given any hearing whatsoever, though the consequences of the proceedings are serious in that he loses the property or faces the penalty. It is however urged that certain provisions of the Act which permit retrospective operation are arbitrary and have no reasonable nexus whatsoever. It was stated for the State that 26th September, 1970, was the date when the Chief Ministers' Conference met in Delhi to review the provisions regarding ceiling to evolve a national policy in that regard and that date is given for the purposes of prospec-

tive operation. An affidavit is put in in some of the petitions to say that they were not aware of any such conference nor had any knowledge from any source about the said conference.

34. One more point which according to the petitioners goes to the root of the matter is raised because of the two Acts. Act No. 21 of 1975, which is an amending Act and which was made operative on 19th of September, 1975, is said to have become the part of the original Act on 19th September, 1975, because it was put into effect on that date. The other Act No. 47 of 1975, which is styled as the Maharashtra Agricultural Lands (Lowering of Ceiling on Holdings) and (Amendment) Amendment Act, 1975, was brought into force on 20th of September, 1975. The argument is that because the earlier Act was put into effect on 19th it became the part of the original Act and nothing survived as Amendment Act, 1975. Therefore, Act No. 47 of 1975 would not operate upon any other Act. Reliance is placed on *Shyamrao Parulekar v. D. M. Thana*, (AIR 1952 SC 324) to point out the effect of the amendment. Mr. Hajarnavis who raised this point with considerable conviction argues that Act No. 47 of 1975 is a stillborn law. In effect it brought about the results which drastically change even the ceiling areas. He relied upon the changes made by Act No. 47 of 1975 with regard to the area of land to be retained by the person or family unit and the class of land to submit that this law cannot operate because there is no Act No. 21/75 available for the purposes of further amendment. It is, therefore, said that at any rate Act No. 47 of 1975 should be adjudged to be a bad piece of legislation.

35. Two questions were raised, one by Mr. Kherdekar with regard to Section 4 (2) of the Act regarding the dissolution of marriage and their statutory effacement from an anterior date 26-9-1970 and another by Mr. Athaley regarding whether the Hindu idol is a person within the meaning of the Act so as to be able to hold property till the ceiling limit. We make it clear at the very outset that we are not called upon to enquire into the validity of the provisions of Section 4 (2), for, before us there is no case where the marriage is being ignored at the foot of Section 4 (2). The question for all purposes is left open. As far as the question raised by Mr. Athaley is concerned, we had already made clear when he argued the matter that it merely raises a question of interpretation and

application of the law which can be appropriately considered by the authorities under the Act first or any other remedy available to the petitioners in that regard. That question is also being left open.

36. Then is the question regarding the extra-territorial operation of the provisions of Sections 3 (1), 3 (2) and Section 4 along with Sections 8, 9, 10, 11, 12, 16, 17, 18, 21, 23, 43-A as well as 47. Some of these sections create penalties, while some direct ignoring transfers and other devices and operate retrospectively for that purpose. The submission is that on the face of the scheme of these sections, there is clear extra-territorial operation both with regard to the subject as well with regard to the liability. It is urged that for making such laws the Maharashtra Legislature is incompetent. It can only enact laws which will be operative in its own territorial jurisdiction. It is further submitted that there is no territorial nexus sufficient or real which will permit such a legislation. According to the submission, the nexus has to be arrived at by the legislative relations with regard to the object, thing or activity about which the law is made. Reliance is placed on the Full Bench decision of this Court reported in *State v. Narayandas*, (AIR 1958 Bom 68), *Wallace Bros. and Co. Ltd. v. Commissioner of Income-tax*, (AIR 1948 PC 118), *State of Bombay v. R. M. D. Chamarbaugwala*, (AIR 1957 SC 699), *Tata Iron and Steel Co. Ltd. v. State of Bihar*, (1958 SCR 1355) = (AIR 1959 SC 452), *State of Bihar v. Sm. Charusila Dasi*, (AIR 1959 SC 1002), *Kochuni v. States of Madras and Kerala*, (AIR 1960 SC 1080). It is urged that the view taken in *Madanlal Rupchand's* case of the Division Bench is clearly unsustainable with regard to the extra-territorial operation as well as with regard to the nexus on which the law operates.

37. As the questions are raised regarding the constitutional amendments questioning the validity of the Constitution (First Amendment) Act, 1951 enacting Article 31-B questioning validity of the Constitution (Thirty-Eighth Amendment) Act inserting Clause (1-A) to Article 359 and questioning the validity of the Constitution (Fortieth Amendment) Act, 1975, and as is the duty of the Court when such questions are raised to decide the same, we begin by observing what we feel to be the correct position according to us about the constitutional amendments.

38. The situs and the conspectus of the power to amend the Constitution is in Part XX, Article 368 thereof. By Constitution (Twenty-Fourth Amendment) Act, 1971, clause (1) was substituted and in terms Constitution now declares that "Notwithstanding anything in this Constitution, Parliament may in exercise of its constituent power amend by way of addition, variation or repeal any provision of this Constitution in accordance with the procedure laid down in this article". The width and scope of this clause is declaratory as well operational. It is made clear that Indian Parliament possesses the supreme constituent power. Except the procedure required to be followed by terms of Article 368, the operational field of that power is potentially available with regard to addition, variation or repeal of any of the provisions of the Constitution. In Constitutional theory, it must be assumed that the omnipotent sovereign power as far as Indian Constitution is concerned now vests in the Parliament which represents for all constitutional purposes the people of the country. The omnipotent sovereignty is derivative to the extent that the Indian Parliament in law and by its creative force represents the people of India. In any developed polity it is recognized principle that the ultimate sovereignty is in the people of the country from whom springs all legitimate authority of other organs. Constitution being the fundamental law for governance by its terms as available in Article 368 indicates the seat of constituent power for effecting changes in that fundamental law and further lays down the procedure therefor. By sheer logic of language and the underlying principles of the omnipotence of such sovereign constituent power, indeed it is difficult to imply limitations on the power in its operational sphere. Language of the Charter of the Constitution in this regard per force should receive broad and natural construction and narrow pedantic views based on apprehensions of the abuse, misuse of undue arrogation of such power so as to construct anomaly or unclarity has to be avoided. It would be salutary to refer to what was stated by the Privy Council in *The Queen v. Burah*, ((1878) 5 Ind App 178) (PC):

"..... The established Courts of Justice, when a question arises whether the prescribed limits have been exceeded, must of necessity determine that

question; and the only way in which they can properly do so, is by looking to the terms of the instrument by which affirmatively, the legislative powers were created, and by which, negatively, they are restricted. If what has been done is legislation, within the general scope of the affirmative words which give the power and if it violates no express condition or restriction by which that power is limited (in which category would, of course, be included any Act of the Imperial Parliament at variance with it), it is not for any Court of Justice to inquire further, or to enlarge constructively those conditions and restrictions."

The high principles so stated by the Privy Council have been applied to the interpretation and even in finding the basic structure or the basic principles in this constitutional doctrine in *Kesavananda Bharati v. State of Kerala*, (AIR 1973 SC 1461).

39. Two correct propositions emerge with regard to the exercise of the judicial scrutiny by interpretation with regard to the exercise of the constituent power from the observation which is a high law as far as the constitutional theory is concerned. Firstly, the Courts should scrutinise instrument to find out the positive terms thereof. Secondly, the Court should seek to restrict the power if there are express limitations put on the exercise of that power by the terms of the statute. The doctrine of express limitation on the power, if applied on first principles, it would be obvious that in constitutional theory upon the contents of Article 368 which is the Charter conferring constituent power, except the procedure required to be followed, no other express conditions or restrictions or limitations have been imposed or made operative. It would be legitimate to infer in the context that the width and the amplitude of Article 368 and its scope does not permit any inhibition on the exercise of the power provided it is exercised for the purposes mentioned therein.

40. In constitutional theory exercise of constituent power cannot be mixed with the procedure prescribed for that exercise of power. By laying down the procedure, the fundamental instrument does not lay down limitations on the content of such power. It is always prudent that power and procedure for its exercise should be separately understood and latter need not be confused with the former.

41. To this it must be added what is germane in the doctrine of separation of powers in a democratic State. The submissions, as were advanced before us, are always pressed in aid as if this too is operative limitation upon the concept of constituent power. In theory the separation of legislative, executive and judicial wings of Government is the product of some seminal principles of political governance which may draw upon the Charter of the Constitution. These departments or agents of State Power are the creative organs for the total governance of the country. In law it is the Government that itself functions by these three departments, each of whom have inbuilt sphere of activity. They owe their origin and source as well its existence and operation to the Constitution of the State itself. By the felt dictates of historical necessities, the charter of governance of the fundamental law makes choice of full and complete separation of powers by resort to enumerative and exhaustive declarations and devices work out lines of limitation. There is no contradiction contemplated if the Charter of the Constitution tends to permit overlapping of authority. The source of limitation therefore, of such derivative power has to be searched for and found in the express terms of the fundamental law itself and not elsewhere. By very nature of things and by the wisdom of the experience the given people may evolve a system which will not answer the theory of isolation in authority or tight separation of power. What particular polity would have for themselves as a fundamental law and what premises and what character and content would it possess are clearly the matters that form part of the political power which makes the part of the constituent power itself. The Courts erected by the constitutional premises after all are the State functionaries. They cannot, nor do possess any constitutional or political power in the sense stated here. The doctrine of scrutiny or review by Courts is limited by the express purpose of the creation of Courts. Judicial power so properly called should be understood as distinct and unconnected with the political power, the latter having contents of effectuating political measures and policy. Distinctively the constituent-power is original political authority and is best subserved by its omnipotence in any sovereign country. Any limitation by scrutiny or review by any other organ which owes its origin to the fundamental

instrument emanating from that power would lead to antilogical as well practical areas of confrontations.

42. As the High Court of the State under the Indian Constitution and having the function if question is raised to find the constituent power and its possessor in the constitutional document, we would have, left to ourselves, leaned to take the view that after the Constitution (Twenty-Fourth Amendment) Act, 1971 which in terms declared what was implicit in Article 368, the challenge raised before us was unentertainable. From the very beginning it would be impermissible exercise to admit any debate with regard to the Constitution Amendment Acts, on the basis of the wisdom or on the basis of public policy, except to the extent that the procedure for exercise of the constituent power expressly stated has not been followed or the purpose for which the power is necessarily to be exercised has not been reached. As we stated above, Article 368 by itself has laid no inbuilt express limitation and clause (2) thereof indicates procedure and by proviso requires that the law should also be ratified in the specified matters governed by sub-clauses (a) to (e) by the Legislatures of not less than one-half of the States. Further the doubt that was debated at the foot of Article 13 stands expressly resolved by clause (3) of Art. 368 in that nothing in Article 13 would apply to any amendatory law made under Article 368. Thus on plain and grammatical first reading, the exercise of the constituent power is not limited in any manner. It should be legitimate to infer from the terms of Article 368 itself that the judicial organ represented by Courts would only be entitled to see whether the constituent power has been exercised in the manner prescribed and for the purposes of the constituent power. It follows that we cannot be asked to sit in appeal over the wisdom, over the policy or over the matters of exigencies of the amendatory laws affecting changes in the Constitution.

43. All this we observe with full awareness that much debate in respect of Article 368 and in respect of the Constitution (Twenty-Fourth Amendment) Act has been raised and now holds the authority of law as far as we are concerned because of Article 141 of the Constitution. It has been accepted by the highest Court of the country that the words of Article 368 (1) still possess ambiguity and the constituent power referred to in Article 368 cannot

be equated to the constituent power which is exercised while framing the original Constitution and further that the words 'any provision' indicate an inbuilt inhibition against the exercise of the constituent power itself. Having found areas of ambiguity the limitations on the exercise of the constituent power have been judicially recognised. Though we feel that the situs and conspectus of power is totally omnipotent by the plain reading thereof, it appears to us to be a mere exercise by rendering obiter which has little value.

44. Truly the field is not virgin. Powerful criss-cross columns of powerful beams of light of thoughts have explored and searched the inter-crevices of all that this Article 368 holds out as the constituent power in favour of the Indian Parliament. We are bound to apply the law as declared by the highest court in this country because of the dictates of Article 141 of the Constitution, whatever may be our views on law in this regard. Therefore, the exercise before us eventually would be an exercise of finding ratio of the decisions of the Supreme Court and its application and not any original exercise.

45. We begin by referring to few stages of the constitutional history. In this regard what is eventually to be found out are the principles that would be effectively applied to the controversy before us. The Constitution (First Amendment) Act, which came into force on 18th June, 1951 within almost 2 years of the Constitution becoming effective inter alia enacted Article 31-A as well Article 31-B of the Constitution and was questioned before the Supreme Court in Sankari Prasad's case (AIR 1951 SC 458) and the constitutional amendment was upheld. The law on this aspect of the matter has been consistently applied on the footing that Article 13 (2) of the Constitution did not put fetters on the constituent power, till decision in Sajjan Singh's case (AIR 1965 SC 845) was rendered. In Sajjan Singh's case the Constitution (Seventeenth Amendment) Act was found to be validly enacted as the subject-matter of the Act fell within Article 368 and in Golak Nath v. State (AIR 1967 SC 1643) the ratio of Sajjan Singh's case as also of Sankari Prasad's case was put in issue and the majority of the learned Judges found that Article 13 operated as a fetter on the amendatory power with regard to the Constitution vested in Parliament, the power being the part of reser-

duary item of the legislative list given in Schedule VII with regard to the Union subjects. Thus in *Golak Nath's* case for the purposes of the constitutional theory, Article 368, as it then stood was found to be not the situs of the constituent power and it was treated to be the power referable to the Union List and the residuary Article. Consequently it being a power to make laws it was treated to be always subject to Article 13 of the Constitution. Thus *Golak Nath's* case overruled the principles on which *Sankari Prasad* and *Sajjan Singh's* cases upheld the constitutional amendment to the Indian Constitution.

46. The Parliament, therefore, passed Constitution (Twenty-Fourth) Amendment Act, 1971 which came into force on 5th November 1971. The Article to which we have made a reference was amended by that Act. Because of the direct pronouncement of the Supreme Court, that amendment was necessitated and there was eventually challenge to the Constitution (Twenty-Fourth Amendment) Act in *Kesavananda Bharati's* case which we propose to call as the BASIC STRUCTURE CASE reported in AIR 1973 SC 1461. There the Constitution (Twenty-Fourth Amendment) Act was put in issue, so also the power of the Parliament to amend the Constitution and its conspectus as operative upon the provisions of the Indian Constitution.

47. Before we understand the holdings of the BASIC STRUCTURE CASE (AIR 1973 SC 1461) as far as relevant for our purpose, because much reliance is placed on that case, we may indicate that in *Kunjukutty Sahib v. State of Kerala*, (AIR 1972 SC 2097), Kerala Land Reforms Act, 1964, i.e. as amended by Act No. 35 of 1969, was found to be invalid because it did not satisfy the requirements of Article 31-A of the Constitution. By Constitution (Twenty-Ninth Amendment) Act, which came into force on 19th of June 1972, the said Act was placed in the Ninth Schedule and put under the protection of Article 31-B. In the BASIC STRUCTURE CASE the validity of that Act was also questioned. Similarly the Constitution (Twenty-Fifth Amendment) Act enacting the original Article 31-C was also questioned in that case. As a matter of historical holding we may state that right to property on the strength of Article 31 and Article 19 (1) (f) was the subject-matter of different pronouncements leading upto the Bank Nationalisation case, *R. C. Cooper v. Union of India* (AIR

1970 SC 564) which had eventually led the Parliament to enact the Constitution (Twenty-Fifth Amendment) Act, 1971.

48. In this judgment for the sake of brevity and for the sake of indicating the topics we have already proposed to call *Kesvananda Bharati's* case (AIR 1973 SC 1461) as BASIC STRUCTURE CASE, which was eventually considered in *Smt. Indira Nehru Gandhi v. Rajnarayan* (AIR 1975 SC 2299) which we would call as ELECTION CASE. The third important case and the decision of the Supreme Court so often cited before us is that of *A. D. M. Jabalpur v. Shivkant Shukla* (AIR 1976 SC 1207) and we propose to refer to it in this judgment as LIBERTY'S CASE.

49. It must be at once observed that the BASIC STRUCTURE CASE (AIR 1973 SC 1461) overruled *Golak Nath's* case (AIR 1967 SC 1643) (supra). It accepted the Constitution (Twenty-Fourth Amendment) Act, 1971 as validly made and it further ruled that what was implicit in Article 368 from the very beginning had been made explicit by the amendment to Article 368 itself by the Parliament. This is the highest recognition of the finding of the constituent power in Article 368 itself. With regard to the Constitution (Twenty-Fifth Amendment) Act inserting the Article 31-C the BASIC STRUCTURE CASE found by majority that the later declaration appended to Article 31-C was not competently made by the Constitution Amendment Act by the Parliament. It struck down that declaration but upheld the validity of the main Article 31-C. The Constitution (Twenty-Ninth Amendment) Act, 1972 which protected the Kerala Land Reforms Act which was found to be invalid because not being in conformity with Article 31-A was entirely upheld by the majority though numerical minority Judges indicated that the question could be left open to be decided by the appropriate Constitution Bench. The learned Chief Justice Sikri in terms made a reference to that effect in the judgment rendered by him in the BASIC STRUCTURE CASE, but the majority of the learned Judges upheld the Constitution (Twenty-Ninth Amendment) Act, which afforded protection because of Art. 31-B to the two Kerala Land Reforms Amendment Acts.

50. The BASIC STRUCTURE CASE (AIR 1973 SC 1461) further ruled by majority that though Article 368 is the

situs of the constituent power in favour of the Indian Parliament it was not entirely omnipotent like the power that initially and primarily vests in the body like Constituent Assembly. Its exercise in terms found to be open to judicial scrutiny and judicial review available in the Indian Constitution, because the words of Article 368 indicated certain ambiguous results and because the Indian Parliament was merely conferred with the amendatory power which by its very nature is limited, the Court found that there was inbuilt limitation which operates upon the content of the law regarding the amendment to the Constitution. These limitations were spelt out by the learned Majority Judges of the Supreme Court which is now styled by the phrase as Basic structure or Basic framework of the Constitution. Each learned Judge enumerated illustrations of the basic structure or basic framework of the Constitution. Accordingly if the amendatory law made by recourse to Article 368 affected the basic-structure or framework of the Constitution, it would be impermissible piece of constitutional legislation.

51. The learned Majority Judges in favour of this proposition did not lay down definitively what the structure means though as stated above, illustrative lines and items are to be found in the differing judgments. As far as we are concerned, the moot question is whether Part III of the Constitution as originally enacted and which deals with the fundamental rights and lays down certain other matters is basic structure or basic framework of the Constitution not amenable to the power that vests in Parliament because of Article 368. On closer scrutiny it appears that the majority of the Judges in BASIC STRUCTURE CASE (AIR 1973 SC 1461) have not treated the entire Part III of the Constitution as basic structure so as to be a limitation on the constituent power emanating from Article 368 of the Constitution. It is needless to refer to the judgments in detail. Suffice it to say that the learned Judges including the learned Justice Ray, as he then was, Justice Palekar, Justice Mathew, Justice Beg, Justice Dwivedi and Justice Chandrachud did not render any judgment in favour of basic structure or framework of the Constitutional doctrine. Learned Judge Khanna who constituted the majority of the Judges in favour of the limited power of amendment upon basic structure or basic features doctrine has rendered a sum-

mary of his findings. In paragraph 1550 of the judgment at page 1903 of the AIR report this summary is available at points (vii) and (viii) and the learned Judge observes:

"(vii) The power of amendment under Article 368 does not include the power to abrogate the Constitution nor does it include the power to alter the basic structure or framework of the Constitution. Subject to the retention of the basic structure or framework of the Constitution, the power of amendment is plenary and includes within itself the power to amend the various articles of the Constitution, including those relating to fundamental rights as well as those which may be said to relate to essential features. No part of a fundamental right can claim immunity from amendatory process by being described as the essence or core of that right. The power of amendment would also include within itself the power to add, alter or repeal the various articles.

(viii) Right to property does not pertain to basic structure or framework of the Constitution."

Thus in the holding of the learned Judge Khanna, the power of amendment is plenary and includes within itself the power to amend the various articles of the Constitution including those relating to fundamental rights as well as those which may be said to relate to essential features. No part of a fundamental right can claim immunity from amendment by being described as essence or core of that right. This is subjected, however, to the basic structure or framework of the Constitution. The right to property according to the summary of the judgment by the learned Judge does not pertain to basic structure or framework of the Constitution.

52. Thus following the judgments delivered though we are bound by each and every judgment coming from the Highest Court, the finding of the ratio depends on the numerical strength behind the principle eventually decided by that Court. The numerical strength in our view clearly indicates that in BASIC STRUCTURE CASE (AIR 1973 SC 1461) the Supreme Court did not by majority treat the entire Part III of the Constitution as basic-structure or basic framework of the Constitution of India. As far as the right to property is concerned, there is a clear statement available from the Seventh Judge, to which we have

already made a reference and it appears to be the ratio upon the holding of the learned Seventh Judge that the right to property cannot at all be treated to be the basic structure or framework of the Constitution and that right as enacted in the Constitution original or otherwise cannot be treated to be a fetter or a limitation upon the constitutional amendatory power repositied in the Indian Parliament under Article 368 of the Constitution.

53. We now proceed to make reference to ELECTION CASE (AIR 1975 SC 2299) (supra). There the problem before the Supreme Court was raised because of the Constitution (Thirty-Ninth Amendment) Act, 1975 and the challenge was to Article 329 (A4) and (A5) inserted by that amendment. Along with those amendments it is useful at this stage to state that the Representation of the People (Amendment) Act (Act No. 58 of 1974) and Election Laws Amendment Act (Act No. 40 of 1975) which was placed under the constitutional umbrella by Art. 31-B were also questioned both on the ground of basic structure or framework of the Constitution and on other grounds including the equality at the foot of Art. 14.

54. The case undoubtedly was decided on the footing that BASIC STRUCTURE CASE (AIR 1973 SC 1461) rendered by the Supreme Court laid down the correct constitutional and binding principles to be made applicable to the controversies before the Supreme Court. However, ELECTION CASE itself raised some original and basic problems and sought solution from the Supreme Court including the problem which is being raised as to the finding that was rendered in the BASIC STRUCTURE CASE. In the judgment of the learned Chandrachud J. the ratio of the BASIC STRUCTURE CASE is tried to be summarised and the following observations in para. 664 may be quoted with advantage:

".....The ratio of the majority decision is not that some named features of the Constitution are a part of its basic structure but that the power of amendment cannot be exercised so as to damage or destroy the essential elements or the basic structure of the Constitution, whatever these expressions may comprehend. Sikri, C. J. mentions supremacy of the Constitution, Republican and Democratic form of the Government, secular character of the Constitution, separation of powers, federalism and dignity and free-

dom of the individual as essential features of the Constitution. Shelat and Grover, JJ. have added to the list two other features; the mandate to build a welfare State, unity and integrity of the Nation. Hegde and Mukherjee, JJ., added sovereign democratic republic, Parliamentary democracy and the three organs of the State form the basic structure of the Constitution. Khanna, J., held that fundamental rights are not a part of the basic structure and therefore, they can be abrogated like any other provisions. He observed that basic structure indicates the broad outlines of the Constitution and since the right to property is a matter of details, it is not a part of that structure. The democratic form of Government, the secular character of the State and possibly judicial review are according to the brother Khanna a part of the basic structure of the Constitution. It is obvious that these are merely illustrations of what constitute the basic structure and are not intended to be exhaustive. Shelat and Grover, JJ., Hegde and Mukherjee JJ., and Reddy J., say in their judgments that their list of essential features which form the basic structure of the Constitution is illustrative or incomplete. For determining whether a particular feature of the Constitution is a part of its basic structure, one has perforce to examine in each individual case the place of the particular feature in the scheme of our Constitution, its object and purpose, and the consequences of its denial on the integrity of the Constitution as a fundamental instrument of country's governance. But it is needless for the purpose of these appeals to ransack every nook and cranny of the Constitution to discover the bricks of the basic structure. Those that are enumerated in the majority judgments are massive enough to cover the requirements of Shri Shanti Bhushan's challenge

It is clear that about learned Khanna, J.'s holding in the BASIC STRUCTURE CASE learned Chandrachud J. has made a reference to the effect that Khanna J. found that the fundamental rights were not the part of the basic structure and therefore, they can be abrogated like any other provisions. Khanna J., who was also a party to the ELECTION CASE examined his own judgment rendered in the BASIC STRUCTURE CASE. In the context of the point raised regarding the fundamental rights being basic or not, the learned Judge explained his own earlier judgment and negated any inference

that he did not treat fundamental right as being basic. In this regard Khanna J. in paragraph 198, page 2349 made reference to BASIC STRUCTURE CASE and observed that in that case the majority ruled that the power of amendment of the Constitution contained in Article 368 did not permit altering the BASIC STRUCTURE of the Constitution and the Seven Judges who constituted a majority were correct that the democratic set up was part of the Constitution. In further paragraph 210 on page 2354 the learned Judge observed:

"If there is amendment of some provisions of the Constitution and the amendment deals with matters which constitute constitutional law in the normally accepted sense, the Court while deciding the question of the validity of amendment would have to find out in view of the majority opinion in Keshavananda Bharati's case (AIR 1973 SC 1461), as to whether the amendment affects the basic structure of the Constitution."

As to the holding in the BASIC STRUCTURE CASE, the learned Judge discussed the matter in paragraph 251, page 2369 and after quoting from the judgment observed:

"It would appear from the above that no distinction was made by me so far as the ambit and scope of the power of amendment is concerned between a provision relating to fundamental rights and provisions dealing with matters other than fundamental rights. The limitation inherent in the word 'amendment' according to which it is not permissible by amendment of the Constitution to change the basic structure of the Constitution was to operate equally on articles pertaining to fundamental rights as on other articles not pertaining to those rights."

After referring to the summary extracted above at point No. (vii), the learned Judge in paragraph 252 observes thus:

"It has been stated by me on page 685 of the judgment (already reproduced above) that the secular character of the State, according to which the State shall not discriminate against any citizen on the ground of religion only cannot likewise be done away with. The above observations show that the secular character of the Constitution and the rights guaranteed by Article 15 pertain to the basic structure of the Constitution. The above observations clearly militate against the contention that according to my judgment fundamental rights are not a part

of the basic structure of the Constitution, I also dealt with the matter at length to show that the right to property was not a part of the basic structure of the Constitution. This would have been wholly unnecessary if none of the fundamental rights was a part of the basic structure of the Constitution."

55. Thus in ELECTION CASE (AIR 1975 SC 2299) the learned Judge Khanna explained his earlier holding in the BASIC STRUCTURE CASE (AIR 1973 SC 1461) by saying that the fundamental right under Article 15 and the concept of secularism formed the basic structure of the Constitution but at the same time clarified that the right to property was not in his view the basic structure or framework of the Constitution.

56. What was stated in ELECTION CASE (AIR 1975 SC 2299) by Chandrachud J. further may be summarised here so as to clearly understand what these two cases indicate as ratio relevant for the present premises and debated before us. The learned Chandrachud J. in paragraph 665 of the judgment after quoting the ratio of the BASIC STRUCTURE CASE (AIR 1973 SC 1461) in paragraph 664 (cit. sup.) observed:

"..... I consider it beyond the pale of reasonable controversy that if there be any unamendable features of the Constitution on the score that they form a part of the basic structure of the Constitution, they are that: (i) India is a Sovereign Democratic Republic; (ii) Equality of status and opportunity shall be secured to all its citizens, (iii) The State shall have no religion of its own and all persons shall be equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion and that (iv) the Nation shall be governed by a Government of laws, not of men. These, in my opinion, are the pillars of our constitutional philosophy, the pillars therefore, of the basic structure of the Constitution" (underlining ours.) Thus in the holding of learned Chandrachud J. the pillars of the Constitution have been enumerated being Sovereign Democratic Republic, equality of status and opportunity, secularism citizen's freedom to religious worship and rule of law.

57. Taking both these cases i.e. BASIC STRUCTURE CASE and ELECTION CASE (AIR 1973 SC 1461 and AIR 1975 SC 2299) together, it could be observed safely that each and every article

or the right guaranteed by Part III of the Constitution is not treated as basic nor is there a limitation on the amendatory power that vests in the Indian Parliament under Article 368 of the Constitution. If only the BASIC STRUCTURE CASE is taken into account for the purposes of determining the ratio, it is obvious to us as was also found by Chandrachud J. in ELECTION CASE, that Part III of the Constitution was not treated to be the part of basic structure or framework of the Constitution including right to property as forging any limitation on the sovereign constituent power contained in Article 368 of the Constitution. Even taking the judgment of learned Khanna J. in ELECTION CASE only secularism and Article 15 have been added to the basic structure or basic principle. The right to property is not found to be the basic structure either in the BASIC STRUCTURE CASE or in the ELECTION CASE.

58. In paragraph 668, learned Chandrachud J. further enunciated the guideline when the theory of basic structure was pressed in aid in matters seeking judicial review of the constitutional amendments by Indian Courts. The learned Judge observes:

"..... Since the Constitution, as originally enacted, did not consider that judicial power must intervene in the interests of purity of elections, judicial review cannot be considered to be a part of the basic structure in so far as legislative elections are concerned. The theory of basic structure has to be considered in each individual case, not in the abstract, but in the context of the concrete problem."

It is thus obvious that while asking judicial review of the constitutional amendments the whole theory of basic structure or basic framework of the Constitution cannot be invoked. In the context of the problem posed, relevant principles alone will have to be examined and applied for finding out whether treating it as the basic structure or basic framework of the Constitution the amending Act could be said to be incompetently made.

59. It is enough to observe at this stage that this high holding of the Supreme Court shows that right to property is not a basic structure or basic framework, nor is it a basic principle of the Indian Constitutionalism. The very ratio of upholding the Constitution (Twenty-Ninth Amendment) Act in the BASIC STRUCTURE CASE (AIR 1973

SC 1461) by the Supreme Court clearly shows that this doctrine of basic structure cannot be usefully pressed in aid when the rights affected are rights in property and further when the laws affecting those rights are put under the Constitutional umbrella erected by Art. 31-B of the Constitution by amending Schedule IX. For the present purposes, therefore, it would suffice to observe that whatever is being questioned before us as a challenge to the Constitution (Fortieth Amendment) Act which amended the Ninth Schedule and put the amended statute dealing with rights in property, under the protection of Art. 31-B stands sufficiently negated by the ratio in BASIC STRUCTURE CASE itself, and further as explained by the learned Judges in the ELECTION CASE (AIR 1975 SC 2299). Reference to the laws in issue which have been put in the Ninth Schedule of the Constitution by Constitution (Fortieth Amendment) Act is to the laws relating to land as an object of property and rights in or over the same. These have been put under the constitutional umbrella. The right to property being not basic structure of the Constitution, nor being the basic principle of the Indian Constitutionalism, the challenge to the Constitution (Fortieth Amendment) Act on the basis of the basic structure theory cannot but be rejected.

60. A collateral issue which can be disposed of at this stage is challenge to the present amending Acts on the basis that the basic structure doctrine is violated by these laws. The four constitutional pillars quoted above from the judgment of Chandrachud J. are said to have been shaken by the premises of the provisions of these Acts. It may be mentioned that the same said challenge is made to the Presidential Order directing suspension of enforcement of Article 14 during the period of emergency because of Article 359 (1-A), as amended. We will deal with the question of validity of the Article 359 (1-A) later. Upon the ratio of the judgments in BASIC STRUCTURE CASE (AIR 1973 SC 1461) as well ELECTION CASE it appears to us that challenge to laws or order is not permissible on the ground that these contravene any basic principle or framework.

61. We have made reference to the controversy in the ELECTION CASE (AIR 1975 SC 2299) before the Supreme Court which included the challenge to amendments effected to the Representation of the People Act and Election Laws

(Amendment) Acts. One of the attacks to these amendments expressly negated by the Supreme Court rested on the basic structure or framework of the Constitution relying on the earlier decision rendered in the BASIC STRUCTURE CASE (AIR 1973 SC 1461). In the judgment of the learned Chief Justice reference is made to this aspect of the matter in paragraph 137, page 2332 and para. 153, page 2335. The learned Chief Justice observed:

"The constitutional validity of a statute depends entirely on the existence of the legislative power and the express provision in Article 13. Apart from the limitation the Legislature is not subject to any other prohibition." The learned Chief Justice further observed:

"The contention of the respondent that the Amendment Acts of 1974 and 1975 are subject to basic features or basic structure or basic framework fails on two grounds. First, legislative measures are not subject to the theory of basic features, or basic structure or basic framework. Second, the majority view in Kesavananda Bharati's case (AIR 1973 SC 1461) (supra) is that the 29th Amendment which put the two statutes in the Ninth Schedule and Article 31-B is not open to challenge on the ground of either damage to or destruction of basic features, basic structure or basic framework or on the ground of violation of fundamental rights."

62. Mathew J., referred to this part of the controversy in paragraph 346 onwards. In paragraph 347, the learned Judge observed after making reference to the BASIC STRUCTURE CASE (AIR 1973 SC 1461):

"But I do not find any such inhibition so far as the power of Parliament or State Legislatures to pass laws is concerned."

The learned Judge referred to the inhibition, meaning inhibition that is operative upon the amendatory process of the Constitution and made a clear statement that that inhibition was not operative on the power of the Parliament or State Legislatures to pass laws under Articles 245 and 246 of the Constitution. In paragraph 357 the learned Judge further observed:

"It is rather strange that an Act which is put in the Ninth Schedule with a view to obtain immunity from attack on the ground that the provisions thereof violate the fundamental rights should

suddenly become vulnerable on the scope that they damage or destroy a basic structure of the Constitution resulting not from the taking away or abridgment of the fundamental rights, but for some other reason"

63. There is no support from the majority in Bharati's case (AIR 1973 SC 1461) for the proposition advanced by counsel that an ordinary law if it damages or destroys basic structure should be held bad or for the proposition that a constitutional amendment putting an Act in the Ninth Schedule would make the provisions of the Act vulnerable for the reason that they damage or destroy a basic structure constituted not by the fundamental rights taken away or abridged but some other basic structure."

64. Learned Beg J., answered the problem referring to the submissions of the counsel as follows: (Para 477)

"The learned counsel for the election petitioner contended that, as a candidate at an election, the Prime Minister and the ordinary candidate should enjoy equal protection of the laws and should be afforded equal facilities irrespective of the office occupied by one of two or more candidates. Such an attack upon the validity of this amendment seems to me to be possible only under the provisions of Article 14 of the Constitution. But as Act 40 of 1975, has been placed by Section 5 of the 39th Amendment in the protected 9th Schedule of the Constitution, it becomes immune from such an attack. After the practically unanimous opinion of this Court in Kesavananda Bharati's case (AIR 1973 SC 1461) (supra) that such an immunisation of an enactment from an attack based upon an alleged violation of the chapter on fundamental rights is constitutionally valid. I do not think that a similar attack can be brought in through the back door of a 'basic structure' of the Constitution." The learned Chandrachud J. in paragraph 692 observed:

"..... The argument regarding the invalidity of the Representation of the People (Amendment) Act, 58 of 1974 and of the Election Laws (Amendment) Act, 1975, has however, no substance. The constitutional amendments may, on the ratio of the fundamental rights case, be tested on the anvil of basic structure. But apart from the principle that a case is only an authority for what it decides, it does not logically follow from the majority judgment in the Fundamental Rights case that ordinary legislation must also

answer the same test as a constitutional amendment. Ordinary laws have to answer two tests for their validity: (1) The law must be within the legislative competence of the Legislature as defined and specified in Chapter I, Part XI of the Constitution and (2) it must not offend against the provisions of Article 13 (1) and (2) of the Constitution. 'Basic structure' by the majority judgment, is not a part of the fundamental rights nor indeed a provision of the Constitution. The theory of basic structure is woven out of the conspectus of the Constitution and the amending power is subjected to it because it is a constituent power. 'The power to amend the fundamental instrument cannot carry with it the power to destroy its essential features' — this, in brief, is the arch of the theory of basic structure. It is wholly out of place in matters relating to the validity of ordinary laws made under the Constitution."

65. Before we summarise the effect of these holdings for the purposes of the present controversy, we may indicate that even the result reached in these two cases i.e. BASIC STRUCTURE CASE (AIR 1973 SC 1461) and the ELECTION CASE (AIR 1975 SC 2299) upon the constitutional Amendment Acts does not at all help submissions addressed before us for the petitioners. By the result of these cases if the ratio were to be worked out, in the BASIC STRUCTURE CASE eventually only the declaration which foreclosed the judicial review about the matters in Article 31-C was held to be offending the basic structure. That declaration which was the part of Article 31-C enacted by the Constitution (Twenty-Fifth Amendment) Act, 1971 stated:

"..... and no law containing a declaration that it is for giving effect to such policy shall be called in question in any court on the ground that it does not give effect to such policy."

This declaration was eventually found to be offending the basic structure or basic framework of the Constitution. In other words, the judicial review that was simply foreclosed by a declaration made by the Legislature enacting the Act and as under the Constitution judicial review was fundamental such a declaration was found to be inhibited by the basic structure doctrine enunciated therein. Somewhat similar result is indicated by the eventual holding in ELECTION CASE. There the provisions of Article 329 (A-4) inserted by Constitution (Thirty-Ninth

Amendment) Act, 1975 were struck down, though different reasons have been given by the learned Judges for reaching to that conclusion and it appears to us to be more or less unanimous verdict that Clause (4) operated upon the field of judicial review and in fact rendered a legislative judgment upon the case which was either decided or was alive before the competent Court to be adjudicated according to the constitutional premises.

66. The ratio indicated by the result, if that be the guide for finding the ratio of the cases, goes to the extent that the constitutional amendments that affect the basic concept of judicial review and pre-empt in the garb of constitutional amendment a legislative judgment upon the cause would not partake in the constitutional amendment and would be bad as affecting basic principle. Such provision introduced by amendment would not partake in the nature of amendment of the provision of the Constitution, for, as the learned Chief Justice put in the ELECTION CASE (AIR 1975 SC 2299) that will be rendering a legislative judgment. In our view, therefore, about the result obtained in both the cases upon which reliance is being placed, the fundamental principle that weighed with the Court to strike down the constitutional amendment and as explained supra was that because of those provisions of the constitutional amendments there was foreclosure of the judicial review extant in the Constitution or for that rendered a legislative judgment upon the cause. This resulting position too from these judgments does not help the petitioners in the present cases for raising challenges to the Constitution (Fortieth Amendment) Act which is validly and competently made.

67. It is now useful to take a summary of the findings in both the BASIC STRUCTURE CASE and ELECTION CASE (AIR 1973 SC 1461 and AIR 1975 SC 2299) together about the principles which are relevant and applicable in the present controversy. These principles can be stated together and appear to us to be as follows:

FIRST: Upon the constituent power having situs in Article 368 of the Constitution, there are inherent limitations of the basic structure or framework of the Constitution or constitutional principles which are not indicated in the Constitution itself. The power under Article 368 is not akin to the original, plenary un-

limited constituent power and is not therefore omnipotent.

SECOND: These basic structure principles include the fundamental constitutional contemplation of the permissive judicial review of the Constitutional Amendment Act so as to find out firstly whether in exercise of the constituent powers what is enacted is a law permissible by the premises of Article 368 of the Constitution; and secondly whether the amendment in substance does or does not accord with basic structure doctrine or basic framework or basic principles of the Constitution. In the exercise of making an amendatory law by exercise of constituent power, it would be impermissible to render legislative judgments on cases which under the Constitution form part of the jurisdiction of the judiciary and is pre-eminently a judicial function.

THIRD: The law amending the Constitution would be bad if it affects or abrogates the basic structure as enumerated and summarised in **ELECTION CASE** (AIR 1975 SC 2299) which includes fundamental principles of equality of status and opportunity. The right to property is not part of basic structure nor constitutional amendment laws can be affected by that principle.

FOURTH: The ordinary law either made by the Parliament or by the State Legislature cannot be subjected to challenge on the ground of basic structure or constitutional framework or principle and that there exists no paradox in constitutional theory in arriving at such a position.

FIFTH: Only by reason of the fact that such ordinary legislation is placed in Schedule Nine by the Constitutional Amendment Act, the challenge to that law on the ground of the basic structure or framework of the Constitution is not available. For the purposes of the law it retains the character of a law made by the Legislature with reference to its powers under Articles 245 and 246 of the Constitution.

68. Applying these summarised principles as are relevant for the purposes of submissions made before us, it is obvious that the Constitution (Fortieth Amendment) Act placing the amended statutes in issue in the Ninth Schedule cannot be questioned nor those Acts can be questioned on the ground of basic structure doctrine which is only applicable to the Constitutional Amendment Laws as such. The same would be position with regard

to Presidential Order made under Article 359 (1-A) of the Constitution.

69. Now what survives for consideration on the constitutional aspect of the challenge is referable to the submissions advanced against the Constitution (Thirty-Eighth Amendment) Act, 1975, which amended Article 359 by inserting Clause (1-A) and other submissions made to challenge Article 31-B itself which was amended by the Constitution (First Amendment) Act, 1951.

70. The validity of Article 31-B as enacted by the Constitution (First Amendment) Act, 1951 appears to us to be fully reinforced by the **BASIC STRUCTURE CASE** (AIR 1973 SC 1461) itself. There, as we stated above, *inter alia* Constitution (Twenty-Ninth Amendment) Act was questioned which had put the Kerala Land Reforms (Amendment) Act No. 35 of 1969 and Kerala Land Reforms (Amendment) Act, 1971 (Kerala Act No. 25 of 1971) in the Ninth Schedule. The efficacy and validity of the provisions of Article 31-B was not at all doubted. On the other hand it was observed that the provision of Article 31-B was an independent provision affording immunity to the laws placed in the Ninth Schedule independently of Article 31-A of the Constitution. Once that immunity is available, the provisions of Part III in regard to laws providing for acquisition of any estate or any right therein would be rendered wholly immune from challenge. Upon the ratio of the **BASIC STRUCTURE CASE** where the first doctrine of basic structure was formulated and where the Constitution (Twenty-Ninth Amendment) Act was in terms upheld, it is difficult to understand the submission that because of the basic structure doctrine now Article 31-B should be held to be vulnerable or is assailable. Article 31-B itself is on the Statute Book along with Article 31-A since the first amendment of the Constitution. It is too late and too futile to question the validity of that provision on the assumption that the constitutional device of Article 31-B is likely to be abused or likely to create Para-Constitution always running counter to the fundamental or basic structure of the Constitution itself.

71. To us it appears. Article 31-B has primarily constitutional purpose and is equally basic as any other Article in Part III of the Constitution.

72. If we begin to question the validity of any of the provisions of an Article like Article 31-B on the supposed

or likely result or apprehension of misuse of that power, we are merely beating the rope for the snake. Where the constituent power vests the judgment to select the laws for affording the constitutional umbrella to the wisdom of the sovereign body like Parliament responsible to the people of this Country, such considerations are wholly irrelevant and spring from distrust in the very principle of popular sovereignty which is the corner stone of the Indian Constitution.

73. Article 31-B does not affect in our view any of the enumerated basic structure principles evolved by the BASIC STRUCTURE CASE (AIR 1973 SC 1461). On the other hand, it subverts the constitutional purpose. After all, Parts III and IV of the Constitution appear to evolve a composite scheme for the governance of the country. There is underlying assurance given to the people regarding dispensation of political, social and economic justice. The Constitution assures that in the state of just conditions, liberty of thought, expression, belief, faith and worship along with equality of status and equality of opportunity will be rendered available to the people at large. The directive injunctions in Part IV are the matters for the governance of the country and in terms it dictates that these principles shall be applied as the duty by the State in making laws. The rule of law that is eventually to be ushered by these guiding principles will have to subserve the needs of the tenets of provisions contained in Part IV so as to achieve a state where social, economic and political justice shall prevail. These principles and these constitutional premisses have to operate to restructure the social, economic and political life of the society as much as to confer upon the members thereof the fruits of liberty and equality. In the making of these constitutional premisses, the life of the people, their economic, social and cultural conditions involving levels operating and resulting inequality as well conditions oppressive between man and man are all part of the constitutional experience that can hardly be glossed over. Rights are not mere exhortations. Possessor of right has to be conscious, able, activist. Conditions that tend to bind masses in processes of mute economic and social subjections undo the capacity of the political person to enjoy, to realise or to stand by the right so guaranteed. On closer analysis the rights conferred by Part III are active principles to be upheld by applying the

principles of governance enunciated as basic to the State particularly by Part IV of the Constitution. It follows such constitutional conferment of right cannot affect the eventual objective the Constitution has placed before itself the objective to offer justice to the people as the collective entity in social, economic and political field and to achieve just conditions for all where exploitation and oppression in human or material relations shall for ever be banished.

74. Indeed there has to be a yielding away by a few of the interests for the benefit of many as well by individual in favour of the community of material resources if such just state of national existence has to be eventually restructured. The process of constitutional engineering has pragmatics of people's interest and that cannot be imprisoned by reference to individual claim for right to material means of production and exploitation. The wide gap of economic existence between man and man as well the social, political and cultural effects emanating therefrom and legislative restructuring of the same enjoined upon the State are all primary and necessary considerations inbuilt in the premises for enacting provisions of Article 31-B of the Constitution. Laws under its protection are meant to be of vital matters requiring yielding away the other provisions of Part III of the Constitution.

75. The selection of enactments for the purpose of affording statutory shield or constitutional umbrella is matter of serious consequences and that itself offers the guiding principles to uphold the article. There is hardly any doubt that by Article 31-B the matters are left to the high constituent power to be exercised by Indian Parliament in accord with the procedure indicated by Article 368. There being thus a constituent procedure, there being an indication of principles by its very placement in Part III and there being an obvious purpose for which Article 31-B was enacted, we do not find any reason to doubt the validity of Art. 31-B, only because it puts under eclipse the challenges based on Part III to the laws otherwise competently made by the Legislatures. As stated above, the fountain spring underlying the enactment of Article 31-B itself appears to us to be fundamental in view of the dictates of directive principles. Further the basic contemplation of the Constitution that the legislature which makes an Act or the

authority which makes Regulation is the best Judge of the social and economic facts and circumstances available to it so as to make a law in the interest of the community or the people is sufficient guarantee that the provisions are not likely to be abused. But for the umbrella of Article 31-B it is easy to conceive and it has been the experience that several community laws were struck down as running counter to the rights conferred upon the individual as enshrined in Part III. Moreover process of amendment of Ninth Schedule indicates a circumspect and selective modality. Before the law gets the protection, it is required to be made by the competent Legislature itself. Secondly there is full or complete permissive scrutiny available because unless the Parliament in exercise of Article 368 decides to afford the constitutional protection to such a law, Article 31-B and its protection does not hold the law in the state of immunity from Part III of the Constitution. This inbuilt legislative and constitutional process is enough safeguard against complaints of abuse or erection of paraconstitution in Ninth Schedule. There being thus underlying principles to harmonize several competing fields of constitutional rights and objectives and further there being quite a possible legislative and constitutional review in the matter of selection and choice before the laws are placed in the Ninth Schedule, we have no hesitation in holding that merely upon apprehensions of abuse the provisions cannot be questioned as being violative of any basic structure or framework of the Constitution. On the other hand it is apparent that Article 31-B by its very contemplation has been super-imposed to further and to fortify the basic structure of the Constitution. The Constitution (First Amendment) Act, 1951 enacting Article 31-B therefore, is not open to challenge. To the interpretation of Article 31-B itself, we will turn a little later on.

76. One of the the learned counsel Mr. V. R. Padhye referred to Chandrachud J.'s observation in *ELECTION CASE* (AIR 1975 SC 2299) and drew our attention to the national struggle for independence and what was at stake in that struggle. He fervently urged that it is the duty of the Court to consider the history of the constitutional document in the light of the aspirations of the people as eventually reflected in the original Constitution. He submitted that the constituent power is being abused by such

enactments of amendments. In fact there are historical limitations on that power flowing from the struggle for independence and, therefore, we should lean towards the holding against the validity of Article 31-B which operates to the detriment of the large class of property holders and which could never have been conceived by the original makers of the Constitution.

77. Firstly, in the Court of law, there cannot be any appeal on the ground of sentimentality. Fervour of the national struggle which represents the movement of the people of this country had then the limited objective i. e. to achieve freedom from foreign subjugation. Having attained the freedom it is for the people of the country as free sovereign polity to restructure the life of the nation and for that to find out appropriate legal and constitutional modality so as to have equitable and just governance of their own. It is in exercise of those seminal powers that the Constituent Assembly framed the original Constitution and by the very original Charter reposed the constituent power by enacting Article 368 in the Parliament responsible to the People. The Indian Parliament thus being repository of constituent power, the matters of enacting appropriate constitutional laws must be left to its wisdom and to its constitutional judgment. Judicial review, of necessity, is a limited exercise of known limitations. We have already stated that the provision of Article 31-B cannot be questioned on the basis that the amendment of Ninth Schedule is likely to be abused by the Parliament while exercising the power under Article 368 of the Constitution. If such logic were to prevail in a Court of law, we fail to see why Arts. 245 and 246 along with lists in Seventh Schedule be not treated as vulnerable. Approach of such a kind is totally fallacious and is the offspring of fictitious fears.

78. Now we turn to the Constitution (Thirty Eighth Amendment) Act, 1975 which inserted Clause (1-A) in Article 359 of the Constitution. The vice that is being complained of is that this newly added article purports on the face of it to be the part of emergency provision. It is urged that under its premises a wide mischief of suspending the very basic principles underlying the Constitution is permitted. Reliance was placed on the observations of Chandrachud J. in *ELECTION CASE* (AIR 1975 SC 2299) that

equality before law was the basic structure and the same cannot be taken away even by the Constitutional amendment. It was urged, such effect can be attempted by putting in jeopardy and complete eclipse the equality so basic by simply making of the order under the newly added Cl. (1-A) to Art. 359 (1) of the Constitution. It is submitted that the width of the power as conferred by Clause (1-A) would take in equality conferred by Part III of the Constitution including life, liberty, religious freedom and even secularism flowing therefrom. Strong emphasis was laid on the decision of the Supreme Court in *LIBERTY'S CASE* (A. D. M. Jabalpur v. S. Shukla, AIR 1976 SC 1207) to show what happened because of the Presidential order to the right to life and liberty enshrined in Part III of the Constitution. It was submitted in *LIBERTY'S CASE* that the basic right under Article 21 was put under eclipse and ultimately the Courts were rendered powerless, the remedy being not available to the detenus. Again reliance was placed on the *BASIC STRUCTURE CASE* (AIR 1973 SC 1461) to build up the submission that some of the rights in Part III would conform to the basic-structure, particularly, Art. 14 thereof. If by the device of amending Article 359 (1-A) Article 14 can be put in the state of suspension it is submitted that the power conferred on the President of India is inchoate, untrammelled, uncontrolled and therefore, conspicuously bad and running counter to the basic structure of the Constitution.

79. As stated while considering some of the aspects of the matter, these submissions too raise contentions emanating from considerations of apprehension and abuse of the power that is eventually conferred by the incorporation of Clause (1-A) in Article 359. Constitutional amendments competently enacted cannot be attacked on any such ground. That is an elusive approach. The power or jurisdiction created and its purpose are always reflected by the objectual motivations of the statute. What is use and what is abuse are all matters of exercise of power. Theoretical apprehensions in this regard cannot render the provision invalid. As we have said earlier, the Presidential Order which put in eclipse Article 14, is subjected to the challenge to the limited extent, that it affects the basic structure. Upon the summarised holding of the cases, that is, the *BASIC STRUCTURE CASE* (AIR 1973 SC 1461)

and the *ELECTION CASE* (AIR 1975 SC 2299), we have found ample (sic) to observe that the Order is unassailable on any such ground, for the same reason as the ordinary law cannot be challenged on the basis of the basic-structure doctrine.

80. It would be trite in this context to observe that in a democratic setup strong public opinion is the only guarantee and the limitation upon all exercise or the supposed abuse of the power by the authorities or agents of the State. It is equally trite to say that merely because power is conferred it tends to corrupt and absolute power corrupts absolutely. All this furnished no ground to find a legal vice that would render enactment of Article 359 (1-A) unconstitutional. That provision has been competently enacted by recourse to the procedure as indicated by Article 368 of the Constitution. Even in *LIBERTY'S CASE* (AIR 1976 SC 1207) the same was not challenged and on closer scrutiny and applying the principles to which we have made reference Article 359 (1-A) inserted by the Constitution (Thirty-Eighth Amendment) Act, in our view would reveal that it does not affect any basic-structure or any basic framework of the Constitution.

81. Part XVIII of the Constitution has always been the part of our Fundamental Law. That enacted the scheme of emergency provisions and permitted the President of the country to proclaim state of emergency upon satisfaction of the matters stated in Article 352 (1). Reference to that provision would indicate that the President has to be satisfied about the existence of grave emergency wherein security of India or any part of the territory thereof is threatened either by war or external aggression or internal disturbances. By adding Clause (4) by the very Constitution (Thirty-Eighth Amendment) Act, which is not in issue before us, it is made clear that the President may exercise the power to issue different proclamations on different grounds being war or external aggression or internal disturbances or imminent danger of war or external aggression or internal disturbance, and such satisfaction is made conclusive and not open to the judicial review. The effect is indicated by Article 353, firstly, lifting the fetters on the executive power of the Union and making it operative to give directions to any State with regard to executive powers. The power of the Union Parliament to make laws during the period of proclamation

of emergency is further fortified and augmented. By Article 354 the President is permitted to suspend the operation of Articles 268 to 279 relating to distribution of revenues subject to the eventual order being laid before the Parliament. An obligation is cast by Article 355 upon the Union to protect every State from aggression and internal disturbance. Article 356 deals with the matters when there is failure of constitutional machinery in a State and enables the President to make order in that regard and Article 357 is the part of the same scheme. Article 358 by itself suspended the provisions of Article 19 during the emergency and made it possible to make law or to take executive action unfettered by the terms of Article 19 to the extent indicated in that article.

82. Clause (1) of Article 359, as it was available before the Constitution (Thirty Eighth Amendment) Act, permitted the President to make order declaring that the right to move any Court for the enforcement of such of the rights conferred by Part III as will be mentioned in the order and proceedings pending in any Court for such enforcement of the right would remain suspended during the period of the proclamation or for a shorter period as may be specified. Article 360 related to making of proclamations when the financial stability of credit of India or in any part of the territory was threatened.

83. This scheme, it would be seen is the part of the constitutional contemplation underlying Part XVIII in that the President in whom the executive power of the Union vests—(Art. 53 (1))—and in whom the supreme command of all the forces of the Union vests because of Article 53 (2), is further enabled to deal with the matters in the state of grave emergency. The proclamations contemplated by Article 352 are made to subserve the security of India which may be threatened either by war or external aggression or internal disturbances. The founding fathers of the Constitution were aware that the hard-won freedom of the country is subject to threats of war and external aggression and is not immune from internal disturbances. In such state, the threat is to the life and existence of the polity of the country as such. To deal with those matters effectively, the emergency provisions are the necessary part and parcel of the constitutional premises. In face of war or aggression or disturbances, it is indeed clear that there can hardly

be any appeal to finer sense of values. The voice of reason stands silenced by the boom of arms and the basal elements explode to surface. Concepts of life, liberty, expression, all stand negated by the march of organized or unorganized acts of violence. Social and political security stands gravely perverted. To keep the body-polity strong, unified and on the march to meet these forces, is the obligation cast on the President by resort to the provisions of Part XVIII of the Constitution. The President is enabled to take effective steps to meet these challenges and aggressions. That he should be so armed with emergency powers is the original contemplation and appears to be equally basic to the framework of the Constitutional premises. Indeed in the BASIC STRUCTURE CASE (AIR 1973 SC 1461) sovereignty and integrity of India are treated to be the part of basic framework of the Constitution. To protect and reinforce that structure the emergency provisions are clearly enacted.

84. What Clause (1-A) of Art. 359 does is to permit the President to make an order and remove the fetters that may be operative because of Part III of the Constitution, upon the power to make law or to take executive action during the period of emergency. By the very nature, such a power is merely ancillary to the purpose of emergency rule. When security of the country is threatened by war or external aggression or internal disturbances, it is but proper and reasonable to find the power which will be operative irrespective of the constitutional fetters imposed by Part III of the Constitution, Clause (1-A) to Article 359 thus furthers the cause of the integrity and security contemplated by the basic-structure of the Constitution. Enforcing of the rights through the remedy of Courts could be suspended during the period of emergency by virtue of earlier Clause (1) of Article 359. Now it is made clear that that right itself can be subjected to the process of suspension. What was implicit in the scheme of Clause (1) of Article 359 has really been made explicit. Without remedy there can hardly be any right. Enforceability is the part and parcel may the juristic soul of the concept of right. It is not mere moral exhortation. If it is so, it would not partake in the nature of right. Right is not only an injunction against the State action but has a positive content, the fruits of which can be realised by the constitutional remedy.

85. Original Article 359 (1) permitted suspension of the remedy itself with regard to certain rights to be mentioned in the Presidential Order, the selection being left to the discretion of the President himself. That would have indirect result of rendering possessor of the right disabled to enforce the same by remedy in Court of Law. Now what would have been the indirect effect is clarified by permitting the President to make an order expressly suspending the rights conferred by Part III by specification. That would permit laws and executive actions to be taken which otherwise would have been void, only during the period of emergency. The provision on the face of it being part of the original scheme with regard to emergency matters is merely enabling and it appears is necessary for the exigencies that eventually have to be met by the authority of the President. Only because such a power is given, we cannot be asked to strike Clause (1-A) of Article 359 down by stamping it to be running counter to the basic principles of the Indian Constitution. The provisions of Article 359, Clause (1-A), in our view are really meant and intended to further fortify the conditions so as to maintain security of India during the period of grave emergency. On the face of it it is reasonable to think that the President who is charged to take steps while the country is engulfed by conditions threatening its integrity would apply his mind and make appropriate selection as may be necessary to meet the challenges emanating from the conditions available about the choice of rights reasonably selected for the purpose of suspension. Only because those rights may include certain fundamental rights like life and liberty or right of equality, the provision cannot be rendered unconstitutional or as running counter to the basic structure of the Constitution. If all those rights were to yield as they must to the security of the country, its reasonableness cannot at all be questioned.

86. We feel fortified by the judgment delivered by the Supreme Court on this aspect of the matter in LIBERTY'S CASE — (A. D. M. Jabalpur v. S. Shukla, AIR 1976 SC 1207). Though the Constitution (Thirty-Eighth Amendment) Act, 1975 was not challenged expressly before the Supreme Court, the Court, however, examined the nature of the amended provision contained in Part XVIII of the Constitution and its impact on the right to life and liberty as contained in Article 21

of the Constitution. Amongst others the majority judgment read with LIBERTY'S CASE decided as a ratio that once Presidential Order competently issued under Article 359 (1-A) suspends the fundamental right to life and liberty as envisaged by Article 21, the possessor of the right cannot have any locus standi to move the writ petition questioning the validity of the detention orders made under Maintenance of Internal Security Act, 1971, during the period the Presidential Order is in force.

87. Close reading of the judgments in LIBERTY'S CASE (AIR 1976 SC 1207) indicate that this ratio was arrived at because of the very nature of the emergency powers contained in Part XVIII of the Constitution. The learned Chief Justice observed:

"The suspension of right to enforce fundamental right has the effect that the emergency provisions in Part XVIII are by themselves the rule of law during times of emergency. There cannot be any rule of law other than the constitutional rule of law. There cannot be any pre-Constitution or post-Constitution Rule of Law which can run counter to the rule of law embodied in the Constitution, nor can there be any invocation to any rule of law to nullify the constitutional provisions during the times of emergency."

88. Chandrachud J., ruled that Article 359 (1) is as much a basic feature of the Constitution as any other and it would be inappropriate to hold that because in normal times the Constitution requires the Executive to obey the laws made by the Legislature, therefore, Article 359 (1) which is an emergency measure, must be construed consistently with that position. The learned Judge further ruled that the argument of basic feature is wrong for yet another reason that Article 359 (1) does not provide that Executive is free to disobey the laws made by the Legislature and further that the 'Rule of Law' argument like the 'Basic Feature' argument is intractable; the emergency provisions contained in Part XVIII of the Constitution which are designed to protect the security of the State are as important as any other provisions of the Constitution and that the true construction and effect of Article 359 (1) does not violate the rule of law.

89. Bhagwati J., on this aspect observed that whilst a Presidential Order issued under Article 359, Clause (1) is in operation, the rule of law is not oblite-

rated and it continues to operate in all its vigour that the executive is bound to observe and obey the law and it cannot ignore or disregard; and that if the executive commits a breach of the law, its action would be unlawful, but merely the remedy would be temporarily barred where it involves enforcement of any of the fundamental rights specified in the Presidential Order.

90. It follows from these statements contained in the Judgment in **LIBERTY'S CASE** (AIR 1976 SC 1207) that the emergency provisions contained in the Constitution are to be treated basic to the Indian Constitutional Law and the amendment made to Article 359 by inserting Clause (1-A) is clearly explanatory and enabling to make appropriate declaration with regard to the suspension of rights contained in Part XVIII of the Constitution so that the emergency situation can be effectively and without any detriment are met by the legislative organs of the State as well as by the Executive. For all purposes, it appears to subserve the basic emergency provisions as contained in the integral scheme of the Constitution itself. It is neither unguided nor untrammelled. The exigencies of situations in emergency periods by themselves and in the very nature of things would evoke the necessity to make appropriate orders. Like any other enabling provision in the Constitution, Clause (1-A) confers the power on the President, who is the authority to make the emergency declarations, to appropriately make the order suspending the given fundamental rights so as to effectively meet the challenge in the interest of the security of the country that may arise because of such emergent conditions. We do not find any substance in the complaint that the constitutional provision leaves the matter at large and can be subjected to abuse by lifting the fetters of Part III from the legislative and executive operations. After all in such matters the choice and selection thereof must be left to the conscious exercise of power by the highest office in the country.

91. In the sum we do not feel that on the doctrine of basic structure or basic principles, Clause (1-A) added to Article 359 (1) by the Constitution (Thirty-Eighth Amendment) Act, 1975 can be treated as incompetently enacted. On the other hand, it appears to us to have been added to fortify the concept of the constitutional basic provisions regarding the Emergency Rule of Law. We accord-

ingly reject the submissions raised before us that Section 7 of the Constitution (Thirty-Eighth Amendment) Act, 1975 which enacted Clause (1-A) of Article 359 should be declared *ultra vires*.

92. As to the challenge to the Presidential Order of June 27, 1975, because the President has included in his order Article 14 to be suspended during the period of emergency, we have already stated that such challenge cannot be raised on the ground that there is breach of basic structure or basic framework of the Constitution. It was submitted that Article 14 has been chosen by the President in colourable exercise of the power so as to abrogate the basic equality available in the Country.

93. Firstly, there is no material before us to hold that the emergency conditions which necessitated the proclamation by the President did not require the suspension of the fundamental right guaranteed by Article 14 of the Constitution. We cannot be asked to adjudge the validity of the express emergency powers by mere reference to the high quality of the principles of equality and its basic nature by reference to certain cases. Mere invocation of principles is not a substitute for facts on the basis of which the Presidential Order purports to have been made. Moreover, it must be assumed that the President of this country makes his choice with full consciousness of the circumstances and the facts available in the situation while making the emergency orders contemplated by Article 359 (1-A) of the Constitution. The President being the highest functionary charged with an obligation to maintain security and integrity of the country always must be presumed to act in the interest of the security of the country. For all purposes the President is the constitutional Judge of the facts and circumstances that emerge and upon which his powers are required to be exercised. The ground on the basis of which such selection is made must always be presumed to be present in the circumstances upon which the emergency powers operate. The effect of such order by its very nature is temporary suspension of certain rights and is not a permanent eclipse thereof. Such a temporary emergent measure taken in the interest of the security of India being basic in itself need not further, in our view, satisfy the test of other basic constitutional principles nor is it open to challenge on any such ground. To infer otherwise would

be to arrogate to ourselves the high, complicated and difficult task of examining the facts and circumstances which the Constitution has placed in the realm of the consideration of the President of the country. On the basic framework or basic-feature-theory we do not think any challenge is possible to the legality of the Order made by the President of India under Article 359 (1-A) of the Constitution suspending the fundamental right guaranteed by Article 14 along with other rights.

94. This discussion will indicate that the points raised against the validity of Constitution (First Amendment) Act, 1951, Constitution (Thirty-Eighth Amendment) Act, 1975 and Constitution (Fortieth Amendment) Act, 1975 have to be rejected. Similarly the point raised that ordinary laws that is like the present Amending Acts can still be tested on the doctrine of the basic structure equally fails.

95. Now we turn to other aspects of the matter which are already enumerated above. Before we go ahead to examine the challenge to the laws that the provisions of Art. 31-B and Art. 31-C are not satisfied, it appears proper that we may deal with the argument that has been advanced on the basis that Art. 301 of the Constitution has been violated by the present enactments. As stated above, it was said that the entire Acts in issue, violate the freedom of trade and commerce guaranteed to every citizen of this country; under Article 301 of the Constitution. We have indicated the cases on which reliance was placed by the learned counsel who argued that matter.

96. This aspect of the matter, in our view, does not really call for any serious debate, for it appears to us that the submissions overlook the very object of the Act and the Constitutional guarantee under Article 301 of the Constitution. The law has been made to provide for more equitable distribution of land and to ensure a ceiling of land to persons who are related to land and owning or cultivating the same for the purpose of agriculture. By providing ceiling on holding of land clearly a regulatory measure about the holding of immovable property, like land is enacted. That the Legislature has the required competence to so regulate is not doubted before us. Even, therefore, assuming that holding of land for agricultural production is a trade or commerce, the laws in pith and substance are regulatory in nature. The guarantee

of Article 301 of the Constitution does not affect the regulatory measures even in the field of trade and commerce.

97. Decisions mentioned supra do not really help to resolve the problem raised by the learned counsel nor are appropriate for the present controversy. In fact the decisions in *Atiabari Tea Company v. State of Assam*, (AIR 1961 SC 232), *Automobile Transport Co. v. State of Rajasthan*, (AIR 1962 SC 1406) and the *District Collector, Hyderabad v. Ibrahim and Co.*, (AIR 1970 SC 1275) were rendered in the context of the restrictions imposed upon the movement of trade, commerce and intercourse. The substance of the freedom in this regard that fell for consideration was whether the statutes created any barricade in the free exchange of trade and commerce and intercourse guaranteed by Article 301. By very nature the land is immobile and the term 'trade' even if inclusive of agriculture would mean productive activity over and with reference to that land. By providing for ceiling of such immobile property within the limits of the State, it cannot be said that any barricade that will affect the movement of trade or freedom of commerce itself are being created. As we have said it is mainly a regulatory measure and perfectly within the competence of the State Legislature. How much land a person or family unit shall hold within the State and its enacting cannot in any manner be said creating barricades upon the movement of trade or commerce of agriculture.

98. Heart-matter and the central piece of this Article 301 is the term 'free' used in the context of trade, commerce and intercourse so as to maintain economic concourse in the country. The term 'free' indicates the movement of trade, of commerce and its intercourse. Freedom from restraints in the matters of commercial activities is constitutionally declared and guaranteed at the foot of the article. The freedom of movement extends to intra-State as well inter-State trade or commerce. Legal erections of unreasonable inhibition which will impede the economic concord in this country have been constitutionally stamped out except to the extent of its regulation and necessities therefor. The aim and object of this guarantee is clearly to achieve homogeneous national economy of the people.

99. The grievance at the foot of this Article can possibly be that flow of movement of trade or commerce or economic intercourse by any means of law

is impeded or inhibited. Regulation or laying down lawful limits to hold property for all purposes goes to support the freedom of trade rather than impede the same. 'Freedom' according to law and according to this guarantee is the touchstone. Regulatory measures taken by the Statute to control immovable property cannot be termed as having effect on the inflow or outflow of economic concourse in the country. Only because the entitlement to hold land above the ceiling limits is curtailed, it does not follow that the resultant economic venture itself is put in any type of barricade. The concept of 'freedom' in the context of land necessarily means the freedom to possess, freedom to enjoy and freedom to deal with it. Providing for the ceiling of such property is only to chisel or limit the extent of these rights in the property. In spite of ceiling, the agriculture which can be said to be trade and commerce and its intercourse is fully left free. To what extent the land should be available to citizen for the purpose of exploitation by agricultural and allied pursuits can always be defined by law. Once the pith and substance of the law is of such kind, it follows that the trade or the commerce and its flow as far as agriculture is concerned, is neither impeded nor in any manner affected, for, within the limits it is free and the limits are permissible. No person or citizen possessing property can have claim to freedom to hold limitless land on the footing that his holding should know no bounds. In the days when the flow of life is being tailored by several social and cultural scissors, such an approach would be a pure antithesis and unrealistic seeking to possess the land that touches the horizons. The lure of land and its reasonable control cannot be equated as impeding the economic movement guaranteed by Article 301 of the Constitution.

100. We may mention that even before the present Amending Acts were so questioned, it appears that such an argument advanced before this Court has been ruled out: (The Godavari Sugar Mills v. S. B. Kamble, (1975) 77 Bom LR 261). The present submission challenging the enactment fixing the ceiling and acquiring surplus land based on Article 301 of the Constitution, therefore, must fail.

101. Let us now turn to the provisions of Article 31-B itself. So as to understand its impact on the present controversy, we have already upheld the validity of Article 31-B, and ruled that

it is immune from challenge on the ground that it violates any basic structure of the Constitution.

102. Before we extract and examine the provisions of Article 31-B, we may indicate that the provisions of Article 31-B have been usefully applied and several times held to be affording total protection to laws from challenges based on Part III of the Constitution.

103. Though *Dhirobha Devisingh Gohil v. State of Bombay*, (AIR 1955 SC 47) was not eventually approved in the later judgments by the Supreme Court in *Golak Nath's* case it is useful as providing a point of reference. In view of *Golak Nath's* case (AIR 1967 SC 1643) being overruled by the BASIC STRUCTURE CASE, (AIR 1973 SC 1461) it is possible to look back to what was found by the Supreme Court in *Gohil's* case. The provisions of the Bombay Taluqdari Tenure Abolition Act were questioned in *Gohil's* case. The challenge was on the ground that the provisions violated Section 299 of the Government of India Act. The provisions of the Bombay Taluqdari Tenure Abolition Act were protected because they were included in the Ninth Schedule and were under the constitutional umbrella of Article 31-B. The Court rejected the challenge by observing that the protection under Article 31-B is not merely against the contravention of certain provisions but an attack on the ground of unconstitutional abridgement of certain rights. It will be illogical to construe Article 31-B as affording protection only so far as these rights are taken away by an Act in violation of the provisions of the new Constitution but not when they are taken away by an Act in violation of Section 299 of the Government of India Act, which has been repealed. The intention of the Constitution to protect each and every one of the Acts specified in the Ninth Schedule of the Constitution from any challenge on the ground of violation of any of the fundamental rights secured under Part III of the Constitution irrespective of whether they are pre-existing or new rights is placed beyond any doubt or question by the very emphatic language of Art. 31-B. Hence the Court found that the validity of the Bombay Taluqdari Tenure Abolition Act which was included in the Ninth Schedule was not questionable on the ground of violation of the provisions of Section 299 of the Government of India Act. It is indeed clear that in *Gohil's* case one of the challenges was based on

the legislative incompetence. While considering the challenge the Court observed:

"The challenge now made to the validity of the impugned Act is based on the alleged violation of that right. Nor does this challenge cease to be in substance anything other than a challenge in respect of the violation of the said right notwithstanding that under Section 299 of the Government of India Act the right is secured in terms which restricts the power of the Legislature and operates as a restraint on its competency. What under the Government of India Act was a provision relating to the competency of the Legislature, was also clearly in the nature of a fundamental right of the person affected." (underlining ours).

The Court applying the ratio of the case in *State of Bihar v. Kameshwar Singh*, (AIR 1952 SC 252) observed:

"A careful perusal of the judgment however shows that the challenge allowed was as to the competency of the Legislature to enact certain provisions of the impugned Act which in the opinion of the majority of the Court, were in the nature of fraud on the exercise of the legislative power."

104. In *Ram Kissen v. Divisional Forest Officer*, (AIR 1965 SC 625) the provisions of West Bengal Estate Acquisition Act (Act No. I of 1954, as amended by Act No. 25 of 1957) having been placed in the Ninth Schedule and having the protection of Article 31-B because of Constitution (Seventeenth Amendment) Act, were questioned inter alia on the ground that there was absence of a provision for compensation for the acquisition of the rights by the enactment itself. Coming to the protective effect of Article 31-B, the Court observed:

"Learned counsel drew our attention to the provisions quoted and submitted that the learned Judges erred in their constitution of these provisions and that in fact no compensation was provided, but this question about the Constitutional validity of the amending Act does not really fall for consideration because learned counsel for the appellant did not contest the position that after the enactment of the 17th Amendment to the Constitution, and the inclusion of West Bengal Act I of 1954 among those specified in Schedule IX, the absence of a provision for compensation for the acquisition of the appellant's rights would not render the West Bengal Act or the acquisition thereunder unconstitutional."

The observations of the Supreme Court in *Ram Kissen Sinha's* case indicate that even a law regarding the acquisition providing for no compensation like the one before it could be protected from challenges under Part III, if it had been placed in Ninth Schedule.

105. In *N. B. Jeejeebhoy v. Assistant Collector*, (AIR 1965 SC 1096) provisions of Article 31-B were noticed by the Supreme Court in the context of the argument that Articles 31-A and 31-B should be read together, and Article 31-B would only illustrate cases which would otherwise fall under Art. 31-A. The Court indicated the effect of Article 31-B by pointing out that the said Article was not governed by Article 31-A. The Court observed:

"We, therefore, hold that Article 31-B is not governed by Article 31-A and that Article 31-B is a constitutional device to place the specified statutes beyond any attack on the ground that they infringe Part III of the Constitution."

(Underlining is ours). Thus *Jeejeebhoy's* case is an authority also that any attack on the basis of any provision of Part III is not available once the statute is protected by Article 31-B.

106. In *Latafat Ali Khan v. State of U. P.*, (AIR 1973 SC 2070) the Supreme Court had the occasion to observe with regard to the rule framed under an Act placed under the protective umbrella of Article 31-B. The challenge to the rule was on the basis that it violated Articles 14, 19 (1) (f) and (g) and 31 (1) of the Constitution. Negativising the challenge, the Court observed:

"It seems to us that if a statutory rule is within the powers conferred by a Section of a statute protected by Article 31-B, it is difficult to say that the rule must further be scrutinised under Articles 14, 19 etc."

Eventually as we have stated above, the Constitution (Twenty-Ninth Amendment) Act which was put in issue in the *BASIC STRUCTURE CASE* — (*Kesavananda's case*), (AIR 1973 SC 1461) was an enactment putting the Kerala Land Reforms Act, which in *Kunjikuttty v. State of Kerala*, (AIR 1972 SC 2097) was not found to be violative of Article 31-A and the Supreme Court in the *BASIC STRUCTURE CASE* upheld the Constitution (Twenty-Ninth Amendment) Act.

107. From these cases and particularly the *BASIC STRUCTURE CASE*,

(AIR 1973 SC 1461) it is apparent that Article 31-A and Article 31-B are independent provisions; that the law that may not satisfy Article 31-A can still be protected by Article 31-B of the Constitution and once such protection is afforded it cannot be questioned on the ground that it violates any of the rights guaranteed by Part III of the Constitution. Thus about rights there can hardly be any debate or dispute and Constitutional shield erected is strong enough to repel any attack based on rights conferred by any provision including Art. 31-A of the Constitution.

108. Before us, however, an argument is made in spite of these decisions, that Article 31-A which is an independent provision than Article 31-B, as stated above, carves out a fetter on the legislative power and is in the nature of a proviso with regard to the specified laws to be read with Article 245 of the Constitution or Art. 246 as the case may be. In our view, such type of submission overlooks the plain width in which Article 31-B has been couched and has been pre-eminently enacted.

109. We proceed now to extract the said Article so as to find its plain reading and its protective effect on the laws against the challenges arising out of the provisions of Part III.

"31-B. Without prejudice to the generality of the provisions contained in Article 31-A, none of the Acts and Regulations specified in the Ninth Schedule nor any of the provisions thereof shall be deemed to be void, or ever to have become void, on the ground that such Act, Regulation or provision is inconsistent with, or takes away or abridges any of the rights conferred by, any provisions of this Part, and notwithstanding any judgment, decree or order of any court or tribunal to the contrary, each of the said Acts and Regulations shall, subject to the power of any competent Legislature to repeal or amend it, continue in force." (Underlining ours).

110. We have underlined the provisions out of the body of Article 31-B to emphasise what appears to us to be the primary connotation as operating upon each and every provision contained in Part III. Article 31-B itself is a protective statutory shield and its grammatical construction should be approached and understood in plain terms and given effect to by what it states in express

terms, Act or Regulations or provisions of the laws may be rendered void because those are enacted inconsistently with any provisions as contained in Part III which is fundamental part of the Constitution. Similarly the Act, Regulation or provision may be rendered void because the same takes away or abridges any of the rights conferred by Part III of the Constitution. Both types of contingent invalidation affecting the legality of the laws appears to us intended to be covered by the express wide terms employed herein. It would not be proper to read Article 31-B as a mere proviso to Article 13 of the Constitution. On the other hand it is self-contained and self-operative and explicit in effect and purpose. It cures the defect of rendering the Act or Regulation void, which may arise even without reference to Art 13 itself. Like any other provision of the Constitution, the language of the article must receive its own independent interpretation uncontrolled by the considerations of the other Articles unless context or necessity of interpretation requires otherwise. Undoubtedly aid of other articles may throw light upon the intent expressed by the Constitutional terms, but the rule primordial is that each Article in Constitutional document should be read plainly should receive first construction on the basis of the language used therein.

111. It was suggested as one of the constructions that when Article 31-B refers to "inconsistencies with any provision in this Part", it has in its contemplation the term 'provision' as used by Article 394 and further it only covers cases contemplated by the first clause of Article 13 and when this article uses the phrase "takes away or abridges any of the rights conferred by any of the provisions of this Part" it is suggested that it refers back only to Article 13 (2) of the Constitution. It is further urged that the "comma" after the preposition 'by' indicates that inconsistency with any of the rights conferred by the provisions of the Act is only contemplated. In other words, if the laws are inconsistent with provisions which do not confer rights but are mere provisions indicating matters other than rights Article 31-B would not be operative.

112. We find it difficult to follow any such approach which constricts the scope of Article 31-B itself. Article 31-B in all its prints appears to us carefully

punctuated and we cannot lose the significance of the use of "comma" placed after the preposition 'by' followed by the words 'any provision in this part'. Though undoubtedly punctuation is a minor element in the construction of the statute, sometimes if the statute is carefully punctuated its considerations assume importance and throw light on the intention of the makers of the statute.

113. Comma here, after the preposition 'by' appears to have been used with purpose to give meaning to the earlier phrase 'is inconsistent with any provisions of this Part'. Before comma there are two operational clauses, both ending by two prepositions, one ending with 'with' and another by 'by'. These 'inconsistent with' or 'conferred by, any provisions of this Part, have to be commonly read. So read, both the prepositions 'with' and 'by' make ample and clear reading the provisions of Art. 31-B. Thus read, the protection or immunity offered by the Article 31-B would be operative when any Act, regulation or provision is inconsistent with any provision of Part III or secondly when it takes away or abridges any of the rights conferred by Part III.

114. So read the provision does not in any manner require to be read as only subject to Article 13 of the Constitution. Article 13 is declaratory and is in two parts. It declares void pre-constitutional laws if they happen to be inconsistent with the provisions of Part III. It enacts also constitutional injunction against the State for not making any law which would take away or abridge the rights conferred by Part III and if such law is made, it declares such law to be void to the extent of the contravention. Sub-clause (2) of Article 13 would render the Acts void if the law takes away or abridges the right conferred by Part III. The term 'conferred by' is of wide import. It means 'give' or 'bestow'. The provisions regarding the conferral of the right are contained in several provisions and other articles and some of the articles themselves indicate how the rights so bestowed can be subjected to the process of law. Scheme of Legislation to be enacted as operative upon the field of rights constitutionally conceived can be termed as enacted by the "provisions of the Part III" and is apart from "the rights conferred" by that part,

115. Rights are declared as in Article 14—equality before law or Article 29 (1)—Protection of interests of minorities or Article 31 — right of minorities to establish and administer educational institutions. There are rights conferred by negative declarations as contained in Article 15 — Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth, permitting, however, the State for making any substantial provision for women and children — Article 15 (3). Similar is the position with regard to the right of opportunity in the matters of public employment. Article 16 and provisions to make appropriate law in favour of certain class of persons Clauses 3, 4, 5 of Article 16. There is provision like Article 17 which contains a declaration in the matter of abolition of untouchability and Article 18 in the matter of abolition of titles. Right to freedoms is enacted in Article 19 which is subject to exceptions contained in the provisions of sub-articles (2) to (6) in favour of certain laws and making of laws in that regard. Similarly 'life' and 'personal liberty' is subject to the procedure established by law (Article 21). Article 22 offers protection against arrest and detention and lays down the mandatory procedure when a person is arrested and detained in custody. Right against exploitation in Article 23 is similarly couched first declaring the right and then making a provision permitting the State as indicated by sub-article (2) to impose compulsory service for public purposes. Article 24 prohibits employment of children in hazardous employment. Right to freedom of religion is subject to public order, morality and health and the other provisions of the Part as stated in Article 25 (1). The right to property is stated in a negative manner and injunctive in its content for stating that "no person shall be deprived of his property save by authority of Law". Then follow sub-articles (2), (2-A), (2-B), (3), (4), (5) and (6). Sub-article (2) being again an injunction from compulsory acquisition or requisitioning of the property for public purpose. Articles (2-A) and (2-B) take into account the law and sub-article (3) requires the law made in terms of Cl. (2) to be reserved for consideration of the President and necessity of obtaining the Presidential assent. Article 32 is a constitutional remedy to move the Supreme Court and is a fundamental right, not liable to be suspended except as otherwise provided for by the Constitution.

Article 33 is a power of Parliament to modify the rights conferred by the Part in their application to the Armed forces. Article 34 deals with restriction on rights in the state of martial law. Article 35 is declaratory provision in favour of the Parliament to make laws with regard to matters as stated in Clauses (a) and (b) thereof.

116. This review of several articles for the present purpose indicates that the rights conferred by Part III are on citizen, person, body or denomination and further are subject to restrictions to be imposed in accordance with different provisions of the part. Restrictive provisions available in Part III are clearly intended to be operative upon the rights and are none-the-less "the provisions as contained in Part III" and by resort to those provisions, the rights may be abridged or be eclipsed.

117. The words "right conferred by this Part" could be properly understood therefore as against the context of the rights bestowed by Part III. The matters of permissible legislative provisions are matters of provisions. Articles 31-A and 31-C, for example, are the provisions regarding the savings of laws on the ground that such laws are inconsistent or take away or abridge any of the rights conferred by Articles 14, 19 or 31 of the Constitution of India and not matters of right as such. It is obvious that inconsistency may arise if laws do not appropriately answer requirements of such provisions.

118. Inconsistency with such of the provisions on this Part that would arise and that would affect the rights either by abridgement or by taking away the rights bestowed by the Part would lead to a result of invalidity. Such inconsistency in any law would thus be the contravention contemplated by Article 13 (2) of the Constitution and to the extent of such inconsistency in that law, which eventually takes away or abridges the right, the law would be void. It would thus appear that the terms of Article 13 (2) are broad enough to affect the laws which are inconsistently made with the provisions of Part III itself that deal with the conferral of rights. Speaking illustratively a law which is inconsistently made and operating upon the rights bestowed under Articles 14, 19 and 31 and not fully satisfying the requirements of Article 31-A of the Constitution either because it did not comply with the specific provisos ap-

ended to that article or the law which is not appropriately made in keeping with the second proviso may be rendered void because of Article 13 (2) read with the rights conferred by Articles 14, 19 and 31. But such a law that would be an instance of inconsistent legislation as far as Article 31-A is concerned would not be rendered void once it is placed under the constitutional umbrella of Article 31-B.

119. As we read it, the phrase 'inconsistent with any provisions of this Part' is wide enough and need not be specifically controlled by the phrase 'takes away or abridges any of the rights conferred by any provisions of this Part'. When the inconsistency is spoken of, it is obvious that it is inconsistent with any of the provisions and not only with the rights conferred by Part III. Similar phrase is used in Article 31-A in Cl. (1) before the two provisos indicating the effect upon the law consistently made in terms of Article 31-A and the declaration is that such law shall not be deemed to be void on the ground that it is inconsistent with or takes away or abridges any of the rights conferred by Article 14, Article 19 or Article 31. Similar identical phrases are used while indicating the immunity effects upon laws covered by Article 31-C of the Constitution. It is undoubtedly therefore clear that the inconsistency with any provisions of this Part is not merely inconsistency with regard to the positive rights declared. That may arise because the law may not satisfy the requirements of some other provisions contained in Part III which by itself may not be the positive provision conferring rights under Part III.

120. All this construction became necessary because one of the submissions is that Article 31-A is an enabling legislative provision permitting making of laws in the matters of agrarian reform like the acquisition of property by State of any estate or of any rights therein or the extinguishment or modification of any such rights and unless all the provisions of Article 31-A are fully satisfied, the law made by legislature by recourse to its power under Article 245 for agrarian reforms would be still void and would not be protected by Article 31-B of the Constitution. Article 31-A appears to us to be a provision of the Constitution by which laws inconsistent with the rights conferred by Articles 14, 19 and 31 can be effectively made for the purposes stated in sub-clauses (a) to (e) of Cl. (1) of Article 31-A. Such law has to satisfy

the provisos in that the law so made has to be reserved for the consideration of the President so as to have Presidential assent and if the law provides for acquisition of estates held by a person for personal cultivation within the ceiling limit under any law for the time being in force then such law of acquisition of property has to provide payment of compensation at a rate which would not be less than the market value thereof. Law so made would be immune from challenge flowing from the rights conferred by Articles 14, 19 and 31 and though inconsistent with those rights, would be valid and enforceable. Second proviso to Article 31-A, even if treated as a right to receive compensation conferred by this part is nonetheless a provision contained in Part III.

121. What is contained in Article 31-A need not be imported for application and understanding of provision of Article 31-B. These are all independent provisions and the law that may not satisfy the requirements of Article 31-A may yet be well protected because of statutory shield if put in Ninth Schedule and conferred by Article 31-B in spite of the fact that it is inconsistently enacted with the provisions of Article 31-A. The clear ratio of the BASIC STRUCTURE CASE (AIR 1973 SC 1461) which we have discussed in the earlier part of this judgment appears to us an authority for such a position, for, in *Kunjukutty's case* (AIR 1972 SC 723) the laws which were eventually placed under the statutory shield of Article 31-B were found to be inconsistently made with Article 31-A and yet the Supreme Court by majority upheld the Constitution (Twenty-Ninth Amendment) Act placing those laws under the protection of Article 31-B and laws immune from such challenge.

122. As found above the same legal and constitutional effect is evidently achieved by the Constitution (Fortieth Amendment) Act placing the amendment Acts in issue in the Ninth-Schedule though the Acts themselves may not be on any ground satisfying the requirements of Article 31-A of the Constitution or even Article 31-C of the Constitution. The effect of the placement of the Acts in the Ninth Schedule is that the Acts are immune from challenge on any ground based on inconsistency with the provisions of Part III for taking away or abridging any of the rights conferred by Part III of the Constitution.

123. Here, there now is a challenge that the Amending Acts in issue, affect the right guaranteed by Article 25 of the Constitution regarding the freedom of religion. We propose to dispose of this issue at this stage itself.

124. The freedom guaranteed by Article 25 is not a freedom to hold unrestricted property nor can it be so conceived. The moral Codes of Religion mainly concern with the way of life of the man and lay down principles of interests in given society without any guarantee to hold or possess the property. By its very nature rights of property are secular and extra religious. The content of religious freedom is personal so as to permit holding of belief and to practice freely according to one's individual judgment, conscience any religious faith. No doubt, conduct in the matters of preaching religious faith as a measure of awakening consciousness in or acceptance by fellow being is the part of the purpose of propagation. Dissemination of ideas about mundane as well super mundane matters to the community at large is all that this freedom connotes. (See: *Commissioner, Hindu Religious Endowments v. Sri Lakshmindra Tirth Swamiar of Shri Shirur Mutt*, (1954 SCR 1005) = (AIR 1954 SC 282) and *Ratilal v. State of Bombay*, (1954 SCR 1055) = (AIR 1954 SC 388)). However, this freedom is clearly declared subject expressly to other provisions of Part III of the Constitution. It is obvious that freedom of religion and the freedom of conscience extends not only to the citizens but to persons and to denominations. Religious convictions and matters of conscience can be articulated by its preaching and practising subject to public order and morality and health as well other provisions of the Part III of the Constitution by which this right has been guaranteed. It is difficult to accept that right to hold property either because it is possessed by individuals or group of persons or denominations propagating a given religion and further there exists religious tenets laying down the principles of succession or inheritance or its application should be treated as the part of the right conferred by Article 25 of the Constitution. The character of the right is limited by the express declaration contained in clause (1) of Article 25 entitling any person to freedom of conscience and the right to freely profess, practise and propagate religion. Sub-article (2) expressly permits the State to make laws regarding the activi-

ties which are economical, commercial in character though associated with religious practices (See: *Commissioner, Hindu Religious Endowments v. Sri Lakshmindra Tirtha Swamilar of Shirur Mutt*, 1954 SCR 1005 = (AIR 1954 SC 282)).

125. It being clear that Article 25 does not confer by itself the right to property, nor the right to property can be treated as part of the religious right recognised thereunder such argument has little force. The complaint that personal laws of succession or inheritance or maintenance of minors and widows and dependants as well laws regulating the extent of interest in property would run counter to the provisions of the impugned enactments and, therefore, Article 25 is violated appears to us as fallacious and not warranted at all. The impugned Acts do not in any manner affect the right conferred by Article 25, nor abridge the extent of that right. Even assuming that there is some cloud cast as is being canvassed upon that right by the Act in that property which could have been utilised or is meant to be utilised for religious purposes even then the exercise of right to freedom as covered by Article 25 which is subject to other provisions of Part III would not be affected. Article 31-B being the provision contained in Part III of the Constitution and if read with Article 25 of the Constitution would afford protection to such laws placed in Ninth Schedule even if property used for religious purposes is affected. Therefore, challenge on any such ground on the basis of Article 25 is not well merited. (See: also *Wasudeo Mahadeo v. State*, (AIR 1976 Bom 94)).

126. Having disposed of the question regarding Article 31-B and its effect we would now turn before we consider the challenge on the basis of Article 31-A and Article 31-C to one small point raised by the petitioners. That point has something to do with the effect and the application of the two Acts i.e. Acts Nos. 21 and 47 of 1975. The argument is that Act No. 47 of 1975 is a dead letter because the earlier Act which was amended by that Act already put in force and as such had become the part and parcel of the original Act on 19th of September 1975. So the Act No. 47 of 1975 which was put into effect on 20th September 1975 had no Act upon which it would have an operational field.

127. All these submissions and the reference to the Supreme Court

judgment in *Shamrao v. D. M., Thana*, AIR 1952 SC 324 proceeds over a central concept and i.e. as soon as Act No. 21 of 1975 was brought into effect by the Notification of the State Government it ceased to have existence as an enactment or a piece of legislation upon which Act No. 47 of 1975 could operate. A little probing into the terms of these two enactments would reveal that by construction of this kind no such logical consequences at all ensue.

128. The Legislature in its wisdom made both these Acts and left the date of their application to be notified by the State Government, Act No. 21 of 1975 which was gazetted on 7th of August 1975 required the State Government by subsection (2) of Section 1 to make the notification regarding the enforcement date. Accordingly the State Government notified the date as 19th September 1975 on which date the Act became effective in the sense it subjected the original Act to amendments made by Act No. 47 of 1975. As stated in *Shyamrao V. Parulekar v. District Magistrate, Thana*, (AIR 1952 SC 324) the amendments inserted by this Act in the original Act would be treated to have been made by pen and ink in the original body statute.

129. Act No. 47 of 1975 was passed and gazetted on 19th September, 1975 i.e. the day when Act No. 21 of 1975 was put into effect. That Act obviously was passed with reference to the provisions of Act No. 21 of 1975 and purported to amend the provisions of that Act. Instead of the Legislature itself declaring that this Act upon its passing would become a part of the Act No. 21 of 1975, it provided that it shall come into force on such date as the State Government may by notification appoint. In other words the latter Act which was an amending Act of earlier amending Act would not be effective unless so notified and enforced by the State Government. For the purpose of putting into effect the provisions of this Act, the legislative intent is always to keep the terms of Act No. 21 of 1975 available so as to effectively amend the same from the date to be notified by the State Government. Only because that date happens to be notified later on, the amendments enacted by the Legislature cannot be said to have been rendered nullity or nugatory. Simple effect of the second enforcement would be to incorporate by pen and ink the terms of the provisions in original Act as amended by

Act No. 21 of 1975 to the extent enacted by Act No. 47 of 1975.

130. The salutary doctrine of reference operates for the purpose of interpretation and construction of statutes. That emanates by the very exigencies to keep the statutes available for the legislative purposes. By reference to earlier amending Act, the second amending Act can effectively introduce further changes in the body of the original Act though the former has become part and parcel thereof. The power to make such amendment in this manner always exists and the matter is purely one of interpretation. Once this is granted, wherever there occurs a reference to the Maharashtra Agricultural Lands (Lowering of Ceiling on Holdings) and (Amendment) Act, 1972 in Act No. 47 of 1975 it would mean the provisions as contained in that Act and to that extent that would have to be read out and corrected by pen and ink in the structure of the original Act. Act No. 47 of 1975 refers for the purpose of amendment to the Act No. 21 of 1975 as 'the Amending Act' and provides by different sections ranging from 2 to 8 how the Amending Act shall stand amended upon the enforcement of Act No. 47 of 1975. That term is intended to mean clearly the provisions of Act No. 21 of 1975 and by reference would operate with all force wherever Act No. 21 of 1975 is operative. No anomaly is introduced nor any antilogy is raised. For, it is perfectly permissible for the State Government to notify earlier or on simultaneous dates for effectuating the provisions of Act No. 47 of 1975 which would have made this Act that part of Act 21 of 1975 and thereafter notify the date of Act No. 21 of 1975 for the purpose of enforcement. For reasons obvious it was left to the power of the State Government so to give effect to Act No. 21 of 1975 and then to make effective Act No. 47 of 1975. The Legislature did not injunct otherwise. It is common experience that the Legislature in its wisdom always follows such device of leaving the matters of notifying enforcement dates to the State Government. That is clearly because of several good reasons including administrative and executive exigencies and knowledge thereof which Executive Government better possesses. This power undoubtedly partakes in minor legislative function. The effect however of such a device merely is that from that date of enforcement the statute becomes operative and enforceable. As far as Legislature is concerned, the law

stands enacted reflecting the will of the Legislature once the same is gazetted as an Act duly made. Thereafter there is no such stage as 'non-existence of an Act'. Enforceability of an Act of the Legislature and the existence of the Act are two independent matters. Even before enforcement and after such enforcement, it is available as an Act for the purposes of amendatory legislative process.

131. Once all this is clearly conceived the submission must fail. On the date Legislature made Act No. 47 of 1975, for its purposes Act No. 21 of 1975 was available and once the same was put into effect it would operate upon the terms of Act No. 21 of 1975 as have become part of the original Act. The argument that both these enactments besides being vague have made some drastic changes in their premises cannot advance the submission as to the nature, existence and effect of Act No. 47 of 1975.

132. Having thus found that both the Acts 21 and 47 of 1975 further amended by Act No. 2 of 1976 are operative in the field, we now turn to considerations relevant to the terms of Articles 31-C and 31-A along with the directive principles contained in the Constitution with reference to Article 39 (b) and (c) of Chapter IV of the Constitution. We may note at the outset that some of the learned counsel submitted before us that while examining the validity of such enactment because of the protection available under Article 31-C it should be permissible course for this Court to find whether the enactment runs counter to some other directive principles. One of the learned counsel made a reference to Article 39 (a) for pointing out that the rights of minors as well women in the matters of means of livelihood are being subjected to treatment which will render them destitute in spite of the directive principles contained in clause 39 (a). Another learned counsel questioning the validity of one of the provisions namely, Section 2-A along with Section 44-A of the Amendment Act with regard to the constitution of Surplus Land Determination Tribunals made a complaint at the foot of the directive principles as contained in Article 50 that the principle of separation of Executive and Judiciary though fundamental principle of governance as enunciated by that article is being violated because the land is being taken for the purposes of State and the State itself has been given the power to appoint its officer to be the Tribunals

so that there is complete go-by given to the directive principles and its contemplation in Article 50. At the time of considering the submissions based on Sections 2-A and 44-A, we will have further occasion to refer to this aspect of the matter. Suffice it to say at this stage that the directive principles of State policy as Article 37 itself lays down are not enforceable principles though the Constitution recognises them as fundamental principles for the governance of the country and requires the State to apply the same while making the law. Because of Article 37 we cannot be asked to enforce clearly any of the principles or the contemplations underlying such provisions of directive principles. It is indeed a principle guiding the State policy and it is for the State eventually to choose given principle while making an enactment. The inference that follows from Article 37 itself appears to have utility firstly while approaching the laws these should receive construction in consonance with the directive principles of the State policy. As Courts we would lean towards that interpretation which will subserve the directive principles and if the laws are susceptible to two interpretations the one upholding the directive principles and subserving its ends and the other running counter to the principle enacted, the one that subserves the directive principle would be eminently followed. (See: *Balwantrai v. Union of India* (AIR 1968 All 14) and *F. N. Balsara v. State of Bombay* (AIR 1951 Bom 210) (FB)). However, the provisions of Part IV and its purposes in the constitutional processes are clearly enabling and there is no compulsive course indicated by any of the provisions. Suffice it to observe that the submission that the Court should strike down the laws because some of the directive principles do not appear to have been kept in view by the Legislature cannot be upheld. (See: *B. B. Ramecha v. Mandsur M. C.* AIR 1960 Madh Pra 20 and *Jaisingh Pyara v. Gram Panchayat, Singhanwala*, AIR 1965 Punj 232).

133. The Supreme Court in *State of Bombay v. Balsara*, (1951 SCR 682) = (AIR 1951 SC 318), *Hanif Qureshi v. State of Bihar* (AIR 1958 SC 731) and in *Bijay Cotton Mills Ltd. v. State of Ajmer* (AIR 1955 SC 33) consistently looked to the relevant directive principles while understanding and considering the validity of the Acts which were questioned on the basis of fundamental rights referable to Article 19 of the Constitution. In *State*

of Bihar v. Kameshwar Singh, (AIR 1952 SC 252) the requisition of land for subserving the purpose of clauses (b) and (c) of Article 39 was treated to be for the public purpose within the meaning of Article 31 (2). This is ample authority to indicate that the use of directive principles in the matters of challenge before us to the laws like the present one is limited by the very nature of the principles declared to be fundamental in the governance of the country. While upholding the legislative policy of the law upon interpretation it would subserve the given principle available in Part IV of the Constitution and that would be found as underlying constitutional requirement met by the law. The law, however, cannot be compelled to make the premises of directive principles by judicial interpretation which would mean its enforcement. Nor it would be proper to treat the directive principles in the constitutional scheme as limitations or fetters on the legislative powers.

134. Once we observe like this, it follows that we cannot be asked to colour our judgment by reference to directive principle of Article 39 (a) or Article 50 of the Constitution as the arguments were advanced before us.

135. The root matter is what is the purpose of the law and whether if those purposes accord well with the principles specified in clause (b) or (c) of Article 39 so that the statute gets protection of Article 31-C. Principles of Article 39 (b) and (c) are to the effect that the State is enjoined to evolve a policy in the making of its laws to secure that the material resources of the community are distributed to subserve the common good. In other words, clause (b) of Article 39 refers to the distributive justice in the matters of material resources available to the community. The principle underlying clause (c) of Article 39 is clearly to restructure the economic system of the society so as to avoid the concentration of wealth and means of production to the community detriment. It is a principle inhibiting monopoly of means as well as of wealth.

136. Turning to the present enactments in our view apart from the declaration contained in Section 2 of Act No. 21 of 1975 to which we have already made a reference, there is ample evidence in the terms and contemplation as well as in the working of the statutes that both these principles are in fact furthered by the provisions of these laws. Act No. 21

of 1975 is meant to lower down the ceiling of holding of land that was initially imposed by the original Act. The purpose of the original Act was to put maximum limit on agricultural holdings of the persons and further to acquire land for the distribution to the class of persons who were otherwise not possessing land. Lowering down the ceiling limit cannot have any other purpose and the law in terms states to what purpose the surplus land would be utilised. It provides that after the ceiling is so declared, the surplus land shall be taken possession of in the prescribed manner and it shall be deemed to be acquired by the State for the purposes of the Act (Section 21' (4)). Chapter VI deals with distribution of surplus land and indicates how the same shall be distributed. The landless person appears to be the first priority who may have become landless by certain reasons as indicated by sub-section (2) or sub-section (3). Thereafter the weaker sections of the community who are landless are indicated by sub-section (4) of Section 27. They include scheduled castes, scheduled tribes, nomadic tribes and other backward classes. Sub-section (5) of Section 27 thereafter indicates the order of priority in whom are included the persons who are landless. It is not necessary to delineate the whole scheme in this regard. Suffice it to observe that the emphasis is to lower down the ceiling area of the holding of a person as contemplated by law so that the surplus is acquired and distributed to the classes of persons in accordance with Chapter VI.

137. The amendments of the Act are therefore replete with the principles underpinned by Article 39 (b) and (c) of the Constitution. In the agrarian society land is a valuable means of the economic system itself. We will refer to it later on when we consider the Art. 31-A of the Constitution and in that context the concept of agrarian reforms. However suffice it to say at this stage that roots of monopoly landlordism and its social and economic effects which lie in the recent past are all matters of common knowledge and legislative strategy to free the society therefrom. The feudal system of holding lands because of the conferment of titles and jagirs or watans and the concentration of economic power with it are all parts of historical experience of Indian society.

138. The Legislature is presumed to know all these facts and their far-reaching effects on the material resources

of the community or economic system which subserves the common good so as to enact limits of viable unit of land and permit the persons to till the same and to acquire surplus land for public purposes and to permit landless persons to take the same which in turn would better effectuate the agricultural production and do away concentration of economic resources like the land. In our view, nothing can be more clear. If that be the primary scheme of the law, requirements of Article 39 (b) and (c) of the Constitution would be answered. Eventually laws would be protected from the challenges under Articles 14, 19 or 31 of the Constitution because of statutory shield of Article 31-C of the Constitution. Only because the law for the purpose of making available the surplus land seeks method of clubbing of properties like land, the principle underlying is not affected.

139. Now we turn to the challenge that these laws are not protected under Article 31-A. Under this aspect of the matter two main submissions, as we indicated above, are discernible, one based on second proviso appended to Art. 31-A and second on the aspect of the family unit as contemplated by Section 4 of the Act along with certain other provisions set out as said to be not satisfying the concept of agrarian reform. It is apparent that Article 31-A, particularly permits acquisition by the State of any estate or of any rights therein or any extinguishment or modification of any such rights and the law has to satisfy the conditions of two provisos. That raises the question as to the concept and reach of laws regarding agrarian reforms and its enactments.

140. The original Act till the stage of several amendments as we stated earlier has been found to be the piece of legislation subserving the agrarian reforms. The present amendment Acts substitute the amended Chapters II and III for the original Chapters in the principal Act followed by further amendments. They have one integral scheme and it is difficult on the face of it to see how the scheme cannot but be termed as a scheme furthering the agrarian reforms in the State.

141. The case relating to lowering down of the ceiling area of land is not a haphazard device found by the State Legislature. It has clear national history and is a part of the national policy.

Lowering down of ceiling as a measure of national land policy so as to better subserve the agrarian economy has been undertaken by several States and almost simultaneously as is evident from the statement filed before us on behalf of the State showing how revised ceiling laws in different States have been put into effect between the period ranging from 1970 to 1975.

142. It would be appropriate here to take a purview of the movement of agrarian reforms in the country and significant hall-marks thereof. Such reference to economic movements available in the national policy is quite necessary and permissible though juridically there has always been attempts to keep plan and policy out of the ken of consideration.

143. As back as in 1949 Agrarian Reforms Committee of the leading political party, Indian National Congress, made a report and national policy on land reforms eventually found place in the shape of First Five-year Plan. The objective of the First-Five Year Plan was to increase the agricultural production and to diversify the agricultural economy so as to achieve the higher level of efficiency. The First Five-Year Plan further outlined the broad principles of its strategy that there should be absolute limit upon the extent of land which any individual may hold to be fixed by the State, having regard to the agrarian history of the State and its problems and further that cultivation and management of the land by an individual owner should conform to standards of efficiency to be determined by law. Land Reforms Panel was formulated in 1955 and it made a report of 'Size of Holdings'. Amongst other, recommendations, it initiated a policy of imposition of ceiling on land for the purposes inter alia of reducing glaring inequalities in ownerships and use of land. The Reforms Panel indicated that a farm which yielded a gross average income of Rs. 1,600 or a net income including remuneration for family labour of Rs. 1,200 and is not less than a plough unit or its multiple in area, may be considered as a 'family holding'. It recommended three family holdings for an average family of five members. It was further advised that family being the real operative unit in land ownership as in land management, the members of the family should be taken into account and husband, wife and dependant sons and daughters and grand children may be reasonably included in the concept of family.

144. The Second Five-Year Plan after review of the Committee's recommendations emphasized measures of agrarian economy with high level efficiency and productivity. It, in fact, emphasised the need to build up progressive rural economy removing disparities in the ownership of land. Imposition of ceiling during Second Five-Year Plan as a measure of social justice was recommended. Further the family holding was advisedly stated to be an operational unit and an area of land which can yield a certain average income. The Second Plan in terms rejected the concept of family holding and recommended the scheme as an operational unit. The Third Five-Year Plan reiterated the objectives of the Second Five-Year Plan with emphasis on elimination of elements of exploitation from agrarian system in the country.

145. The Fourth Five-Year Plan noted these developments and observed that the State laws on the subject were far from being perfect and there is every need for effective legislation.

146. Under these planned objectives the original Ceiling Law was made effective in the State. The All India Chief Minister's Conference held on 28th and 29th of November 1969 noted the progress and the difficulties in the country to achieve these objectives by means of law. As a result of deliberations certain States began revising the ceiling laws having objectives of reducing the ceiling limits and providing for standard holdings. Again the Conference of the Chief Ministers was held on 26th September, 1970 and on its agenda Ceiling on Land was the high topic. The deliberations of the Conference further resulted in examination of the issue of the ceiling on agricultural holding by the Central Land Reforms Committee. The Office of the Land Reforms Commissioner under the Ministry of Agriculture was created in October 1970 and all this history is presently available in the paper published by the Ministry of Agriculture on 'Ceiling on Agricultural Holdings'. (Government of India 1972 Publication by P. S. Apu.)

147. The case for 'Low Ceiling' as a national objective was advocated as flowing from the considerations of social justice. Pertinent reference was made to Articles 39 and 40 regarding the State policy to promote the welfare of the people by securing and protecting as effectively as may be a social order in which justice, social, economic and politi-

cal, shall inform all the institutions of national life. It was suggested that the fixing of ceiling on agricultural holdings at a low level will subserve all these objectives. The Government Publication observes:

"In this country a simple and effective means for ensuring a measure of social and economic justice will be a radical redistribution of land. Agriculture has had and, will continue to have for years to come, a dominant position in the Indian economy. It contributes nearly 50 per cent of the national income and over 70 per cent of the population depends upon agriculture and allied occupations for subsistence. (P. 19)." The publication further observes:

"..... In such a situation social and economic justice call for a more equitable distribution of the available agricultural land. (P. 19)."

"In Indian conditions it is only the ownership of land which can provide a minimum of social security and raise the social status of the under-privileged. (P. 20)."

"These measures will lift those at the bottom of the social ladder, namely, the share-croppers and the landless labourers, to a higher status. (P. 21)."

148. Specifically the drawbacks of big holdings were pointed out and the case of smaller holdings operated by family labour was essentially recommended. For, such smaller holdings will be cultivated more intensively leading to enhanced overall production. Simultaneously there would also be fuller utilisation of the available manpower. The report observes:

"..... Thus there is considerable force in the argument that a radical redistribution of land leading to a substantial increase in the area under owner-cultivation will have beneficial results on the utilisation of labour in agriculture. (P. 25)" and again "..... Thus there is enough social and economic justification for fixing ceiling on agricultural holdings at a low but viable level in this country. (P. 25)."

149. After these recommendations, it is now legislative history that laws were enacted drawing upon the inspirational pattern of decisions emanating from the Chief Ministers' Conference of 26th September 1970 on national level and the work of Commission on Land Reforms. The conclusions of the Chief Ministers' deliberations eventually were formulated

by July 23, 1972 and the same have been placed on the record of the present petitions. Those conclusions related to the level of ceiling in all States and recommended inter alia that the maximum area of ceiling should not exceed 54 acres. The conclusions do indicate also that in the case of land having assured irrigation, the ceiling should not exceed 27 acres. The matters below 54 acres were left to the discretion of the State Government. Unit of application of ceiling was indicated by the standard family being husband, wife and minor children and the methodology of the clubbing was recommended, followed by a recommendation that the major child should be treated as a separate unit for the purpose of application of ceiling. Retrospective operation to such laws was recommended to be given by not later than January 24, 1971. With regard to compensation certain guiding principles were also enunciated along with the distribution of land and the measures therefor. This historical background eventually resulted in Drawing Bill No. 56 of 1972, published in the Maharashtra Government Gazette, Part V, dated 10-8-1972, pages 385-413 and the Maharashtra Legislature deliberated on the Bill in August 1972 as is evident from the Assembly Debates available: (See: Assembly Debates—Vidhan Sabha Karyawahi, Vol. 35 and the Council Debates in Vol. 35). Actually the Bills were introduced on 14-8-1972 and passed on 18-8-1972 in the Assembly while it was introduced in the Council on 21-8-1972 and passed on 26th August 1972. As stated above the Bill had the guidelines in the national policy to which we have made a reference, firstly in the planning objectives and secondly, in the special recommendations with regard to the land reforms. Though the Act was passed in 1972, as we have already stated, it was made effective law on 19th of September 1975.

150. The basis of this Act and its operational area in the State has a clear objectual premise and has to be understood and can be best demonstrated if a few statistics are stated at this stage. We directed the State to file affidavits with regard to statistical data, relevant for our purpose. There is also available data in 1971 census publications.

151. On the basis of 1971 census the State of Maharashtra has a total geographical area of 3,07,762 sq. kms., having a coastal line of 720 kilometres had a population of 5.04 crores of people. The

State is geographically divided in Bombay, Poona, Aurangabad and Nagpur Divisions, having 26 districts for the local and revenue administration. It has several types of cultivations ranging from the Sea-coasts areas to the hilly tracks and to the fertile beds of the rivers. The State's population, according to 1971 Census, 68.8 per cent inhabited rural areas in 35778 villages. The figure of total number of towns is only 289, 17 of which are above 1,00,000 population and 25 between 50,000 and 1,00,000 population. It is thus clear that the majority of the State resides and habitates in rural sector. Turning to agriculture, that shows that the number of cultivators in the State as per 1971 Census was 65.37 lakhs and the land sown was 1,84,62,000 hectares. The labour involved included the labour of the agricultural labourers as per the figure of 1971 numbering 53.93 lakhs. Out of the population in the rural areas of 3,47,01,000 as per the Census Report, 54,29,631 were the landless labourers. In 1971-72 the State had total irrigated land to the extent of 16,51,000 hectares, roughly 9 per cent of land available under cultivation. The figures indicate that in 1972-73, 52 per cent of the geographical area was sown and it was in the range of 173 lakhs hectares. Out of this, 71 per cent, was under food crop, while the range of non-food was 29 per cent. The approximate provisional figures for the year 1974-75 foodgrains show a turnout of about 78 lakhs tonnes as food production. 1972 figures of the livestock is 264 lakhs, while the poultry 122 lakhs. These figures by themselves indicate that the State has an agricultural economy having its large base in rural areas mainly depending on the use and product of the land and its allied use. The figure of landless labourers in the agricultural sector does not include other landless classes. Along with this two more figures need be taken into account which are stated in the affidavit. Under the original Ceiling Act, the State could acquire surplus land to the extent of 1,34,152 hectares, while under the present measures the expected target is to net further surplus land to the extent of 1,50,000 hectares as surplus. It will appear that the first days of ceiling in the State had achieved a limited objective, indicated by the figures stated above and still the State was inhabited by several lakhs of landless persons. The expected objective under the lowering down the ceiling has been, therefore, properly indicated to be

1,50,000 Hectares, which will be available for distribution as enacted by Chapter VI of the Act.

152. To us the amending Acts appear to be prosilient products firstly of the historical national policy regarding the lowering down of the ceiling limits of agricultural holdings in the State for achieving twin objectives of higher agricultural efficiency and providing a strategy for dispensation of economic and social justice in the rural sector of the State, particularly to the landless poor and petty peasants. The deliberations on the national level indicates the principles of finding economically viable and co-efficient units of persons that can reasonably exploit limited area of land for the purposes of best use of agricultural production and to take over excess areas for the purposes of distributive justice to be made available to the landless and poor sections of the community.

153. Chapter II, as substituted by Amendment Act is titled as 'Lowering of Ceiling on Holdings', while Chapter III as 'Restrictions on Transfers and acquisitions and consequences of contraventions'. Sections 3, 4 and 5 provide a composite scheme by laying down the ceiling limit of the holding of a person or a family unit. Chapter IV deals with surplus land and how the same has to be worked out and achieved. Chapter V makes provision with regard to quantum of compensation and payment for the land so acquired from the surplus-holder. Chapter VI deals with the distribution of land to which we have made a reference above. The First Schedule has to be read with Section 5. That shows a uniform ceiling area indicated with reference to the districts in the State. The provisions of Section along with the class of land described in columns 2, 3, 4, 5 and 6 of the First Schedule is indicative that the class of land is to be understood as defined and contemplated by Section 2 (5) of the Act. Thus providing for uniform unit of land which in the legislative premise is a viable unit for the purpose of exploitation by a person or family unit contemplated by law is the principal measure made effective by these provisions. That objective, as we have stated above, is to avoid landlordism or concentration of wealth and further to effectuate intensive agriculture. Such uniform scheme cannot but be the reform contemplated in the agricultural field.

154. The concept of agrarian reforms is not a static formula. It is, in

fact, dynamic in operation and reach. Its scope has been noted to be wide enough so as to subserve the agrarian community interest. [See: State of Kerala v. G. R. Silk Mfg. (AIR 1973 SC 2734, para 3). Kh. Fida Ali v. State of J. & K. (AIR 1974 SC 1522, paras 13 and 14) and State of Haryana v. Sampuran Singh, (AIR 1975 SC 1952, paras 6, 9, 10 and 11)].

155. Agriculture in India has always been the chief support of the people. Ninetenth of the population habitated under different conditions is distinctly rural and three-fourth of the population since long is dependent upon agriculture and allied pursuits like dairy farming, stock raising, forestry etc. Having variety of climates and variety of soils, there is divergence even in the cultivation and the yields available in different parts of the country as well different parts of the State. Coupled together, there is a constant pressure on land because of steep rise in population. Agriculture, in essence, is not only the way of life of large majority of the people but is the backbone of Indian economy. The dimensions of the agrarian reforms are per force wide and unfolding because of the social and economic structure available. None can doubt that with the change brought about by technological advances in the State, even the traditional resource-use pattern in agriculture has considerably transformed and there has been intensification as well diversification of land uses.

156. The concept of reforms by itself is a modality which touches both cultural pattern of life of the people and their economics. For reforms, it is not only a way of life that has to be subjected to object oriented change but also the entwined interplay of relations between man and man and man and land require rearrangement. Appropriated modality that will do away with the conditions of exploitation of labour, oppression of poor landless peasantry which result from monopoly concentration of means of wealth and prowess of land, are justifiable and as such justiciable matters of the agrarian reforms when landlords and their premises are subjected to regulation.

157. It is experience recognised by theory as well by reformists' movements in the field of agriculture all-world-over that presently 'agriculture' encompasses and includes proper 'agri-business'. The problems arising out of widening gap in wealth, income and power between the land monopoly and the landless labour

along with the conditions operative in under-developed agriculture and unplanned rural conditions lead to states of poverty, want, unemployment and even man-made famines. These too make up matters of serious concern for legislation. Reforms, therefore, insist on intensification and diversification of land-uses which will result in increase in production and achieve upshot in productivity of the land and of labour. That has to begin with neat set of the land as a unit available for distribution in rural structure where it is the material means of production. Along with the resource-use pattern, the considerations of the non-use or under-utilisation of the land and labour, coupled paradoxically with the over-exploitation and waste of resources actually in use either because of erosion, loss of fertility, salinisations, deforestation are all being treated species of issues of policy and planning. The reforms moreover act as the balancing levers between agrarian and other economic sectors.

158. We emphasise here that with the term 'agrarian reforms' and under its seminal contents go variety of economic matters and issues. The 'agri-business', that is, its part stands for modernisation of agriculture covering agricultural activities along with the agricultural related industries or services, which would by itself be an enormous aggregate of actual and potential business. Taken widely, the reforms involve individuals or organizations concerned with production as well distribution including marketing of food and other agricultural produce. Thus movement of reforms stretches right from tiller to consumers and affect series of closely related activities beginning with possession of land, its exploitation or eventual use and marketing of the produce. For, action and decision taken at one point of the system may impinge or affect on the other point of the economic chain involved in the system.

159. To this must be all added the historical experiences available in the extant system of land possession, ownership and exploitation, that had roots in the colonial feudalism instilled in this country by the English rulers. Large estates of land belonging to a single landlord or to the village community were settled initially by the East India Company for the purpose of collection of taxes conferring several types of tenures or rights in different parts of the country. The feudal landlords were the net product under whom teaming tenants

and labouring landless tilled the soil without any proportional or no return. That resulted in formation of class structures and economic sections differently situate around land and its uses.

160. Variety of tenancies, including rights flowing from year to year against fixed payments transferable, heritable arose around and on the land. A large class of landless labouring poor by the very operation of economic cycles of this feudal system of landholding steadily increased in number and now habitate the rural India. With independence the feudal proprietary and Zamin-dari rights in several forms were first done away with by legislative measures and in the second stage principle of 'land-to-the tiller' was too made effective by several tenancy legislations. All these laws that regulated the structure of agrarian rights and clearly the milestones of agricultural reforms.

161. By Constitution (Seventeenth Amendment) Act which provided the protection to such laws that was eventually upheld as valid. [See: L. Jagannath v. Authorised Officer, Land Reforms, Madurai, (AIR 1972 SC 425)]. Close on the heels of the regulatory reforms finding viable parcels of land for exploitation for tillers were enacted by ceiling legislations. We have seen that all the emanate principally in the national policy evolved and applied in the shape of the original Act i.e. Act No. 27 of 1961.

162. The reality available in the rural sector and economic compulsions under which the mass of landless poor are engaged in this productive venture essential to the community at large and necessity of growth of productions are clear fountain springs of the present system of law providing for specified units of land called "ceiling areas". That would ensure and intensify the uses of land in best of the manner. Further it would permit distribution of surplus land to the needy and landless or economically depressed which would add to their total joy of economic and cultural existence.

163. A reference to Section 28-1AA of the Act which permits granting of surplus land taken over under Section 28 in favour of cultivating corporations owned and controlled by the State is indicative of the State Policy that in a given case the State may step into the field of agriculture by creating public Corporations which will tend to have compact and integrated blocks of land for better

exploitation and diversification of uses of land. The enabling provisions in Section 28-1AA go a long way to indicate further reach of legislative concept of agrarian reform. Thus all the primary and operation scheme of these laws in our view clearly promotes the measures of agrarian reforms.

164. Some submission has been advanced as noted above at the foot of second proviso of Article 31-A and that requires to be noticed at this stage. Article 31-A, Second proviso, lays down certain conditions with regard to the laws to be made for the acquisition by the State of any estate. It is well settled that the word "estate" in Article 31-A takes in the acquisition by the State of the rights in agricultural lands. The other conditions of the proviso are that such agricultural estate must be held by a person. The said estate must be under his personal cultivation. The estate must be within the ceiling limit applicable to the person concerned fixed by any law for the time being in force and the acquisition must operate upon such land and the law must provide the payment of compensation at a rate not less than the market value of such estate. All these conditions must co-exist before the injunction of the proviso can be effectively answered. For the purposes of the proviso the lands above the ceiling limit fixed by a law are not part of the right to claim compensation at the market rate as contemplated. If the land or the estate that is being acquired is below the ceiling limit, then and then the proviso enjoins that the law must make a provision regarding the compensation at the market rate. The submission, therefore, that even upon acquisition of the surplus land there must be such a compensation and there is any vice in Section 23 or the scheme regarding compensation for surplus land prescribed by the present law is not available on the basis of this proviso.

165. The second complaint is with regard to the concept of the 'person' and the contemplations of this proviso of Article 31-A. It is said that in view of the provisions of Article 367 of the Constitution, the terms and phrases available in other parts of the Constitution are to possess the meaning as is contemplated by the provisions of the General Clauses Act, 1897. So applied, it is only the individual natural person and the acquisition of his estate below the ceiling limit could be contemplated by the second proviso. According to the submission the

'family unit' could not be treated as 'person' within the meaning of the proviso because it is an artificial collocation or group of persons constituted by Section 4 (1) and Explanation appended thereto in this Act. It is not "a person" proper and, therefore, if the lands are to be acquired they will have to be provided for compensation as indicated by the second proviso to Article 31-A separately to each person. Certain decisions referred to supra are relied on this aspect. We propose to consider here this aspect of the matter.

166. General Clauses Act, 1897 defines 'person' as follows:

" 'person' shall include any company or association or body of individuals, whether incorporated or not."

The definition is illustrative and is not exhaustive. The rule of interpretation regarding such inclusive definitions has always been to treat the other entities who would not have strictly within the definition to be the part thereof, because of illustrative enactment of such definition. The inclusive part of the definition in terms indicates that it would take in any incorporated or unincorporated body of individuals or other associations. As far as considerations closer to social and religious groups of persons are concerned, it appears that it is well recognised that a joint Hindu family has been treated to be a juristic person. [See *Gangaram v. Dharamsi*, (AIR 1935 Nag 250), *A. G. Pandurao v. Collector of Madras*, (AIR 1954 Mad 1049) and *Apaji Kulkarni v. Ramchandra*, ((1892) ILR 16 Bom 29 at p. 39) (FB)]. It is undoubtedly true that in the decided cases the mode of living and enjoyment of property of the group of persons living under the name and style of joint family subserved that findings to hold that such entity answered the concept of juristic person.

167. The definition however clearly permits to look for the group of individuals to be brought or placed in the bracket of entity called 'person' for the purposes of a given law. Incorporation which results in juridical creation of personality is not essential. Groups of individuals known and recognised by law as an entity, for all purposes of General Clauses Act would be "the person" and nothing less. It is possible for law to constitute persons or treat specified and related group of individuals to be the 'person'. It has been noted by this Court in *Baburao v. State*, (1974 Mah LJ

385 at p. 392) that "the person" must be recognised by the State as a person and should be capable of rights and liable to duties. These two elements i.e. capacity to possess rights and subjection to obligations and duties are matters of legislative results. Tested from this basic juristic approach, a group of persons which are primarily bound by certain relations can be classed for the purposes of land law to be the 'person'. There is in fact no inhibition in that regard on the legislative power and we do not see why "a family unit" which comprises of the husband and wife or wives and their minor children either being sons or being unmarried daughters for the purposes of the law cannot be treated as a group of individuals and subjected to rights and obligations under the provisions of given statute. Once the body of individuals and we have no doubt that what explanation to Section 4 (1) does is to create a body of individuals obviously known to be related to each other, are treated by a law as one entity, that would always answer for the purposes of Section 3 (42) of the General Clauses Act the requirement of a person. By so grouping and finding law "a person" for the purposes of law, it cannot be said to be defeating the second proviso of Article 31-A of the Constitution.

168. Moreover, it is fallacious to attack the premises of Section 4 (1) along with the Explanation of the Act that it is an artificial, unknown unit of strangers put together arbitrarily by the Legislature so as to commit legislative fraud to take away the property. That is not very sound approach nor sustainable challenge. The very purpose of law is to subject the estates of the person or group of persons who enjoy such estate together to lower limit of ceiling and out of excess to create a pool of surplus land for community distribution. Recognised groups related to land would always be primary objects of permissive legislative activity and criticism on this count is entirely unrealistic. We may here indicate what was noted by this Court in *Baburao's case* (1974 Mah LJ 385) about the social facts in this regard. That case arose under the scheme of the Original Ceiling Act i.e. Act No. 27 of 1961 and the question posed before the Court was, whether an individual residing with his family could claim the benefit of Section 6 so as to retain the property to the extent of two ceiling areas available because the family had members more than five for computa-

tion under Section 6. This Court accepted the contention of the land-holder that an individual residing with the known relations who are dependent upon him either because of natural, or social or blood affinity would all constitute the 'family', and that such individual though he may be personally holding the property would be entitled to the benefit of Section 6, as it then existed to retain the property by computing against each of the member the area permitted by that provision to the extent of two ceiling areas. The argument for the State that family as such must hold the land or must have title and interest in the land was not accepted by this Court. Soon after the decision was so rendered, the present legislative scheme has been enforced and it is indeed salutary to read in the present scheme the results which are more clear and avoids all sorts of ambiguities.

169. Firstly the concept of 'family unit' is now defined by Explanation to Section 4 (1) and entitlement in Section 6 as amended at present, is made restricted to the members so included in the family unit. Though the definition of the term 'family' is retained in the present Act as was in the old Act and "Family" is included in the definition of the word 'person' in the present enactment, Section 6 has been entirely substituted and is made only applicable to the unit called the 'family unit' where there are specified persons who alone can be the members of the family unit. The intention is to clarify what was otherwise ambiguous and open to interpretation. Now instances like Baburao's case are not now likely to occur in the present scheme and the substituted Section 6.

170. Another thing which can be noted with advantage is that in Baburao's case, this Court after considering the concept of the 'family' looked to the sociological growth of the social group called 'family' under the Indian context and upheld the contention that individual living in family answers 'the family' for the purposes of then existing Section 6. Suffice it would be to refer to the concept of family as enunciated in that case. After noting the deliberations of the All India Seminar on the "Indian Family in the Seventies" it is noted that the result of the Seminar has been pointed out to be that the traditional typology of 'joint', 'nuclear' and 'matrifocal' families was a useful one for the exploration of the situation of the families in India. The

second statement available from the deliberations of that Seminar is to be that there was a general consensus in the sociological observations that in India there is a gradual break-down of the joint family and the movement is towards individual family units and that this variation in familial structure is accompanied by emotional as well as economic strains on the family. In the sociological field, therefore, it is recognised passage that the Indian family has come out of the stage known as 'Joint Family' and is marching in transition towards 'nuclear family' that grows around an individual or two of them as the earning unit for self and for those who depend upon them either living together or earning together. Baburao's case noted that this fission from unit to unit is the part of modern social experience. It was therefore observed that if an individual having a family answered to the term of 'family' as distinguished from Joint Hindu Family, he would be within the term 'family'. That case notes:

"Several social principles, therefore, may have their interplay while determining whether a particular group answers the term "family". A "family" may be determined by applying the principle of dependence or residence or relationship and laws applicable to such groups."

(Underlining ours). While considering the argument of concept of 'family' as such against the contest of holding of 'land' in the original Ceiling Act it was observed:

"If a restrictive meaning is given, as contended for by the State, that it must be the family, who as a group must own the land and then it is only those groups or units which own the property as a unit that would get the benefit of Section 6 and no other. Such a view would render the provisions completely restrictive in scope and ambit. No doubt, upon surface reading of that provision, it does indicate a collocation or a group of persons either living under one roof or one domain and related with each other must as such hold land. However, in the social context and the background available in the State it is a matter of common experience that a family consisting of one head and having children and a spouse, owns the land by the head and depends for livelihood on such land by cultivating it. For such family agriculture is the way of life, for it depends for maintenance on such land. Any member of such

a family can cultivate land and for the purpose of the Act it is personal cultivation." (Emphasis added).

171. Thus in Baburao's case (1974 Mah LJ 385) this Court applied the principles of relation and dependence as subserving the need to form a group and treated it as a common group under the social and existing pattern in which social life in agrarian society is obtained. If approached in this manner, explanation appended to sub-section (1) of Section 4 brings forth and operates on known social phenomenon. That reads:

"A 'family unit' means,—

(a) a person and his spouse (or more than one spouse) and their minor sons and minor unmarried daughters if any; or

(b) where any spouse is dead the surviving spouse or spouses, and the minor sons and minor unmarried daughters; or

(c) where the spouses are dead, the minor sons and minor unmarried daughters of such deceased spouses."

It firstly defines the term "family unit" including therein a person and his spouse or more than one spouse and their minor sons and minor unmarried daughters and if any of the spouses is dead the surviving spouse and the minor sons and minor unmarried daughters or where the spouses are dead, the minor sons and minor unmarried daughters of such deceased spouses.

172. The groups indicated by Clauses (a), (b) and (c) severally, it cannot be denied, are known groups wedded together firstly by marriage and being the offspring are entwined by blood relation. The inclusion of minor sons and unmarried daughters and putting them together with their mother or father clearly indicates the principle of dependence which is known to the state of law; the minor being disabled and dependent and looking for the care to others. By very nature such person either survives by maintenance provided for by others and even if owning land looks to others for its management and exploitation. The social group often resides under one roof and shelter having commensuality in each other's interest.

173. There is clear rationale and reasonableness in finding and carving out such social group of persons as a unit. Particularly when such a unit is related to land it would normally be one economic unit. Socio-economic realism operative in the field of land cultivation is under-pinned by these premises.

174. We have already referred to the recommendation in this regard that evolved a national policy regarding the agrarian reform and there too for obvious reasons "the family unit" of such type was eventually conceived as a viable unit to be made unit for the entitlement of ceiling area. Thus such enacting is not by any standard an irrational grouping of persons. Legislature here is clearly aware of the social facts available in enjoyment of land and drawn on expertise of the reports on national reforms. Moreover, if there are more members than five, Section 6 indicates how the additional area will be allowed to be retained by such unit. Mapping out such parcels of land and making them available to the stated group of persons who are inter-linked because of relations and because of social and natural dependency and mode and manner of life, cannot at all be said to be artificial, unworkable or unjust. On the other hand, read with Section 6, it shows legislative circumspection and care to allow further land if there are more than five members in the family unit.

175. It is said that this grouping of persons is exposed to results which are discriminatory, unnatural and unjust. It was suggested that the major person has been treated with a benefit so are also the widows, while it is complained that married daughters are unnecessarily left out. In the scheme of the Act no such unjust or discriminatory results are contemplated. If there be a major person, the premise of the law is clearly that he can hold land possessed by him as owner or tenant to the extent of ceiling area. Every major individual thus stands first and principal beneficiary and as such separate class for legislative consideration. In other words a major individual is treated an economic viable unit and as such related to land ever capable to exploit and to cultivate the ceiling area. That is, for such person is no more dependant on his father or mother and himself is working and toiling agent to put land to the best of its uses. Natural state of majority and its concomitant indicia are sufficient to treat him as a separate class than that of minor.

176. Married daughter, it is social and common experience walks out of the family of her father. She severs, in many societies under law, the relations with her matrifocal family and becomes part of the family of her husband or procreates a new family. She cannot be any more the member of the family because

of the social complexion arising out of marriage-institution. Law may allow her to carry her property to another family where she becomes the wife of her husband. Her property will be taken care of in that family unit which will be counted with her husband. Thus for proving for major persons separately as individual unit and not permitting married daughter to be counted as member of family unit, the law operates on reasonable social premises and no exception is available.

177. Our attention was invited to certain provisions of the Act to show that the minor's property is being affected and there is no safeguard worked out by the law itself. Particular emphasis was in this regard, along with other provisions, laid on provisions of sub-section (3) of Section 16. We may indicate that that provision does not control the collocation as the group of the family unit. What would be the effects and results of law if the property of the minor is frittered away is not the subject-matter of the Ceiling Act, nor we can colour our judgment by any such considerations, once we find that there are good and sufficient reasons to bracket the minor with his/her mother and/or father. In the matters of interpretation there cannot be answers on hypothetical premises that the father and mother who are in charge of the minors interest — nay the trustees, would betray the same by surrendering minor's property at the stage of selection of land for retention by the family unit. Option is given because under Section 4 (1) the property is clubbed together. The selection is clearly for and in favour of the interest of the whole unit and matters of respective interests and rights in property retained will legally attach and inhere in the proportion of the interest by the members of the unit. Ceiling law being clearly a law regarding entitlement of the unit to hold land, principles of proportional interests being preserved would still remain operative in the land retained by the unit. By itself selection does not operate therefore to the detriment of the minor because initially his/her property being grouped with others to the extent of share pooled into unit that would remain always available. Further these provisions are merely enabling the spouses and have to be read subject to other obligations including the obligation of a guardian or a trustee operating upon such property and its care.

178. Provisions of Sections 12 and 13, it was said, expose minors to penal consequences without there being any guidelines in the scheme of Section 12 with regard to filing of returns on his behalf. Here the criticism is not well founded. In the first proviso appended to Section 12 (2) it is clearly indicated that in the case of minor and lunatic return will be furnished by the guardian. Thus for this guardian is obligated and legislative premises are neither vague nor confusing. We cannot countenance the argument that minor will be subjected to penalty because of the fault of the guardian, nor can we be asked to hold that there is any injustice likely to be meted out to the minors because of the bracketing him with his father and mother. We are further not impressed by the argument that Section 40-A which provides for penalty would be invoked against the minor, he or she, having been included in the unit called the family unit. There too it is obvious that the matter is not of course, but the prosecution has to be after the previous sanction is accorded by the Collector who is responsible Revenue Officer of the State in the district. Only because such penal provisions are made which are of general application and which have their independent purpose in the scheme of the Act it does not lose its validity or vitality. It is perfectly possible for the legislation of such kind to find out reasonable mode of enjoyment of property of the group of people and club them together as a unit so as to achieve the declared objectives of agrarian reforms to which we have made reference above.

179. Before we part with the definition and concept of "the family unit", we propose to make few observations with regard to some obvious matters. In the social context "unmarried major daughter" is a social reality available in an agrarian society. In some societies daughters do not possess any interest in the land and in some they do. In the property clubbed for family unit though there may exist a married major daughter very much working and dependant member of the family, Section 6 does not permit for the purposes of computing her to be the member nor can she be included in the definition of the member of the family unit. We do not find any good reason why this type of person, i. e. major unmarried daughter in a family has not been treated to be the member of the family. Economic laws are eventually to

meet the social facts and reach justice evenly. However this is all for the Legislature to decide whether such a person appropriately can be included as a member for permitting better benefit of Section 6 in favour of the Family Unit.

180. Secondly here we observe, the anomalous results expressly leaving the question open about the validity of sub-section (2) of Section 4 as its operation is retrospective by almost five years i.e. from 26th September 1970. In the State as well outside dissolution of marriages by custom is a common mode and way of life in several communities of the people. There are several social groups, tribes, castes as well several different religious entities that operate their marriage system differently and dissolutions are permitted by respective customary law. The effect of dissolution of marriage is to snap the civil as well familial and religious tie between husband and wife and upon valid dissolution in law rendering them strangers fully free to marry, free to procreate, free to be a family all anew. It is not unknown that the wife of one may marry another may further get the dissolution and again enter remarriage with other. By giving retrospective operation for about 5 years to collocate such strangers in "Family Unit" only because they happened once to be tied in the bond of marriage which is differently treated in different castes and communities appears to us *ex facie* unreasonable. Moreover the provision of sub-section (2) does not operate with a presumption as is the scheme of Sections 8, 9 and 10 of the Act. That shuts clearly the proof to establish that the dissolution of marriage was not meant to avoid the effects of the law. Section 4 (1) is a provision of clubbing of land together of diverse or joint interests. Results of Section 4 (2) in a given case would be to put quite the strangers in one bracket and subject them to liability only by reason of past relation. However, question of validity of Section 4 (2) does not arise in any of the petitions before us and we have made these observations after hearing the learned Advocate-General on this aspect so that the legislative machinery may take note of the same to make provisions more reasonable and fair keeping in view the social and customary rights of the people.

181. Now complaint at the foot of alleged confiscatory results of certain provisions upon the interests of the members of the family unit.

182. Section 8 prohibits transfers, Section 9 acquisitions, Section 10 lays down the consequences and Section 11 disregards certain partitions. By explanation as far as to the first part regarding the scheme evinced by Sections 8, 9 and 10, Explanations (1) and (2), is criticised as confiscatory. We do not think so. These are enacted clearly to give effect to the purposes and objects of the Act and Explanation (1) below clause (b) of sub-section (1) of Section 10 merely enacts a rule of evidence and casts the burden to prove otherwise on the party who wishes to stand by transactions and its validity. Under law, transfer or conveyance of immoveable property is normally effected by duly registered documents. Plea based on second explanation, therefore, does not call for further construction in this context. Suffice it to observe that both the Explanations appended below Cl. (b) of sub-section (1) of Section 10 contemplate that all bona fide transactions if properly proved upon equitable consideration will always be respected by law. Such enactments indicating results regarding burden of proof and statutory presumptions are efficacious measures of known legislative activity. The parties who are within the prohibitions of law regard being had to its purposes should begin within statute's presumption and rebut it by proving it to be otherwise. The particular type of proof and its standard are matters involving facts and circumstances in each case. The very fact that adjudication is possible is a sufficient safeguard to any member of the unit including minor.

183. So too would be the case with regard to the partitions within the meaning of Section 11. Reference was made to the provisions of Section 53-A of the Transfer of Property Act and other equitable doctrines operating and judicially applied in the matters of transactions and transfers of property and it is said entire equity is eclipsed by the drastic scheme to ignore partitions. All this overlooks constant premise that "equity" is not a concept that flourishes apart from given law. Law pre-empt conditions which are equitable in its view. When premises of law rule, equity cannot be invoked to control it. Legislature in this field is the sole Judge and its enactments have to receive interpretation that will further its object which must be approached as equitable and not otherwise. Known experience of men to grab land and fight for it by devious means of colourable de-

vices so as to avoid material acquisition of surplus land for public purpose, all further the enactment of the provisions of Sections 8, 9, 10 and 11 of the Act. Moreover presumptions enact rule of evidence untouched by the eventual adjudication whereunder the party can prove bona fides so as to rebut statutory presumption. Adjudication and its possible result are themselves matters of clear equity that respects transactions of the parties. It is tall claim that considerations of equity should help those who stand to defeat the law. Claimant at equity should have stainless transactions and clearer conduct before invoking its principles. Further modern Legislature that acts in socio-economic-political areas possesses omnipotence to structure conditions and restructure rights. Transactions by parties with regard to property, it is primary, must accord with law concerning it and there is nothing supervening sacrosanct about it. Thus law's objective being candid and clear positing permissive modality of raising presumption and providing for adjudication, the grievances against these provisions are entirely unmerited. We reject the same.

184. Turning to some of the decisions relied upon by the several learned counsel in this regard firstly of the Supreme Court, we do not find any support for the propositions advanced that the Legislature disabled either in its wisdom or in its policy to collocate such natural group of persons in "a family unit" and that clubbing could not be done as to achieve the objects of agrarian reforms by providing ceiling and for acquiring lands for the distributive justice. In *Gowli Buddanna v. Commissioner of Income-tax, Mysore*, (AIR 1966 SC 1523), the Supreme Court interpreting the provisions of the Income-tax Act in Section 3 observed that a Hindu coparcenary is a much narrower body than the joint family; it includes only those persons who acquire by birth an interest in the joint or coparcenary property, these being the sons, grandsons and great-grandsons of the holder of the joint property for the time being. Therefore there may be a joint Hindu family consisting of a single male member and widows of deceased coparceners. The Supreme Court further ruled that the plea that there must be at least two male members to form a Hindu undivided family as "a taxable entity" had no force. Thus the case on

the other hand helps to uphold the validity rather than negative it.

185. The case in *A. P. Krishna-swami Naidu v. State of Madras*, (AIR 1964 SC 1515) arose under the Madras Land Reforms (Fixation of Ceiling on Land) Act, Section 5 and Chapters II and III and there following the decision in *K. Kunhikoman v. State of Kerala*, (AIR 1962 SC 723), the Court observed that the 'family' has been given an artificial definition. The 'family' itself was quoted by Section 3 (14) to mean the person, the wife or husband as the case may be of such person and his or her minor sons and unmarried daughters, minor grandsons and unmarried grand-daughters in the male line, whose father and mother are dead. The provision was attacked as violative of Article 14 of the Constitution. The Court observed that—

"We are of opinion that this contention is correct and the ratio of that case (*K. Kunhikoman v. State of Kerala*, AIR 1962 SC 723) applies with full force to the present case. It was observed in that case that "where the ceiling is fixed ... by a double standard and over and above that the family has been given an artificial definition which does not correspond with the natural family as known to personal law, there is bound to be discrimination resulting from such a provision." In the present case also 'family' has been given an artificial definition as will immediately be clear on reading Section 3 (14) which we have set out above. It is true that the definition of 'family' in Section 3 (14) is not exactly the same as in the Kerala Act. Even so there can be no doubt that the definition of the word 'family' in the present case is equally artificial."

And it was further observed:

"The provision of Section 5 (1) results in discrimination between persons equally circumstanced and is thus violative of Article 14 of the Constitution. This will be clear from a simple example of an undivided Hindu family, which we may give. Take the case of a joint Hindu family consisting of a father, two major sons and two minor sons, and assume that the mother is dead. Assume further that this natural family has 300 standard acres of land. Clearly according to the personal law, if there is a division in the family, the father and each of the four sons will get 60 standard acres per head. Now apply Sec. 5 (1) to this family. The two major sons being not members of the

family because of the artificial definition given to 'family' in Section 3 (14) of the Act will be entitled to 30 standard acres in the case of each will be surplus land. But the father and the two minor sons being an artificial family as defined in Section 3 (14) will be entitled to 30 standard acres between them and will thus lose 150 standard acres, which will become surplus land. This shows clearly how this double standard in the matter of ceiling read with the artificial definition of 'family' will result in complete discrimination between these five members of a natural family." (Underlining added as emphasis in the submission).

186. The case for several reasons would be distinguishable because there 'family' itself was defined which was artificial and contrary to the concept of the 'family' known to Hindu law. Here the law as found on the other hand creates a unit of persons naturally related and residing together. 'Family' is independently defined by this law which includes Hindu undivided family and group of persons who by custom or usage live together and can be "a person". For the purposes of Section 4 which provides for clubbing of property each member who is included in the definition of 'family unit' by Explanation may not possess land and yet he may be part of the family unit worked out for the purposes of permitting maximum two ceiling areas read with Section 6. Moreover, if family unit can be treated as a person created by this law, that would be entitled to hold like any other person land to the extent provided. Major person being treated as a separate class for the purpose of legislation having obvious indicia as related to land and such person being entitled to hold land denominated by ceiling area, question of personal law does not affect the provision of Article 14 of the Constitution. Land law is secular in character and operates on economic plane fixing limit the material wealth of production. Reasonable, viable, working, productive unit is the differentia and thus validly enacted. Principles emphasised in this case do not affect these criteria.

187. Moreover in further passage of pronouncement and coming rather closer we have the decision of the Supreme Court in *L. Jagannath v. Authorised Officers Land Reforms, Madurai*, (AIR 1972 SC 425). There the 'family' of the type which was being considered

in the earlier case of *Krishnaswami Naidu* (AIR 1964 SC 1515) (supra) as defined by Section 3 (14) of the Madras Act was treated to be immune from attack under Art. 14 of the Constitution because of the placement of the Act under the statutory shield of Art. 31-B of the Constitution. It is ample, therefore, to observe that even assuming strictly that this is an artificial collocation of persons put together under the concept 'family unit' and such a group is subjected to obligation to surrender surplus land after clubbing the properties together and there results any disparity or discrimination in law as the Act itself has been placed in the Ninth Schedule such considerations of equality of Art. 14 of the Constitution would not be available.

188. For this we must emphasise the operational difference between the protection afforded by Article 31-A, Article 31-C on one hand and Article 31-B of the Constitution on the other to the legislation. Each of the articles has independent protective potential. Articles 31-A and 31-C operate by their own force upon legislation of the type mentioned in those articles and satisfying the conditions of those articles render attacks emanating from inroads upon Articles 14, 19 and 31 as unavailable. By law either of the State or Union satisfying the conditions of Articles 31-A and 31-C immunity is made implicit in these regards without there being any need or necessity and evoke the constituent power under Article 368 of the Constitution. However, when that power is exercised by Parliament amending Ninth Schedule and the law made is placed there, Article 31-B springs into action to offer total protection and immunity to such law from any challenge whatsoever under Part III of the Constitution. Effects of these independent provisions have to be independently observed and applied. Applying the principles in *L. Jagannath's* case (supra) we reject the plea regarding violation of Article 14 of the Constitution.

189. Reference was made to the Full Bench decision of the Punjab and Haryana High Court in *Sucha Singh Bajwa v. State of Punjab*, (AIR 1974 Punjab 162) and *Saroj Kumari v. State of Haryana*, (AIR 1975 Punjab & Har 353). The Full Bench of the Punjab and Haryana High Court in *Sucha Singh Bajwa's* case considered the definition of the term 'family' as available in Section 3 (4) of the Punjab Land Reforms Act, 1973 and

did not accept the contention that it was competently made. However, noticing the terms 'family' from the Maharashtra Act, the Full Bench in paragraph 20 observed:

"From the definition of the word 'family' in that Act it is quite clear that an entity known to the law was particularised as a family which owned land as such and no artificial family was created for the purposes of that Act, as has been done by the Punjab Legislature in the Act under challenge."

The argument put forth before the Full Bench was that the term 'family' could not receive artificial definition and the definition did not answer the requirements of the person as contemplated by Section 3 (42) of the General Clauses Act and, therefore, did not satisfy the proviso to Article 31-A (1) of the Constitution. We have stated above, how we look at the problem and we respectfully disagree from what has been stated by the Full Bench. On the other hand, learned Advocate-General drew our attention to the Full Bench decision of the Andhra Pradesh High Court reported in *Maddukuri Venkatarao v. State of M. P.* (AIR 1975 AP 315), where the Full Bench decision of the Punjab and Haryana High Court (*supra*) has been in terms referred and dissented from. The definition of the term 'family unit' in Section 3 (f) in Andhra Pradesh Land Reforms (Ceiling on Agricultural Holdings) Act, 1973 was upheld by relying upon the legislative competence for the purposes of imposing ceiling which was an agrarian reform. [See: discussion in paragraphs 136, 143 and 144 of the report]. We are in respectful agreement with what is found by the Full Bench of the Andhra Pradesh High Court in this case.

190. Some argument is based on the footing of the reasonableness of the earlier scheme of the Act, i. e. the original Act and results indicated by the Amending Acts. It is said that there the natural social unit family could hold land and the ceiling treated it as a unit by itself, for, in the definition of the word "person" family is included. By the concept of holding land, family could remain in lawful and actual possession as owner or tenant. Further it could cultivate land by labour of any member of the family to answer personal cultivation and further there was a scheme to indicate who would be the member of such family having reasonable nexus or relation inter se as well as with land. This social eco-

nomic unit, it is argued, is disrupted by the present scheme of the Act and in place of 'family' now 'person' who is individual major holder of the property is entitled to hold one ceiling area and further "the family unit" is made entitled to hold to the maximum two ceiling areas, the ceiling area itself having been lowered down to a static formula to the optimum of 54 acres. Substitution of Section 6, definition introduced by Section 4, scheme of finding out individual interests laid down by Section 3 (1) (a) from the interests of family are dictated statutory inroads having no rationale upon the structure of the family which according to the learned submissions is either a social or religious organ close to land and to the people in the State.

191. We are not unmindful of the social conditions and how people live in social-state. But that is no reason to substitute our judgment in place of the legislative judgment in the matters of rights in property. The function of the Court and that of judicial review is limited by its very purpose. We have already shown that there appears to be supervening salient principles operative upon legislative premises which have rational nexus with the relations of the group of the people and possible necessity to regulate the way of their life related to land. Once we find so, it is difficult to countenance all these arguments. Rationally the scheme is not to confer any new rights but to restrict and regulate the rights pre-existing with reference to extent and area. That is the concept of ceiling on land. If the right existed in the group of persons it is common legal experience that it would still be worked out to the extent of individual interests involved in such right. Existence of "Family" as a social group is not further guarantee of its existence as economic unit. If laws are to usher socio-economic relations by permissive measures nothing in the present scheme is irrational. In this regard the legislative judgment clearly furthers basic underlying policy of reforms and does not appear to us to be open to charge of any unreasonableness.

192. In the present scheme, it is obvious that under Section 3 (1) any individual by himself holding property as contemplated by this law is entitled to retain the property to the extent of one ceiling area. If such individual happens to be a member of "the family unit" and there are other members not exceeding five his entitlement is the entitlement of

the Unit and along with others, is limited to one ceiling area. If however in the unit there are more members than five, such unit can claim to retain land to the extent of two ceiling area. Each economic major member and unmarried may hold land to the extent of one ceiling area, though he may be originally the member of the family. Each married person equally may hold land to the same extent. If there be two brothers both major and representing units those will be treated upon their entitlement separately provided they are holders of property. Section 3 (1) (a) permits computation of interest out of joint interests and works out a beneficial scheme and carves out separate ceiling areas. There is no disparity introduced in this the obvious principle being that the economic unit of the land should be correlated to the reasonable working hands available for the purposes of exploitation and the cultivation of agriculture. Only because family as such is not made the unit and such computation is to be worked out we do not think that there are any unworkable harsh or unjust results reached by the statute.

193. We may in fact indicate here the fallacy of all these arguments. In the present Act too 'family' is defined and includes a Hindu undivided family and in the case of other persons a group or unit the other members of which by custom or usage are joint in estate or possession or residence. By term 'person' this family is included in the concept of 'person'. 'To cultivate personally' has been defined in Section 2 (9) and includes cultivation by his own labour or by the labour of any member of his family or even by hired labour or by servants. 'Owner' has been similarly identically defined as in old Act in Section 2 (21), as also the word 'tenant' in Section 2 (30). All these definitions are to operate unless the context otherwise requires.

194. Coming to the declaration of Section 3 (1) which prescribes prohibition on holding of land in excess of ceiling area, the words used are to the following effect: "Subject to the provisions of this Chapter and Chapter III, no person or family unit shall, after the commencement date, hold land in excess of the ceiling area, as determined in the manner provided". Explanation is: "A person or a family unit may hold exempted land to any extent." Under sub-section (2) of Section 3, declaration regarding the surplus land is

required to be made and it is stated that in determining surplus land from the holding of a person or as the case may be, of a family unit, the fact that the person or any member of the family unit has died shall be ignored. In sub-section (3) of Section 3 it is indicated how for the purposes of calculating the ceiling and surplus land the interests of a person who is a member of the family have to be worked out. Similarly it is stated how his joint interest in Co-operative Society or joint estates or firms has to be worked out. Sub-section (4) of Section 3 directs that no land shall be taken into consideration for more than once.

195. It appears to us that reading the composite scheme of Section 3 together, the word 'person' refers to individual person and not to 'the family' as a person. There may however be other juristic persons contemplated by the Act. This is clear because of the provisions of sub-section (2) of Section 3. There the Legislature in terms directs the death of "the person" be ignored for the purposes of determining the surplus having reference to the relevant date. A natural person alone would answer this contemplation. Similarly in sub-section (3) legislative scheme directs finding out of the separate interest of 'the person' from the family property or from other joint estates. Along with sub-section (4) enacting that the same shall not be counted twice over, this integrated scheme unmistakably indicates that for the purposes of entitlement of the ceiling limit the first and primary unit is the person or the natural individual and the second cognate unit contemplated is 'the family unit' as defined and explained in the Explanation appended to sub-section (1) of Section 4. We are expressly leaving out the case of any other juristic entity and restricting these statements to an individual and the group of individuals living as 'family'.

196. Therefore even though there may be Hindu undivided family or other joint family, holding landed property, the individual interests of each major member will have to be found out separately and worked out in the manner indicated by sub-section (3) of Section 3. It follows that if there be a Hindu joint family taking a case for example having three major individuals, their interests notionally would be worked out to find out their individual entitlement to retain one ceiling area as 'a unit' for themselves irrespective of how they would carry on

the enjoyment of the property. Similarly such a family may have more than one 'family unit' and its entitlement will have to be found out. This salutary scheme understood in this manner permits property to be held in viable units and does not lead to any unjust or hard results. May be by such computation Legislature in fact retained basic concept of any Joint Family or Hindu Joint family in fact for there is no compulsion to partition property here but only finding out and working out entitlement of areas of land. There exists thus a clear rationale underlining the scheme of both Sections 3 and 4 and no exception can be taken that there is any unfairness introduced affecting concepts of any personal law. Having determined entitlement as far as extent of land is concerned, personal law is free to operate and determine rights of persons under it.

197. Now we turn to some other complaints raised during the arguments. Firstly, it is said that the classification of land and fixation of the uniform ceiling in the schedule along with the definitions of Section 2 (5) and Section 5 shows patent and invidious discrimination and a preference to certain persons who may happen to hold land in better located and fertile areas of the State. It was stated that old scheme in the original Act was based on the several considerations which included the local rain-fall, assessment and several such other factors and the ceiling areas were fixed having reasonable nexus with the local conditions of different areas of the State and therefore, in some areas the ceiling was 64 as in Kolhapur, while it was 124 or 126 in other parts like Ramtek in Nagpur district. Now as it is both at Kolhapur and Ramtek, area of 54 acres has been pre-empted and on the face of it it is discriminatory.

198. The scheme of the present Act undoubtedly is somewhat rigid and uniform with regard to the fixation of the ceiling areas. Section 2(5) which defines "Class of land" along with Schedule lays down the ceiling areas having correlation with the class of land. In our view the debate raised on this count is important only as a legislative policy upon which the validity of the law cannot be tested. Once the power to legislate a law to fix the ceiling bestowed to the State Legislature is accepted, it is indeed difficult for the Court to review such legislative judgments in this regard. By

the very nature of things the Legislature is possessed of better means of knowledge of its people and their resources as well as conditions available in the entire State and is the best Judge of the legislative modality operative in a particular field. Only because the original Ceiling Act provided for fixing a ceiling taking into account the climatic and local conditions including assessment and the present enactment departs from those criteria and instead prefers uniform standard ceiling areas, the inference does not follow that there has been any inbuilt or demonstrable inequality perpetrated by the Statute. It must be noted that the present Act became operative in 1975, while the first Ceiling Act was enacted and put into force in 1962. The development in the agricultural field between this period of about 13 years is a relevant factor till within the knowledge of Legislature. Judicial notice can be taken of the strides overall in that the State has bettered irrigation schemes providing for facilities to cultivate land and it has effects on the yield of agriculture. There is progressive evidence available all around of intensification of the uses of the land for agricultural and allied purposes and upshot in value of land evidences it. There have been established in the State specialised agricultural Universities so as to disseminate knowledge of all agricultural and allied subjects and to train personnel who will assist better cultivation of the land and promote scientific outlook. Facilities of providing insecticides, pesticides, better seeds, manures are matters of strategy planned by the State to increase the agricultural yield by appropriate economic inputs. The nationalisation of Banks and availability of agricultural loans in rural sectors on better scales further is a boost to agrarian economy. Thus all these steps appear to have set the stage to enact a law regarding uniform ceiling areas of lands to be made, available for agricultural exploitations.

199. What Section 2 (5) defines is the 'class of land' with reference to the irrigation facilities and capacity of yielding of crops of the soil. Classes (a) to (c) indicate an intelligent differentiation with regard to the lands having facilities of irrigation from different sources while classes (d) and (e) refer to dry crop lands with reference to a location thereof in the districts mentioned in class (d) particularly. This classification is in terms related and correlated to ceiling area fixed under Section 5 read with First Schedule, the

main principle being the possible capacity of land regarding agricultural yield by means or irrigation. The ratio between lands irrigated and lands non-irrigated clearly shows the legislative indicia chosen for this purpose. If land be the economic unit subjected to proper exploitation for the purpose of yielding crops and subjected to other allied uses, then such matters of classification of lands have reasonable, rational nexus.

200. We have already made reference to the national policy in this regard and the principles evolved therein. Though it is no doubt true that the climatic conditions vary broadly in the regions of the State, that alone cannot be the criterion for permitting the larger areas to be retained by the landholders. With modern know-how and direct personal cultivations the Legislature expects that smaller, better-managed intensified agriculture should be the aim to tone up the rural economy and to achieve objective of growing more food and having yield of other allied agricultural products in the larger interests of the community.

201. Mere possibility of better yield in a given area than the other areas in our view cannot be emphasized as leading to unjust result or of inequality between holder and holder. In agronomics such a static approach cannot be sustained. For, much depends on the expertise, capital, availability of better seed, market, appropriate sowing and tending of crops along with availability of manure and irrigational facilities. Moreover, the legislative plan clearly is to settle the agricultural economy keeping in view several long-term objectives. Such a pattern of uniform holding is available in other States too and has been expressly upheld also by the Supreme Court: (See Indarsingh's case (AIR 1967 SC 1776 (Paras 7 and 8)) and L. Jagannath v. Authorised Officers Land Reforms, Madurai, AIR 1972 SC 425). We therefore do not see any vice in such a uniform fixation of the ceiling areas,

202. It was contended upon this aspect of the matter that the State has chosen the agricultural sector for effectuating the policy of the State leaving other sectors like Industrial and Urban Sectors untouched. It is indeed the complaint that by so providing a smaller ceiling upon the agricultural holdings the State is practising inequality and inequity for those engaged in agriculture while others engaged in the industrial

field would not be governed by any ceiling as such and that would result in widening of economic gap.

203. Such an argument even under Article 14 would not be tenable. The ceiling on land by itself is a reasonable classification and there cannot be any appeal that there must be uniform ceiling with regard to every type of economic venture. Even if any such argument is available, we think these are the matters of State Policy. What should be done with the Industrial economy or with the urban economy cannot be the determinative factor while testing the legality or validity of the ceiling imposed in the field of agriculture. The appeal should lie somewhere else and not to the Court.

204. In the sum thus we answer that as far as the person is concerned as contemplated by second proviso to Article 31-A "family unit" is a person within the meaning of the General Clauses Act Section 3 (42) and there is no antilogity enacted by the scheme of the Act and further there is equitable, reasonable and workable scheme enacted by laws premises. In our view, therefore, the terms of the second proviso of Article 31-A fully answered and by reason that Act clearly being a measure of agrarian reform it having received the Presidential assent it is immune on its own terms being challenged on the basis that there is any violation of the fundamental rights guaranteed under Articles 14, 19 and 31 of the Constitution.

205. We now turn to the provisions of S. 2-A and S. 44-A along with Sec. 44-B of the Act. Section 2-A directs the State Government to constitute Tribunals necessary for each area for the purposes of the Act. The said Tribunal is called the Surplus Land Determination Tribunal. Sub-section (3) states that each Tribunal shall consist of not less than 3 members of whom one shall be a person who holds or has held a civil post under the State not below the rank of a Tahsildar and such person shall be the Chairman. Power is conferred upon the State Government to constitute and dissolve such Tribunals from time to time. Quorum is to be prescribed by the rules to be framed under the Act. The Tribunal has to act by majority opinion and when it is equally divided Chairman's opinion has to be the decision. The arguments on this aspect of the matter were mainly advanced by few learned counsel, Mr. Pendharkar and Mr. Mohota. Similarly other learned advocates Mr. Desh-

pande, Mr. Chandurkar too attacked the provisions of Section 44-B.

206. It is said in these submissions that there is abdication of essential legislative function in favour of the State Legislature in constituting the tribunals and no guiding principles with regard to qualification of members have been laid down by the Legislature. Reliance has been placed on this aspect of the matter on the two judgments in *M/s. Devi Das v. State of Punjab*, (AIR 1967 SC 1895) and *State of Punjab v. Khan Chand*, (AIR 1974 SC 543).

207. We really fail to see how such an argument can assist if a closer look is taken of the scheme of Section 2-A and Section 44-A of the Act. We have referred broadly to the scheme of Section 2-A. It indeed lays down by its own terms and object of the Act the most significant guideline. Sub-section (3) of Section 2-A requires that the Tribunal shall consist of not less than 3 members of whom one shall be a person who holds or has held a civil post under the State not below the rank of a Tahsildar. Sub-section (6) to which we have made a reference indicates that the decision of the Chairman has primacy. In the Revenue Administration of the State, Tahsildar is an officer upon whom several revenue duties have been vested by the provisions of the Land Revenue Code and other laws. His qualifications are laid down and the office is known to the Legislature to be conversant with the matters connected with land and revenue. Thus naming the Chairman by office itself subserves the need of laying qualification and as well the qualification. It is implicit in the scheme of such constitution of Tribunals that some matters must be left to the executive discretion. The other members upon the Tribunal advisedly will have to be appointed by the State Government by notification looking to the purpose and object of the Act and adjudication contemplated. It is expected by the scheme that the persons will be drawn from the locality over which the Tribunal has jurisdiction and further that they would be conversant with the matters which are required to be dealt with by or before the Tribunal. It indeed appears to us to be a wholesome provision. To permit such constitution of Tribunals, which will be closer to the community and closer to the area and which will possess by necessary implications expected expertise and experience about the conditions of the land and people are clear matters of

legislative indications in this regard. Moreover, the purpose and the object of the Act itself are sufficient guidelines for such constitution after specifying the Chairman who would be of rank not below that of Tahsildar. There is thus no excessive nor abdication of legislative powers in such a scheme. There can hardly be heard any complaint if such a Tribunal eventually closer to people for whose benefit and for whose interest distributive justices have to be administered. Moreover, there is further system of appeal to Maharashtra Revenue Tribunal as well Revisions to Commissioner and to State. Further aggrieved party can seek constitutional remedy available under Article 227 of the Constitution. The entire scheme therefore taken into account is not open to challenge on these grounds. The decisions relied upon do not help to further the submission.

208. The scheme of Section 2-A read with Section 44-A having nominated the Chairman by rank and authority as indicated above and having sufficient guidelines has yet another eloquent facet. There existed an age-old system of adjudicating bodies dealing with justice or causes which had roots in the social experience of the people, based on associative principles of justice. That evoked support, popularity as well the community sanctions. There is clear evidence of such Courts like those of Kula, Sreni, Puga, (See Mayne's Hindu Law PP. 12-13). That system did work with impartial and yet vigorous approach. It also added to the speed and expeditious dispensation of justice in the causes brought before it. The system was close and akin to the life of the people and its experience as recorded proved to be robust being free from technicalities and responding popular faith and community response.

209. Even in the modern World, community Courts or People's Court or Elective Courts are not matters of any alien experience to juridical thought. The system adopted in the developed nations have applied adequate chosen principles to suit best to the conditions and circumstances available in a given polity and for the purpose of given adjudication. Elective Courts backed by popular propaganda for election in the United States of America and the People's Courts and lay Judges of USSR are all successful experiment actions of value. System of such Courts does dynamically operate in the field of justice. (See: Essay by Prof.

Harold J. Laski on Law and Justice in Soviet Russia; The Ends of Justice by V. R. Krishna Iyer in 'Social Mission of Law.').

210. It appears to us that Land Courts or Land Tribunals now contemplated by the present scheme is healthy experiment indicative of return to our roots of associative and community justice principles and hence we cannot be apprehensive of its modality and effectiveness. The members would be essentially drawn from the community or locale likely to be affected by the decision. The Chairman has to be well-versed responsible Revenue Officer. Courts cannot be asked to condemn such salutary scheme on the ground of possible executive favouritism in appointments of illiterate or interested persons on such Tribunals once the legislative competence in this regard is granted. It all depends how eventually the administration of land-justice is carried on and how fairly these tribunals discharge their high function, for honesty and conscience are not the fruits that only flower with education. Health of system of Court depends on several factors, one being constant vigil of inner and outer conscience of the Judge and its constant rapport with community conscience and mind. Indeed modern World Juridical thinking accepts that in such community system of Courts there are clear advantages as the function and role of Court is much wider and can well be educative as well as paternal in socio-political developments. (See: "Justice in the USSR" Chapter XII by Harold J. Berman). We have premise to hope that land Courts would function in the spirit of detachment, impartiality and by dispensation of just premises dispel doubts about the objectives of land justice in the State. These Tribunals thus would have community backing and by its rule educate the public opinion as it acts as parental organ in rural life.

211. Turning to the provisions of Section 44-B in essence the attack is that there is a cloud cast upon the effective right of representation in favour of the land-holder who is exposed to serious consequences of taking away of the property, forfeiture, confiscation and even subjected to penalty. It is said that the principles of natural justice have been violated. It is further urged that the legislature in this field has been unrealistic in not taking into account the magnitude of the ignorance of the body peasantry, who will be subjected to the

process of law at large and possibility of their being exploited in the situation if they are not effectively represented by expert professionalists.

212. The provisions of Sec. 44-B, firstly call for interpretation and secondly we will be indicating our reasons as to why we do not think that there is any inroad upon any vested right with regard to the matters of legal representation. That provision reads as follows:

"S. 44-B: Notwithstanding anything contained in this Act or any law for the time being in force no pleader shall be entitled to appear on behalf of any party in any proceedings under this Act before the Authorised Officer, the Tribunal, the Collector, the Commissioner, the State Government or the Maharashtra Revenue Tribunal."

Provided that, where a party is a minor or lunatic his guardian may appear and in the case of any other person under disability, his authorised agent may appear.

Explanation: For the purposes of this section, the expression 'pleader' includes an advocate, attorney, Vakil or any other legal practitioner." (Underlining added).

213. By the main part of the section "pleaders" as such are excluded from appearance in the proceedings under the Act and prohibition operates upon that class. Explanation added to this section shows that "Pleader" includes an advocate, attorney, Vakil or any other legal practitioner. The Explanation throws light on the term "Pleader" used in the main part of the section. It was not even countered by the learned Advocate-General that by "Pleader" the main provision indicates that the professional class of Advocates, attorneys, Vakils or other legal practitioner is only excluded. The proviso as is well-settled does not merely carve out an exception, but sometimes explains that but for the proviso would not have been effectively understood as the part of the legislation: (See Ishvarlal v. Motibhai, AIR 1966 SC 459 at page 462). Pleadings by themselves are the class of authorised agents and that particular professional is subjected to prohibition. Proviso, however, makes it clear that in a case of disabled persons the authorised agent who may include even a professional would be able to represent the interest of the minor or lunatic or any other person under disability. This interpretation clearly accords well with the scheme inherent here.

214. Having placed such construction on Section 44-B, we feel little hesitation in holding that no exception can be made to law here enacted. It is not apposite function of the Court to test the validity of the provision by reference to the arguments based on the possibility of exploitation, possibility of oppression or possibility of misrule. In spite of the best of the provisions permitting experts and professionals the life of man and society is replete and riddled with these thickets. On the other hand it is proper and safe always to assume that the Legislature is aware of the total social effects of all relevant factors and with purpose departs from normal rules of representation.

215. There appears to be a clear scheme underlying the composite structure of the Tribunal as indicated by Section 2-A read with Ss. 44-A and 44-B as amended. Having directed the constitution of the Tribunal wherein the members or at least the Chairman have better knowledge of the locality and are armed with experience about the matters touching land, it was natural to provide a direct system of adjudication so as to further its justices by placing the person concerned face to face with the Tribunal. The provision brings the land-holder again close to the process of land justice also as to ensure just and fair considerations of all the relevant matters and the concerned claims. This face to face and spot to spot modality by such composite scheme cannot go well with the professional class. Nor it can play important role in such type of modality in the matters of dispensation of justice. This professional exclusion in relevant perspective is clearly meant to accelerate the speed of agrarian reforms and is not in any sense condemnation of any professional class much less that of pleaders in the State. There may be several reasons present to Legislative mind including the necessity to speed the land justice and by the modality create direct and new awareness amongst the peasantry itself by asking them to participate directly in its process. "Pleader" as an expert no doubt has a responsive role to play in the dispensation of justice and that institution by and large has proved its vital necessity in the field of law. But only because prohibition is enacted it does not follow that any legislative judgment is rendered against that class for there are clear premises of direct participatory educative modality of justice herein enacted. We do not feel that the scheme is

in any manner unjust, unworkable or defective, nor can we persuade ourselves to hold that it affects the principles of natural justice.

216. After all principles of natural justice are not matters of any static formula. The right of hearing or right of representation depends on the express contemplation of given statute or of law and type of adjudication. The premises of land justice which has to operate upon land as a means of economic sustenance and to make pool or surplus for the community interests cannot be scissored by such strait-jacket submissions. There is full opportunity provided to everyone concerned at several stages right from the stage of notice (Section 17), return (Section 12), enquiry and statutory issues to be answered (Sections 14 to 18) and eventual declaration (Section 21). Merely for lawyer is not permitted, scheme cannot be stamped as violating natural justice.

217. Further it appears that there is settled authority as far as this Court is concerned in that such questions are the matters of legislative power and do not impinge upon the validity of the enacting provisions. In *Mulchand v. Mukund*, (AIR 1952 Bom 296) the Division Bench of this Court was asked to consider validity of the Rule 36 framed under the Bombay Co-operative Societies Act which did not permit lawyers to appear. What the Bench then said can be usefully stated with regard to the complaint before us:

".....But whether before a particular tribunal a lawyer should be allowed to appear or not is a matter of policy with which this Court cannot primarily be concerned. All that we may point out is that it may lead to considerable hardship if in important matters where complicated questions of fact or law arise a litigant is denied the right and privilege of being represented by a lawyer of his choice. It may be that the arbitrators themselves or those presiding over judicial or quasi-judicial tribunals themselves may feel the necessity of having the help and guidance of lawyers. Rule 36 is so absolute and so drastic in its terms that even if the arbitrators wanted the assistance of lawyers they are precluded from allowing practitioners to appear before them. The arbitrators may also feel that in a particular cause a litigant's rights would be affected or jeopardised by his not being permitted to

fight his cause through a lawyer. But Rule 36 as framed gives no discretion whatever to the arbitrators. We would suggest to Government to consider whether it is not advisable to reframe Rule 36 so as to give a discretion to the arbitrators whether to permit lawyers or not and not to permit Rule 36 to remain in its absolute, unqualified form."

218. Whatever was observed by the Division Bench in Mulchand's case we make the part of our observations as far as the scheme of Section 44-B is concerned (and) leave the matter for considerations of the Legislature, in view of the decision of this Court as well reasons indicated by us above. Reliance placed on this aspect of the matter on Ramoo Bapoo v. State of Maharashtra, (1974) 1 Serv LR 568 = (1973 Lab IC 1638) (Bom) and Pett v. Greyhound Racing Association Limited, (1968) 2 All ER 545 at 549 is not at all apposite.

219. One small matter herein remains to be mentioned in Special Civil Application No. 1494 of 1976. Mr. Sohni complained that even to the pending proceedings under unamended law the bar of Section is being applied and that "the pleaders" are being prohibited. He made a complaint with regard to the petitioner in that petition and that necessitates the making of a few observations.

220. As already stated, Sec. 44-B has been added by amended Acts. The first Amending Act itself to which the second Amending Act added further amendments followed by Act No. 2 of 1976, a saving section being Section 5 of the Act No. 21 of 1975 has been enacted. Section 5 of Act No. 21 of 1975 in terms saves all the proceedings which were taken under the provisions of the original un-amended Act as if that Act had not been amended. Even without such a provision the principles of Section 7 of the Bombay General Clauses Act would operate when there is repeal. Express provision in Section 5 indicates that the proceedings under the original Act have to be continued as if that Act had not been amended. Right of representation by a pleader necessarily is a vested right and cannot be treated as merely formal, for it has consequences including the one that the appeal can be filed by the professional duly authorised in that behalf. These rights involving the proceedings pending and already initiated would obviously be affected leading to unjust results if Section 44-B is also made applicable to ori-

ginal Act. Therefore, in view of the provisions of Section 5 of the Act No. 21 of 1975 and also the provisions of Section 7 of the Bombay General Clauses Act, it appears to us reasonable to hold that the proceedings initiated under un-amended Act or the original Act will have to be continued as if Section 44-B had not been placed on the statute book. In other words, the operation of Section 44-B is prospective and restricted to the Act which is amended by Amending Acts Nos. 21 of 1975, 47 of 1975 and 2 of 1976. To the proceedings pending when those Acts came into force obviously Section 44-B would not be applicable and prohibition against "Pleader" would not be available therein.

221. Now we turn to the specific attacks on certain sections of the Amending Acts. Sub-section (3) of Section 13, Section 17 and Section 21-A (1) are questioned stating that there is an element of confiscation of the property and these provisions have no reasonable nexus to the object of agrarian reforms. Mr. Chandurkar, Mr. Kalele and Mr. Mohota all submitted that these provisions have been incompetently enacted.

222. The provision of sub-sec. (3) is the part of the scheme which enjoins upon a person or a member of the family unit to submit returns under Chapter IV by reason of Section 12. It is upon filing of returns the proceedings in ceiling adjudication are initiated. Section 12 obliges a person or the family unit governed by clauses (a) and (b) of sub-section (1) or by the provisions of sub-section (2) to furnish to the Collector within whose jurisdiction any land in the holding is situate a return in the prescribed form. The return has to give the details as mentioned in Section 12 and prescribed by the rules. The Act being the law as applicable even in future after the commencement date, the obligation to file returns within stated time has to be specified. Section 12 (A) confers power on the State Government to extend time for filing returns by an order to be published in official gazette. What would be the consequences of failure to submit the return is the subject of Section 13 itself.

223. On the plain reading of Section 13, its scheme in sub-section (1) indicates that it is possible for the person to explain the delay in submitting return within the time specified in Section 12. It follows that if the explanation is reasonable, no penalty of the kind indicated by clause (a) of sub-section (1) can

be imposed. There is other ground for the purposes of penalty indicated by clause (b) of sub-section (1) where knowingly a false return is furnished. Sub-section (2) of Section 13 is a power of the Collector to issue notice if in the view of the Collector, there is a failure by a person or a member of a family unit to follow the injunction of Section 12. If after such proceedings are initiated upon notice, the Collector comes to the conclusion that without reasonable cause the notices had failed to submit the return within time or had submitted knowingly the false return, the Collector is enabled firstly to impose a penalty provided by sub-section (1) and further is enabled to require such a person to submit a true and correct return within a period of fifteen days from the date of the order. After such an order is made under sub-section (2) and in spite of that if a person or a member of a family unit so directed fails to comply with the order within the time granted by the Collector, then the penal consequences indicated by sub-section (3) ensue. These consequences are operative upon the surplus land held by such a defaulting holder of property. Free from encumbrance the right, title and interest in such surplus land would stand forfeited to the State Government subject to Chapter IV.

224. Thus it is penal consequence enacted that operates only on the surplus land and not on the land which is within the ceiling limit. With regard to such surplus land the provision declares that right, title and interest of the person shall stand forfeited and vest in the State without further assurance. The very use of the words 'surplus land' and subjecting it to forfeiture shows that all other enquiry as contemplated by other provisions of the Act will be gone into including the stage indicated by Section 16 permitting choice with regard to selection of land for retention. Upon declaration made under Section 21, the surplus delimited would stand forfeited, the legal effect being the entitlement to receive the compensation under Chapter V of the Act for the surplus land will stand extinguished.

225. This type of forfeiture as penalty after full hearing in the very nature of things cannot be questioned as unjust. To lay down the penalties and its scheme by themselves are the matters within the legislative competence. If in spite of law persons choose to act with impunity they render themselves liable

to be dealt with by the penal laws. The scheme indicated above is one integrated scheme and the provision for penalty of forfeiture operates only on eventual compensation that could have been claimed under Chapter V and nothing else. It cannot be treated as harsh or unfair. After all, by the premises of the law the entitlement to hold land is co-extensive only to the ceiling area. After the coming into force of the Act the surplus held by a person or the family unit is available to the State to be acquired in the manner provided by this law. The provision regarding the payment of compensation and the entitlement thereto arises not under any other law but by the terms of this law i.e., Chapter V thereof. Instead of providing a further imposition of fines or other types of penalty, the Legislature devised to cover the field of penalty as co-extensive with the right, interest and title in the surplus land. No exception can be taken to such a scheme only because as was faintly submitted, that in a given case the penalty would be too meagre if the surplus is very small fragment of land and in others it will be too harsh if the surplus found is large holding of persons. There does not appear to be any sound principle to subject each and every person to the same quantum of punishment. The principle is whatever entitlement would have arisen to receive the compensation because of the quantum of surplus land is being deprived, to that person. That principle would uniformly affect every one to the extent he holds the surplus land. The scheme of both Sections 12 and 13 is indicative that there is adjudication provided before the consequences can ensue. That is by itself a salutary safeguard. The provisions of Section 13 (3), therefore, in our view are validly made and cannot be struck down on any principle on which reliance was placed.

226. With regard to the other section, the challenge is to the last part of sub-section (1) of Section 17 added by the Amending Act. That deals with the effect of public notice issued under sub-section (1) of Section 17 and when issue is about the knowledge of the contents of such notice. It statutorily states that issuance of the notice shall be the conclusive proof thereof as against the person who may raise any objection. It was urged that this would work untold hardship and open floodgates for frauds and even innocent persons would lose the right and remedy provided for by the Act. The

submission is that in agrarian society there are several transactions which are benami and which are not reflected in revenue papers and the opportunity to show that really the contents of the notice issued under sub-section (1) of Section 17 were not known to the persons concerned likely to be affected by the proceedings should not be robbed of and the contrary indicated by the statute is replete with unreasonableness and as such the provision is enacted in colourable exercise of the legislative power.

227. In our view the argument is devoid of any merit and is based on hypothetical situation. Firstly, sub-section (1) of Section 17 is merely a rule of evidence and though the words used are 'conclusive proof' with regard to the contents of the notice, it raises a presumption in that regard. Like any other presumption, if a person is subject to real fraud, the challenge on the ground of fraud, mistake or jurisdiction is not at all ruled out. These are legal defences available wherever juridical presumptions arise and operate. Moreover the scheme of sub-section (1) and sub-section (2) has to be viewed together so as to work out a reasonable result. Sub-section (2) enjoins issuance of the individual notices to the holders and to the persons known to be interested. It must be presumed that the legislature obliges the authority to issue these individual notices. Thus the immediate requirement of giving notice and calling upon the persons who are known to be interested is fully satisfied. Apart from these notices contemplated in sub-section (2), the amended section with regard to the public notice issued in the manner prescribed in the villages creates a rule of evidence with regard to the knowledge of the contents of such notices once the public notice is properly issued. Having provided for in sub-section (2) the notices to the holders and to the persons known to be interested in the property, such a provision has been made only to avoid undue delays and cannot in any manner be said to be unreasonable. To test the reasonableness in the matters of such procedural provision, it is ample if there is assurance that the person known and likely to be affected is informed about the proceedings contemplated under the Act and nothing more. All that is evident herein.

228. Section 21-A (1) which has been added by the Amending Act is subjected to the criticism that its provisions are confiscatory, unjust and may put pre-

mium on the omission of the authorities under the Act to take possession of the land and subject the innocent holders to the pecuniary liability to pay compensation or damages. It is said that because of this the same should be declared as invalid.

229. This provision cannot in any manner be treated as unconnected or unconcerned with agrarian reforms or the main object of the statute. The scheme particularly of Section 21 reflects that after the declaration is made of the surplus land under sub-section (4) such surplus land has to be surrendered in possession of the State immediately. Upon delimiting the ceiling and finding the surplus, two legal effects ensue. As far as the surplus land is concerned, entitlement of State to possession of the said land arises followed by an obligation on the surplus holder to hand over the possession thereof. Indeed, in agrarian society love of land is notorious fact and nobody wishes to part with the property which is a powerful means of production. To counter-balance this tendency after lawful declaration of the surplus, reasonably, the present provision appears to provide a mere consequence. The day the surplus is declared the entitlement of the surplus holder to be in possession of such surplus land under law stands extinguished and he has to be ready to part with it. In spite of such lawful extinction of entitlement if he continues to hold the possession of land he can be subjected even on general principles to pecuniary liability for the fruits of wrongful enjoyment, to be assessed in the manner prescribed.

230. Like any other proceedings therefore these are enabling provisions giving rise to the pecuniary liability and its ascertainment. That essentially calls for an appropriate adjudication by the authority concerned. The concept of "damages" introduced and the legislative intent by use of the term 'compensation' are all sound guidelines to infer its intent in that regard and the apprehensions expressed cannot be appreciated. In a given case if really it was the State or its agency which defaulted the taking of the possession in spite of the landholder's willingness to hand over the possession of the surplus land so determined, there would be neither any award of damages nor any entitlement of the State to claim the same. The concept of damages abhors unjust enrichment; and compensation has to be only commensurate with the wrongful loss caused by others. That by itself

assures us that the provision is a well-merited one and is designed to achieve the speedy acquisition of surplus land for the eventual purpose of its distribution according to the provisions of law. We reject all the arguments that the provisions are invalidly enacted.

231. A submission was further advanced that certain provisions have been made retrospective to effect as from 26-9-1970, and that it is arbitrary fixation of the time and open to be struck down because it is arbitrary, affects vested rights and has no nexus to any particular purpose.

232. The affidavit filed on behalf of the State indicates that that was the date when the Chief Ministers' Conference was called at the national level and first move to lower down ceiling including other eventual decisions in that regard were taken on agenda. That turned the leaf in the history of ceiling so as to open public debate not only in this State but all over the country. The Chief Ministers' Conference itself directed that the dates anterior to January 1971, should be fixed for the retrospective operation of lowering the ceiling limits. It has been said on affidavit that the deliberations of the Chief Ministers' Conference were got known and people were knowing that the ceiling limit is likely to be lowered. To avoid the effect of lowering down of the ceiling, the Legislature intended, it is stated, to put the date 26-9-1970 and give retrospective operation to certain provisions for the purposes of effectuating the agrarian reforms.

233. As against this, affidavits were filed in some of the petitions to say that they were not knowing about the so-called Chief Ministers' Conference or the decisions taken thereat nor according to the affidavits the same were publicised. Certain decisions pressed in aid on the question that when the validity of such fixation of dates is in issue, there must be evidence to indicate that the same was widely published or widely known so that by fixation of any such date, the purpose of the Act would have been defeated.

234. As we have over-emphasised in the present judgment that like any other matter it is within the legislative competence to give retrospective operation to any law. The purpose of such legislative policy may become clear if the history to which we have made a reference is taken into account. In fact from the publications issued by the Govern-

ment of India to which we have made a reference under the authority of the Lands Reforms Commissioner, the case of lowering down of ceiling areas in whole country appears to have been an hot issue and was being debated through several media and on several levels. First concrete orientation step towards such policy was that the Chief Ministers were called on the national level to meet in the capital on 26-9-1970. Thus there is some rationale indicated by the historical events which began with that conference and prior to which there was already a case debated in the country by the competent authorities including the economists and agronomists regarding the lowering down of the ceiling areas. Thus in our view there is clear available evidence to find reasonable relation of the date 26-9-1970. Once we find this relation the other arguments that certain petitioners were not knowing about the policy decisions is of no avail. Making of the law and its competency does not depend on the individual knowledge of a particular person. We reject the argument on this aspect also.

235. At this stage we direct that the group of 30 cases being Special Civil Applications Nos. 1527, 1931, 2199, 2197, 2115, 2131, 2200, 1726, 1725, 1894, 1494, all of 1975 and Nos. 2476, 2477, 2478, 1072, 1073, 2990, 5, 266, 267, 3438, 2533, 637, 606, 1033, 1103, 1104, 1106, 3410 and 2172 of 1976 should be separated for in those only the live question with regard to extra-territorial operation of the law is raised. In these petitions too the common points with the group of these cases obviously stand concluded by the judgment now delivered by us.

236. As a result of these conclusions, excepting the Civil Application filed in Special Civil Application No. 1840 of 1976 being Civil Application No. 1378 of 1976 which we propose to dispose of by separate judgment we hold that there is no merit in any of these petitions and accordingly all these petitions raising the questions noted above and numbering 2661 would stand dismissed on the points raised in those petitions. In our view, as far as these points are concerned, the judgment rendered by the Bombay Bench in Special Civil Application No. 49 of 1976 does not require any reconsideration. There are groups of cases as we have indicated in the beginning of the judgment which challenge the validity of the enactments on several grounds and all these cases therefore stand dismissed. Peti-

tions wherein applications for amendment are filed would stand dismissed as amended. There are groups of cases numbering 145, which have been filed after the Maharashtra Revenue Tribunal's Order. The points about the validity of the law raised in those petitions stand concluded by this judgment and to that extent the petitions are dismissed. Those petitions will now be placed before the Single Judge to be dealt with on the merits. There are petitions filed directly after the order made by the Surplus Land Determination Tribunal without filing appeal numbering about 31. That group of petitions is also dismissed. The petitioners in those petitions would be at liberty to follow the remedy if any according to law to question the validity of the order made by the S. L. D. T. on merits. Though we dismiss all these petitions together, we make no order as to costs.

237. Prayer was made in Special Civil Applications Nos. 1918/75, 1949/75, 1694/75, 1970/75, 1948/75, 408/76, 2076/76, 1904/75, 1955/75, 1394/75, 154/76, 161/76, 763/76, 722/76, 331/76, 1394/76 and 340/76 by the learned counsel M/s. S. R. and R. N. Deshpande and Special Civil Application Nos. 1533, 1553, 1574, 1654, 1655, 1656, 1658, 1659, 1660, 1714, 1719, 1721, 1744, 1745, 1746, 1748, 1749, 1750, 1751, 1752, 1753, 1754, 1755, 1847, 1851, 1852, 1856, 1857, 1990, 1991 and 2017 all of 1975 and Nos. 66, 86, 88, 89, 90, 113, 114, 115, 413, 414, 427, 429, 431, 432, 433, 434, 728, 733, 735, 853, 850, 881, 886, 1028, 1038, 1132, 1133, 1382, 1435, 1757, 1974, 2433, 2830 and 2702 of 1976 by Shri L. Mohota for grant of leave to appeal to Supreme Court under Articles 132 and 133 of the Constitution. We do not think that any question arises for grant of such leave. The judgment we have delivered applies the law laid down by the Supreme Court. We reject this prayer.

Orders accordingly.

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KANIA, J.

Kamal Chintaman Mithari and others, Appellants v. Ganpatrao Ramchandra Powar, Respondent.

Second Appeal No. 1302 of 1968, D/- 28-4-1976.*

*(Against order of G. S. Nande, Extra Asst. J. Kolhapur in Civil Appeal No. 428 of 1966).

AU/AU/A261/77/JHS

(A) Bombay Rent, Hotel and Lodging House Rates Control Act (57 of 1947), Section 5 (11) (c) — Tenant — Mistress of tenant living with him along with their children at time of his death is member of his family.

The mistress of a tenant who was living with him along with their children in the disputed premises at the time of his death must be regarded as a member of his family for the purposes of Section 5 (11) (c). The question is not so much about the legal status as wife but whether she would have been regarded by an ordinary man or a layman as a member of the deceased tenant's family at the time when he died. *Hawes v. Evenden*, (1953) 2 All ER 737, Followed.

(Paras 5, 6)

(B) Bombay Rents Hotel and Lodging House Rates Control Act (57 of 1947), Section 5 (11) (c) — Statutory tenant — Right to remain in possession devolves on the death only in manner provided by Act.

A statutory tenant has no interest in the premises occupied by him and he has no estate to assign or transfer. He has merely the protection of the statute in that he cannot be turned out so long as he pays the standard rent and permitted increases, if any, and performs the other conditions of the tenancy. His right to remain in possession after the determination of the contractual tenancy is personal; it is not capable of being transferred or assigned and devolves on his death only in the manner provided by the statute. Thus the heirs and legal representatives of the deceased statutory tenant as such who were not staying with him could claim no right to be the tenants of the premises under Section 5 (11) and it is only a member of his family residing with him in the premises at the time of his death who could claim to be a tenant under Section 5 (11) (c). AIR 1965 SC 414 and AIR 1972 Bom 113 and Civil Revn. Appln. No. 1556 of 1963, D/- 9-2-1966 (Bom) and F. A. No. 164 of 1963, D/- 19-8-1964 (Bom), Referred. (Para 8)

Cases Referred: Chronological Paras
AIR 1972 Bom 113 = 73 Bom LR 600 9
(1966) Civil Revn. Appln. No 1556 of 1963, D/- 9-2-1966 (Bom) 10
AIR 1965 SC 414 = (1964) 4 SCR 892 8
(1964) First Appeal No. 164 of 1963, D/- 19-8-1964 (Bom) 11
(1953) 2 All ER 737 = (1953) 1 WLR 1169 5

V. N. Damle, for Appellants; K. J. Abhyankar, for Respondent.

JUDGMENT :— This appeal raises an interesting question under Section 5 (11) (c) of the Bombay Rents Hotel and Lodging House Rates Control Act, 1947 (hereinafter referred to as the "said Act"). The facts necessary for appreciation of the contentions raised in this appeal lie within a narrow compass. The dispute in the appeal relates to a house in E Ward, Kolhapur, bearing City Survey No. 692/1-2. This house belonged to one Suresh Vasudeo Dongarkar, who sold the same to the plaintiff, who is the respondent herein, on 29th November 1964. One Chintamani Mithari had rented the said house, which I propose to refer hereafter as "the said premises" from Suresh Dongarkar at a rent of Rs. 10/- p.m. He was what has come to be known as a statutory tenant in respect of the said premises. The said Chintamani died in or about 1962. In 1965 the plaintiff instituted a suit being Regular Civil Suit No. 310 of 1965 in the Court of the Joint Civil Judge, Junior Division, Kolhapur, against one Muktabai Nikam, the mother of the appellants before me. The case of the plaintiff was that Muktabai was the mistress of the said Chintamani and was living in the said premises with Chintamani. After the death of the said Chintamani, the defendant continued to stay in the said premises with her children. It was contended by the plaintiff that on the death of Chintamani, the possession of Muktabai, the defendant, became wrongful and that she was a trespasser. After serving a notice on the defendant, the plaintiff filed the said suit for possession of the said premises. The defendant, Muktabai, in her written statement raised several contentions with all of which I am not concerned here. It was, *inter alia*, contended by her that she was the legally married wife of the deceased Chintamani and it was denied by her that she was a trespasser in the said premises. The learned Joint Civil Judge held that the plaintiff had failed to prove that the defendant was a trespasser in respect of the said premises, although he observed that there was no satisfactory evidence on record about the marriage between the defendant and Chintamani. It was held by him that even assuming that the defendant was a mistress of the said Chintamani, as she was staying with Chintamani in the said premises along with her children at the time of Chintamani's death, she was a "tenant" in respect of the said premises in view of the provisions of Section 5 (11) (c) of the said

Act. The plaintiff preferred an appeal in the District Court at Kolhapur being Civil Appeal No. 428 of 1966. This appeal was disposed of by the learned Extra Assistant Judge, Kolhapur. It was held by the learned Assistant Judge that the defendant had failed to prove that she was the legally wedded wife of the said Chintamani Mithari. It was held that she was a mistress in the exclusive keeping of the said Chintamani and could not be regarded as a tenant in respect of the said premises within the meaning of the said term in Section 5 (11) (c) of the said Act. It was, however, made clear by the learned Assistant Judge that he did not express any opinion about the rights, if any, acquired by the illegitimate children of the said Chintamani, who were admittedly staying in the same premises along with their mother, the defendant. This shows that the learned Assistant Judge has not made any observations regarding the rights, if any, of the appellants, in their capacity as the illegitimate children of the deceased tenant, Chintamani, in the said premises. The learned Assistant Judge allowed the appeal and decreed the suit filed by the plaintiff. It is against this judgment and order that the defendant came up by way of this appeal to this Court.

2. It may be mentioned that during the pendency of this appeal, the defendant died and the appellants have come on record as her heirs and legal representatives.

3. As the arguments in the appeal turn mainly on the provisions of Cl. (c) of sub-section (11) of Section 5 of the said Act, it might be useful to set out the relevant provisions of sub-section (11) as they stood at the material time. These provisions were as follows:

" 'tenant' means any person by whom or on whose account rent is payable for any premises and includes—

- | | | | |
|------|----|----|----|
| (a) | xx | xx | xx |
| (aa) | xx | xx | xx |
| (b) | xx | xx | xx |

(c) any member of the tenant's family residing with him at the time of his death as may be decided in default of agreement by the Court."

4. The first question which I have to consider is whether in view of the fact that the defendant Muktabai has been found to be a mistress in the exclusive keeping of the said Chintamani, it could be said that she was a member of his family for the purpose of clause (c) of sub-section (11) of Section 5 of the said

Act. It may be mentioned that the facts found, about which there is no dispute here, show that at the time when the said Chintamani died, the defendant was living with him along with their illegitimate children in the said premises.

5. Reference can usefully be made in this connection to the decision of the Court of Appeal in *Hawes v. Evenden*, ((1953) 2 All ER 737). In that case the defendant had lived with the tenant of a dwelling-house to which the Rent Restrictions Act applied, as his mistress, for some twelve or thirteen years prior to his death. They had two children, one of whom had been adopted by foster parents, while the second child was living with her parents at the time of the tenant's death and thereafter continued to live with the defendant at the same house. After the tenant's death the landlord claimed possession of the house from the defendant, who contended that she was entitled to the protection of Section 12 (1) (g) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, as a member of the deceased tenant's family. The question really was whether the defendant could be regarded as a member of the deceased tenant's family residing with him at the time of his death. It was held that since the evidence justified a finding that the tenant, the defendant, and their children all lived together as a family, the defendant was a member of the deceased tenant's family within Section 12 (1) (g) and was therefore, entitled to the protection of the sub-section. It appears from the judgment of the Court of Appeal delivered by Somervell, L. J., that the correct test to be applied to such a case is:

"Would an ordinary man, addressing his mind to the question whether the woman (defendant) was a member of the family or not, have answered 'Yes' or 'No'?"

It has been made clear in the judgment that the principle laid down therein applies to a case where it is found that the defendant was living with the deceased tenant as his mistress along with their child or children. In view of this decision, it would appear that there is no reason why the defendant who was living with the said Chintamani along with their children in the said premises at the time of Chintamani's death should not be regarded as a member of his family for the purposes of Section 5 (11) (c) of the said Act. It is true that the above decision is of an English Court, but I see no reason

to take a different view in this connection regarding the provisions of Cl. (c) of sub-section (11) of Section 5 of the said Act.

6. It was submitted by Mr. Abhyankar, learned counsel for the respondent, that only a legally wedded wife of the deceased tenant could be considered to be a member of the family for the purpose of Section 5 (11) (c) of the said Act. The question, however, as pointed out by the Court of Appeal, is not so much about the legal status of the wife, but whether she would have been regarded by an ordinary man or a layman as a member of the deceased tenant's family at the time when he died. It will also be useful to bear in mind, as pointed out by the learned Civil Judge, that under the Hindu Digest, which was in force in Kolhapur, the position is that even a mistress would be a member of a joint Hindu family. In view of this, I fail to see why the defendant could not be regarded as a member of the family of the deceased Chintamani residing with him at the time of his death.

7. Although in respect of the question as to whether the defendant could be regarded as a member of the family of the deceased Chintamani I have taken the view that the decision of the learned Assistant Judge is erroneous, it was contended by Mr. Abhyankar that there were several other grounds by reason of which the defendant could not claim the protection of Section 5 (11) (c) of the said Act. It was pointed out by Mr. Abhyankar that the facts found on the record show that apart from the defendant, who was his mistress, and his illegitimate children by the defendant, Chintamani had left surviving him his legally wedded wife and legitimate children. It was submitted by him that in view of this, the only persons who were entitled to claim tenancy under Section 5 (11) (c) of the said Act were the lawfully wedded wife and the legitimate children of the said Chintamani and not the defendant. It was pointed out by Mr. Abhyankar that under the opening words of sub-section (11) of Section 5 of the said Act, a tenant means a person by whom or on whose account rent is payable. It was submitted by him that in the case of a contractual tenancy on the death of the tenant even the heirs of the deceased tenant who were not staying with the deceased tenant in the premises would yet be persons by whom or on whose account rent is payable and would, there-

fore, be tenants under sub-section (11) of Section 5 of the said Act. It was further urged by him that the same position would prevail even in the case of the death of a statutory tenant viz. a tenant who was continuing in possession after the termination of his contractual tenancy. In my view, these contentions of Mr. Abhyankar, even if they are accepted, do not make any difference in the case before me. The question which has to be considered here is whether the defendant Muktabai, was a tenant in respect of the said premises or a mere trespasser. It is not very material to consider as to whether the legally wedded wife and the legitimate children of Chintamani would also be tenants in respect of the said premises. It was urged by Mr. Abhyankar that if there were any legitimate heirs of a tenant, persons claiming under Cl. (c) of sub-section (11) of Section 5 of the said Act merely as members of the tenant's family residing with him at the time of his death would be necessarily excluded in view of the fact that Cl. (c) occurs in the inclusive part of the definition of the term "tenant" in sub-sec. (11). In my view, there is no substance in this contention. The provisions of sub-section (11) show that "tenant" means a person by whom or on whose account rent is payable for any premises; and also included in the definition of the term "tenant" is a member of the tenant's family residing with him at the time of his death as may be decided in default of agreement by the Court.

8. Quite apart from this, in the present case, Chintamani was admittedly a statutory tenant. As appears from the decision of the Supreme Court in *Anand Nivas (P) Ltd. v. Anandji*, (AIR 1965 SC 414), it is the well settled position in law that a person remaining in occupation of the premises let to him after the determination or expiry of the period of the tenancy is commonly though in law not accurately, called a statutory tenant. Such a person is not a tenant at all; he has no estate or interest in the premises occupied by him. He has merely the protection of the statute in that he cannot be turned out so long as he pays the standard rent and permitted increases, if any, and performs the other conditions of the tenancy. His right to remain in possession after the determination of the contractual tenancy is personal; it is not capable of being transferred or assigned and devolves on his death only in the manner provided by the statute. A sta-

tutory tenant has no interest in the premises occupied by him and he has no estate to assign or transfer. In the present case, it is undisputed that the lawfully wedded wife and the legitimate children of Chintamani were not living in the said premises at all, but in another house. Chintamani, as already pointed out, was a statutory tenant, his contractual tenancy having been determined prior to his death. In view of this, it appears to me that the heirs and legal representatives of Chintamani as such can claim no rights to be the tenants of the said premises under Section 5 (11) of the said Act and it was only a member of Chintamani's family residing with him at the time of his death in the said premises as may be decided in default of agreement by the Court who can claim to be the tenant of the said premises.

9. In support of his contention that the wife and the legitimate children of Chintamani were the only persons entitled to the tenancy rights in respect of the said premises, Mr. Abhyankar has referred to certain decision, to which I might now refer. He first drew my attention to the decision of Bhasme, J., in *Gool Rustomji v. Jal Rustomji*, 73 Bom LR 600 = (AIR 1972 Bom 113). In that case the dispute regarding the tenancy rights was between a brother and sister, who were the son and daughter respectively of the deceased Rustomji Lala who was the contractual tenant of the premises in question. The daughter (petitioner) claimed that under the Will made by the deceased tenant, the tenancy rights in the suit flat were given to her. It was submitted in that case by Mr. Abhyankar, who appeared for the daughter, that once it was held that the daughter, had become the tenant under the first part of Sec. 5 (11) (c) then it was not necessary to consider the various other clauses. Rejecting this submission it was observed by Bhasme, J., that

"If the expression 'tenant' means only a person who acquires the tenancy rights of the deceased tenant either as a heir or under the Will, then the other clauses will become redundant. It is true that as a person who gets the contractual tenancy rights under the Will the petitioner (daughter) can claim to be the tenant within the meaning of the first part of Section 5 (11) of the said Act. But that by itself will not take away the rights which can be claimed by the various other persons under the clauses which follow."

In the first place, this decision relates to the case of a contractual tenancy and not a case where the deceased was a mere statutory tenant as in the case before me. Moreover, the observations, which I have set out above, far from supporting the contention of Mr. Abhyankar, tend to negative the same in so far as they clearly show that Bhasme, J., was of the view that even in respect of a contractual tenancy although such tenancy might devolve on an heir or a legatee of the deceased tenant under the opening part of Section 5 (11) of the said Act, the rights claimed by other persons under the clauses which follow the opening part of sub-section (11) would not be taken away.

10. Reliance was next placed by Mr. Abhyankar on an unreported decision of K. K. Desai, J. (as he then was) in Civil Revision Application No. 1556 of 1963 in this Court (Minoo, J., Patel v. Jamshedji B.), decided on 9th February, 1966 (Bom). My attention was drawn by him to the observations in this decision which run as follows:

"..... It would be extremely difficult to hold that by reason of the provisions in Section 5 (11) (c) rights of heirs of a deceased contractual tenant were sought to be extinguished. In spite of the provisions in Section 5 (11) (c), it would require to be held that the rights of heirs of a deceased tenant must be preferred to the rights of mere members of the tenant's family as referred to in Section 5 (11) (c). It is not possible that mere members of a tenant's family would be declared to be tenants under that section so as to defeat the rights of the heirs of a deceased tenant in the contractual tenancy. Having regard to the above situation, it appears to me that the question of tenancy as under Section 5 (11) (c) in favour of mere members of a tenant's family can arise only when the contractual tenancy is found to have been terminated before the death of a tenant and the heirs entitled to continue in occupation are unable to settle their disputes regarding their claim to be held as tenants."

In my view, these observations, which do not constitute the ratio of the case, are not of much assistance in the case before me, because they relate expressly to the question of a contractual tenancy and the observations themselves show that in the case of a statutory tenancy the position might be different. Moreover, I share the hesitation expressed by Bhasme, J., in

accepting the view that even when there is a contractual tenancy the mere fact that there is an heir or a person entitled under a Will to the tenancy rights of the deceased tenant would exclude the claim of the members of the family of the deceased tenant residing with him as members of his family at the time of his death to the tenancy rights under Section 5 (11) (c).

11. My attention was next drawn by Mr. Abhyankar to the decision of Tulzapurkar, J., in First Appeal No. 164 of 1963 in this Court, decided on 19th August, 1964. It has been held there that merely because a special definition of the term "tenant" is given in Section 5 (11) (c) of the said Act it cannot be said that the rights of the heirs under the law of inheritance are abrogated. This decision, in my view, has no application to the case before me. In the first place, it relates to the case of a contractual tenancy whereas in the case before me, the deceased tenant Chintamani was merely a statutory tenant. Moreover, as I have already pointed out earlier, I am not concerned with the question as to whether the rights of the heirs of Chintamani under the law of inheritance are abrogated but merely with the question as to whether the defendant had any tenancy rights in the said premises or was a mere trespasser.

12. It was next submitted by Mr. Abhyankar that even as far as the defendant and her children are concerned, in view of the fact that there was no determination by the competent Court under the said Act as to which of them was the tenant, it could not be said that the defendant was the tenant in respect of the said premises and she could not claim any right as such. In the first place, such a contention has not been raised in any of the Courts below, and, in my view, it cannot be raised at this stage. Moreover, the provisions of clause (c) show that if the members of the deceased tenant's family residing with him at the time of his death are unable to decide by agreement as to which of them should be regarded as the tenant within the meaning of the said term in sub-section (11) of Section 5 of the said Act, that question has to be determined by the Court. This, however, cannot mean that apart from the person who is determined to be the tenant, the other members of the deceased tenant's family who were living with him at the time of his death as members of his family would become trespassers in the said pre-

mises. Although one of them may be recognised to be the tenant, the others would be certainly entitled to stay in the said premises.

13. Finally it was pointed out by Mr. Abhyankar that it appears from the affidavit of the plaintiff filed in Civil Application No. 1349 of 1969 in this second appeal, for stay of execution, that the plaintiff has already obtained possession of the said premises and has demolished the same in pursuance of certain municipal notices. It was submitted by him that in view of this the appeal was futile, as possession of the said premises could not be restored to the appellant therein. In my view, these considerations are not relevant for purposes of the decision of this appeal. What I have really to consider is whether the plaintiff was entitled to a decree for possession in the suit filed by him against the defendant and whether the decree passed by the learned Assistant Judge in Civil Appeal No. 428 of 1966 is justified. As I have already pointed out earlier, I have come to the conclusion that the learned Assistant Judge was in error in having passed the said decree and the suit of the plaintiff was liable to be dismissed. The question as to whether the appellants are entitled to have the possession restored to them is not one which I need consider at this stage. Such a question can be considered as and when an application is made by the appellants for restoration of possession.

14. In the result, the appeal is allowed, the order and decree passed by the learned Assistant Judge are set aside and the suit filed by the plaintiff is dismissed. Looking to all the facts and circumstances of the case, there will be no order as to costs throughout.

Appeal allowed.

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VAIDYA AND MRIDUL, JJ.

Laxmibai Hareshwar Joshi and others, Appellants v. The State of Maharashtra and others, Respondents.

Letters Patent Appeal No. 45 of 1972, D/- 26-3-1976.*

Limitation Act (1963), Article 136 — Amended decree — Amendment providing

*(Against Judgment of S. K. Desai, J., in S. A. No. 1403 of 1969, D/- 22-11-1969.)

HS/HS/C822/76/RSK

that on defendant's failure to do certain things possession was to be delivered and plaintiff could then remove huts of defendants through court — Held limitation would start from date of amended decree and not the original decree. S. A. No. 1403 of 1969, D/- 22-11-1971 (Bom), Reversed. (Para 11)

S. A. Desai, H. M. Raut and L. C. Chogle with B. R. Ketkar, for Appellants; S. C. Pratap, Asstt. Govt. Pleader (for No. 1) and K. J. Abhyankar with D. K. Ghaisas (for Nos. 2 to 4), for Respondents.

VAIDYA, J.:— The above Letters Patent Appeal is on the basis of the leave granted by S. K. Desai, J., against his judgment dated 22nd November, 1971, in Second Appeal No. 1403 of 1969 and involves a point of limitation under Article 136 of the Limitation Act, 1963.

2. Second Appeal No. 1403 of 1969 was filed against the decision of the District Judge, Thana, dated July 4, 1969, setting aside an order passed by Civil Judge, Junior Division, Palghar, in Regular Darkhast No. 34 of 1967, dismissing the said darkhast on the ground that though the darkhast was in time under Article 136 of the Limitation Act, 1963, the darkhast was liable to be dismissed because the subject-matter of the decree was not in possession of the judgment-debtor (respondent No. 7), being *lis pendens*, was hit by Section 52 of the Transfer of Property Act and the decree was executable as the darkhast was in time.

3. In that second appeal the decision of the learned District Judge was set aside on the ground that the period of limitation provided under Article 136 of the Limitation Act, 1963, will have to be calculated from the date of the decree which, in the case, would be from April 14, 1952, which was the date of the appeal decree in Civil Appeal No. 342 of 1949 and not from August 31, 1963, which was the date of the order made in Misc. Application No. 81/1976 for the amendment of the decree.

4. The material facts may be briefly stated as follows. The decree in execution was passed on April 20, 1952, in Civil Suit No. 219 of 1947 in which the plaintiff-decree-holder had sought possession of certain property on the basis that he had purchased the same at court sale which was duly confirmed by the Court. He obtained possession of a portion of the suit property but in respect of another portion there was obstruction, and hence

a suit was filed to remove that obstruction. On April 20, 1949, a decree was passed by the Civil Judge, Junior Division, in favour of the plaintiff. On April 14, 1952, Civil Appeal No. 342 of 1949, filed against the said decree, was dismissed.

5. In the meanwhile, the decree-holder had filed a darkhast, being darkhast No. 122 of 1951, on April 20, 1951 and it was decided on January 17, 1957. Without the decree-holder getting satisfaction of the decree, he transferred it in favour of respondent No. 7 on March 7, 1956. Thereafter on November 14, 1962, the decree-holder filed Miscellaneous Application No. 81 of 1962 for amendment of the decree, which was decided on August 31, 1963.

6. The result of the amendment has been, with respect, correctly summarised by S. K. Desai, J., in paragraph 4 of the judgment as follows:—

"The decree, after it was amended, provided for a declaration that the Plaintiff was the owner of the land in suit. The Defendants were ordered to remove their hut from the property in suit and deliver vacant possession of the land to the Plaintiff. It was further ordered that if the Defendants failed to remove the hut and deliver vacant possession of the land to the Plaintiff, the Plaintiff to remove the same through Court at the Defendants' costs. This was in substitution of the original provision in the decree that the Defendants shall remove the hut and the plaintiff was entitled to get the hut removed at the cost of the Defendants. The remaining part of the decree providing for costs remained unchanged. It is clear that the original decree was incomplete and in order to do full justice, the amendment was allowed by the learned District Judge, Thana. Therefore, on 16th June, 1967, the present Darkhast was filed, ..."

7. Relying on the amended decree, therefore, the darkhast was filed on June 16, 1967 and the learned Judge, relying on certain decisions under the repealed Section 48 of the Code of Civil Procedure, took the view that the period of 12 years should be calculated with effect from April 14, 1952 and not with effect from the date of the amendment, viz., August 31, 1963.

8. The view taken by the learned Judge is challenged before us on the ground that Article 136 was substituted in the Limitation Act, 1963, for Section 48

of the Code of Civil Procedure which was repealed by Section 28 of the Limitation Act, 1963 and for Article 182 of the Limitation Act, 1908. It is contended that so far as Article 136 is concerned, the words are:—

"When the decree or order becomes enforceable or where the decree or any subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods, when default in making the payment or delivery in respect of which execution is sought takes place."

We are of the view that the contention must be upheld because the decree in the present case became enforceable, so far as the complete possession of the property in dispute was concerned, only after the amendment of the decree as pointed out by S. K. Desai, J.

9. Previous legislation may be relevant to the interpretation of later statutes in two ways: (1) The course which legislation on a particular point has followed often provides an indication as to how the Act at present in force should be interpreted, and (2) Light may be thrown on the meaning of a phrase in a statute by reference to a specific phrase in an earlier statute dealing with the same subject-matter. Under Section 48 of the Code of Civil Procedure, a view appears to have been taken that the date of the decree for the purpose of limitation under that section was the date of the original decree and not the date of the amendment.

10. So far as Article 182 of the Limitation Act, 1908, was concerned, there was a specific clause which states that where the decree has been amended, the period of limitation should be calculated from the date of the amendment. The Legislature, having regard to the technical pleas which appear to have been raised with regard to the amended decree, has repealed Section 48 and also Article 182 of the Limitation Act, 1908, as it stood before 1963 Act and has used the expression, "when the decree or order becomes enforceable, etc., etc."

11. In the present case the defendants were ordered by amendment to do certain things and on their default to do so, delivery of possession was to be made to the plaintiff and the plaintiff could remove huts of the defendants through Court. A declaration was also given in

favour of the plaintiff that he was the owner of the land in suit. In view of this, with great respect we are unable to agree with S. K. Desai, J. in holding that the date which is material for the purposes of limitation is the date of the original decree and not the date of the amendment. There cannot be any doubt that if the date of the amendment of the decree, viz., August 31, 1963, is taken into consideration, the darkhast is well within time under Article 136 of the Limitation Act, 1963.

12. Mr. Abhyankar, the learned Counsel for the Respondents, tried to urge a new point which does not appear to have been urged before S. K. Desai, J., though it was raised and negatived before the learned District Judge. Apart from the fact that the learned District Judge has rightly negatived the contention having regard to the provisions of Section 52 of the Transfer of Property Act that the darkhast could not be resisted by judgment-debtor No. 7, who became transferee pendente lite we are of the view that it is not open to Mr. Abhyankar to urge any point which was not urged on behalf of the Respondents before S. K. Desai, J.

13. Mr. S. A. Desai, who appeared for the Appellants and who had appeared before S. K. Desai, J., made a statement at the Bar that no such point was urged on behalf of the Respondents before S. K. Desai, J. It is not open to us to allow the parties to agitate the point which was not considered by the learned Judge who has given leave to file Letters Patent Appeal.

14. In the result, the Letters Patent Appeal is allowed. The order passed by S. K. Desai, J., on November 22, 1971, is set aside and the judgment and the order passed by the learned District Judge, Thana, on July 4, 1969, is restored. In all the facts and the circumstances of the case, there shall be no order as to costs of this Court.

Appeal allowed.

AIR 1977 BOMBAY 170

MUKHI, J.

Bai Fatubai Fidaali Lala, Appellant
v. Yusufally Esmailjee Nagree, Respondent.

A. F. O. No. 412 of 1975, D/- 3-2-1976.*

Civil P. C. (1908), Order 40, Rule 1 — Equitable mortgage — Appointment of receiver.

In the case of an equitable mortgage or a simple mortgage the fact of interest being in arrears, with something more, would be sufficient for the Court to exercise its discretion and appoint a receiver on the footing that it was just and convenient to do so. Thus where the conduct of the defendant clearly showed that he took advantage of his own sisters, paid interest for sometime and thereafter declined to pay the principal sum as well as interest on the mortgage deed on the plea that somehow in his own way of thinking he had repaid the full amount which was due from him, held that it was just and equitable that a receiver should be appointed. AIR 1939 Bom 54, Rel. on; Case law discussed. (Paras 31, 53, 57)

Cases referred: Chronological Paras
AIR 1965 SC 430 = (1964) 6 SCR 727 15
AIR 1962 Raj 225 = 1962 Raj LW 236 30
AIR 1961 Raj 179 = 1960 Raj LW 626 30
AIR 1947 All 157 = 1947 All LJ 10 27
AIR 1939 Bom 54 = 40 Bom LR 1266 22, 31

AIR 1936 Rang 290 = ILR 14 Rang 292 19
AIR 1929 Mad 138 = 56 Mad LJ 115 24

C. C. Chhaya, for Appellant; M. R. Kotwal with S. R. Chitnis, for Respondent.

JUDGMENT:— This appeal arises from a dispute between a brother and a sister in relation to a certain family property, which was dealt with as far back as 1951 in a partition deed between the plaintiff, as one of the sisters, and the other brothers and sisters including the defendant Yusufally as one of the brothers.

2. In the events that happened an equitable mortgage appears to have been executed soon after the execution of the aforementioned partition deed by which the property in suit came to be owned by defendant Yusufally.

*(Against decision of G. H. Guttal, Judge, City Civil Court at Bombay in Short Cause Suit No. 9354 of 1974.)

3. It requires to be noticed that the equitable mortgage is evidenced by a registered document dated the 10th of June 1952, the document having been duly admitted and registered on the 25th of July 1952.

4. Although the mortgage amount which was Rs. 11,000/- in so far as the plaintiff is concerned (the other sum of Rs. 11,000/- being due to the plaintiff's sister Safiabai since deceased) there was also a provision in the Indenture of mortgage itself that after the principal sum or any part thereof and interest became payable, the defendant would execute an English mortgage in favour of the plaintiff and her other sister Safiabai. Neither the principal amount was paid nor was an English mortgage executed.

5. It would appear that the two sisters for some reason, it may perhaps have been sisterly affection for their brother, were content to allow the matters to remain as they were, because it is on record that the defendant Yusufally was regularly paying interest on the mortgage amount, at least to the plaintiff. The plaintiff has stated in her affidavit that the defendant Yusufally had agreed to pay interest at 12 per cent, instead of 6 per cent, as provided in the Indenture of mortgage, and that this amount of Rs. 110/- per month he paid to her regularly by way of interest till April 1971, after which he ceased to make the payments. The plaintiff further states that it was only then that the defendant Yusufally sought to tender interest at the rate of 6 per cent, per month, i.e., Rs. 55/-, which the plaintiff did not accept.

6. In any event, as a result of these disputes and the stoppage of payment of interest by the defendant to the plaintiff, the plaintiff filed the suit in the City Civil Court at Bombay for a declaration that the defendant was liable to pay to her a sum of Rs. 15,710/- with further interest on Rs. 11,000/- at 12 per cent, per annum from the date of the suit till the date of the decree and for interest thereafter till realisation. There was also a prayer that it may be declared that the said amount be charged on the property which was the subject-matter of the mortgage.

7. Then followed the prayer that on the defendant's failure to pay the amounts, the suit property should be ordered to be sold.

8. There was also a prayer in the plaint that pending the hearing and final

disposal of the suit, the Court Receiver should be appointed to take charge of the mortgaged property.

9. The plaintiff thereafter took out a Notice of Motion for the appointment of a receiver and in her affidavit in support of the Notice of Motion sought to show the reasons and the circumstances on which it was just and convenient that a receiver should be appointed. One of the grounds taken was that the defendant was in arrears of interest and that he had also to pay the estate of the other sister Safiabai (since deceased) and that the property was very old and in a dilapidated condition. The suggestion was made that the defendant having put tenants all over the property and there being heavy litigation and taxes being in arrears the plaintiff's security for the amounts advanced and the interest thereon was in jeopardy.

10. The learned Judge of the City Civil Court (Judge Guttal) disposed of the Notice of Motion by a very short order comprising three paragraphs and he seemed to feel that the plaintiff had failed to establish that the security on which she had advanced the loan ran the risk of deterioration. He then noticed the defendant's averments that the property in question was worth Rs. 80,000/- and that it was insured for a sum of Rs. 46,000/-, and came to the conclusion that the plaintiff's case that the security was in jeopardy was destroyed and that, therefore, "there is no case for appointment of receiver".

11. It is against this order that the plaintiff Bai Fatubai has come in appeal and Mr. Chhaya, the learned Advocate for the appellant-plaintiff, has contended that if regard be had to the history of the case; the fact that there is a registered mortgage deed in existence; that interest is in arrears and that the conduct of the defendant is improper then it can be validly contended that the plaintiff has set out a prima facie case that it is just and convenient that a receiver of the property in suit should be appointed.

12. The case of the respondent-defendant, broadly speaking, is that the moneys said to have been paid by him to his brothers and sisters at the time of the execution of the partition deed dated the 30th of November 1951 were in fact not paid; that the plaintiff was entitled to receive from him only a sum of Rs. 8,653/- as a result of the arrangement envisaged by the partition deed; that the equitable

mortgage was a sham document and not intended to be acted upon; and that if regard be had to the payments actually made by him to the plaintiff Fatubai and the allocation of such payments towards capital and interest, then it would be found that nothing is due to the plaintiff. Thus according to the defendant the question of appointing a receiver does not arise.

13. Mr. M. R. Kotwal, the learned Counsel for the respondent-defendant, after referring to some of the factual aspects of the matter as to the execution of the partition deed and the deed of mortgage and how, according to him it is *prima facie* clear on the record that he has discharged all his liabilities to the plaintiff, argued that even if it be held that there was a mortgage in existence, the plaintiff cannot have a receiver appointed as of right merely because the principal amount is not paid or the interest is said to be in arrears.

14. A number of authorities have been cited by both the Advocates and the first point to be considered is whether a receiver can be appointed in the case of a mortgage by deposit of title deeds, popularly but erroneously referred to in India as an equitable mortgage.

15. The first authority referred to by Mr. Chhaya is a judgment of the Supreme Court in *K. J. Nathan v. Maruthi Rao*, AIR 1965 SC 430, where the true nature of a mortgage by deposit of title deeds was considered. The Supreme Court set out the three requisites for such a mortgage as being (1) debt, (2) deposit of title deeds, and (3) an intention that the deeds shall be security for the debt.

16. The Supreme Court then went on to observe that although a mortgage by deposit of title deeds as provided by Section 58 of the Transfer of Property Act, 1882, was often described as an equitable mortgage, there was an essential distinction between an equitable mortgage as understood in England and a mortgage by deposit of title deeds under Section 58 of the Transfer of Property Act in India. The Court held that an equitable mortgage in England did not operate as actual conveyance, though it was enforceable in equity. But under the Transfer of Property Act, 1882, a mortgage by deposit of title deeds was one of the modes of creating a legal mortgage whereunder there will be transfer of interest in the property mortgaged to the mortgagee.

17. There can be no manner of doubt that the Supreme Court has now laid down that under the law of India a mortgage by deposit of title deeds, though it is limited to specific cities, is on par with any other legal mortgage.

18. In this view of the matter, a mortgage by deposit of title deeds has the same effect in law as a simple mortgage, in the sense that there is a transfer of interest in the property mortgaged to the mortgagee, although there is no right to possession of the mortgaged property in the mortgagee.

19. The next authority cited on behalf of the plaintiff is the judgment of the Rangoon High Court in *Ally Ramzan Yezdi v. M/s. Balthazar and Son Ltd.*, AIR 1936 Rang 290, where it was firstly held that in the case of a simple mortgage or of a mortgage by deposit of title deeds itself, unless there was an agreement to that effect expressly made, neither the right to possession nor the right to rents and profits are part of the interest which is transferred to the mortgagee. The Rangoon High Court then went on to hold that in a mortgage suit, where interest is in arrears, the Court will normally appoint a receiver. It is on this aspect of the judgment that Mr. Chhaya, the learned Advocate for the appellant-plaintiff, wishes to rely, and the passage on which he so relies reads as follows:—

"..... Now, the Court is entitled to appoint a receiver under Order 40, Rule 1, whenever it is deemed just and convenient to do so; for example, in a mortgage suit when interest is in arrear the Court will normally appoint a receiver at the instance of the mortgagee as of course, whether or not the property appears to be a sufficient value to cover the mortgage debt and interest, and whether or not the right of the mortgagee to obtain a personal decree against the mortgagor subsists or has been lost;"

20. Now, it requires to be noticed that in that case the Court was of the view that it was not just that a defaulting mortgagor, after the mortgagee had taken steps to enforce his security, should be allowed to batten upon the rents and profits without paying either the principal or the interest due under the mortgage.

21. In other words, in so far as the Rangoon High Court was concerned, it was found that the fact that the interest was in arrears was sufficient to enable the Court to appoint a receiver at the instance of a mortgagee.

22. Reference was then made to a Division Bench judgment of this Court in *Damodar Moreswar v. Radhabai Damodar*, 40 Bom LR 1266 = (AIR 1939 Bom 54), where Chief Justice Beaumont, who spoke for the Court, said that—

..... "there is not the slightest doubt that the Court has jurisdiction to appoint a receiver in the case of a simple mortgage whether before or after a preliminary decree."

23. Upon the question whether in the particular case before the Court it was just and equitable to appoint a receiver, the Court thought that there could be very little doubt because at the time the application was made not only was interest in arrears but rates and taxes were also in arrears and the property was, therefore, in jeopardy. It is interesting to note that the learned Judge in terms stated that he reserved his opinion as to whether interest being in arrears by itself would have been sufficient to hold that it was just and equitable that a receiver should be appointed. In other words, this decision of the Bombay High Court left the sufficiency of interest being in arrears, as a ground for the appointment of a receiver in a mortgage suit open.

24. Mr. Kotwal, the learned counsel for the respondent-defendant, has cited a number of authorities in support of his contention that the mere fact of interest being in arrears is not enough to furnish a ground for the appointment of a receiver. Mr. Kotwal first referred to a judgment of the Madras High Court in *Ethirajalu v. Rajagopalachari*, AIR 1929 Mad 138. In that case it was held that where a simple mortgagor makes default in paying interest and the mortgaged property falls in value, the case is fit for the appointment of a receiver. Mr. Kotwal suggests that this shows that default in paying the interest by itself is not sufficient but other factors must also be present, such as, the fact that the mortgaged property was falling in value so that it was necessary to take hold of it by appointing a receiver.

25. Now, as a matter of fact this judgment of the Madras High Court really does not support the case of Mr. Kotwal because after discussing several authorities, this is what was stated:

"..... I think the result of the authorities is that while Courts would not ordinarily deprive the mortgagor of his possession in cases where the mortgage

is a simple mortgage, there may be circumstances created either by the conduct of the mortgagor or connected with the state of the property which may render it necessary in the interests of justice and for the protection of the mortgagee that a receiver should be appointed. It is impossible to lay down a hard and fast rule laying down under what circumstances the Court will appoint a receiver. But ordinarily there should be some loss or detriment not foreseen by the mortgagee at the time when he chose to take a simple mortgage and allow possession to remain with the mortgagor which loss could not be compensated except by the appointment of a receiver."

26. It was on the basis of these observations that the Madras High Court having regard to the facts of the case before it, the default of the mortgagors in paying the interest and the fall in the value of the mortgaged properties, thought it fit and proper that a receiver should be appointed.

27. In the next case which was cited, viz., *Bireshwar v. Sudhansu Shekhar*, AIR 1947 All 157, the Allahabad High Court, after holding that the Court had the power to appoint a receiver of the property the subject of a simple mortgage in a suit by the mortgagee against the mortgagor in possession of the mortgaged property, felt that because the general ground upon which the Court normally appoints a receiver was the protection of the property for the benefit of persons who had an interest in it, the mere fact that interest on the mortgage amount was in arrears or that the mortgagor's object was merely to delay the final determination of the suit was not sufficient to show that it was just and convenient that a receiver should be appointed, unless the Court was also satisfied that the conduct of the mortgagor was such that it would not merely be to postpone the final determination of the rights of the parties but to imperil the realization by the mortgagee of the amount secured by the mortgage.

28. Now, it would seem that this authority proceeds on the footing that in a simple mortgage, the mortgagee is not entitled to take possession of the mortgaged property.

29. I should have thought that the Court has to consider whether it is just and convenient on a consideration of the entire background of the case and the

conduct of the mortgagor as well as the fact that interest is in arrears.

30. Mr. Kotwal also referred to two judgments of the Rajasthan High Court in Onkarlal v. Rampal, AIR 1961 Raj 179 and Banshi Dhar v. Ghisalal, AIR 1962 Raj 225, where that Court held that the mere failure to pay interest by itself was not sufficient.

31. Now, it is not really necessary for me to discuss the several authorities in greater detail because this High Court in Damodar v. Radhabai, (AIR 1939 Bom 54) (supra) clearly held that the fact of interest being in arrears, with something more, would be sufficient for the Court to exercise its discretion and appoint a receiver on the footing that it was just and convenient to do so.

32. On this position of the law, I will now proceed to consider the factual aspects in order to decide whether the plaintiff had made out a prima facie case for the appointment of a receiver on materials placed on record.

33. First of all it requires to be noticed that the equitable mortgage on the basis of which the suit has been filed is evidenced by a solemn document executed by the parties and registered under the provisions of the Indian Registration Act.

34. At this interlocutory stage there is no reason for the Court to overlook a registered Indenture of mortgage which is shown to have been executed by the parties. It is true that the defendant has alleged that the mortgage deed was a sham and colourable document and was not intended to be acted upon. This may be so, but it will have to be proved to be so by the defendant at the trial and the burden lies heavily on him. The argument of Mr. Kotwal that even at this stage it has been shown prima facie that the mortgage deed is a sham and colourable document is clearly untenable.

35. It requires to be noticed that the Indenture of mortgage dated the 10th of June, 1952, refers in its Second Schedule to the partition deed dated the 30th of November, 1951, made between the several parties, including the plaintiff and the defendant herein. Although a copy of the partition deed has not been placed on record, there is no dispute that the partition deed was executed by all the concerned parties, and that the value of the property shown therein was Rupees 34,692-8-0 and further that the consideration for the conveyance in favour of the

defendant Yusufally was shown as Rupees 25,795/-. All that Mr. Kotwal now contends is that although the parties had signed at the foot of the document to show that they had received the moneys, in fact the consideration money was not paid.

36. Now, once again at this interlocutory stage the Court must take into consideration the document as it exists subject to the defendant proving at the trial in such manner as may be provided by law that in fact the consideration money was not paid and that a certain amount was still due and payable to the plaintiff.

37. The result of the above discussion is that this Court must proceed on the footing that there was a deed of partition dated the 30th of November, 1951, which was followed shortly thereafter by the Indenture of mortgage, whereby the said partition deed, as a document of title, was deposited for the purpose of creating a mortgage by deposit of title deeds, as evidenced by the registered Indenture of mortgage itself.

38. Now, it is interesting to notice that even prima facie the contention made on behalf of the defendant that the alleged mortgage deed was a sham and colourable document and was not intended to be acted upon is belied by the fact that by a writing dated the 20th of December, 1966, the defendant Yusufally signing as "Y. E. Nagree" certifies that a sum of Rs. 1,320/- was paid by him to Fatubai daughter of Esmaljee Nagree and widow of Fidally N. Lala during the financial year 1965-66 at the monthly rate of Rupees 110/-, being interest on mortgage. At the foot of this writing, which is Exh. C, to the plaint, there is a statement that—

"This amount is being paid for the last many years."

Now, this shows that on his own showing, the defendant was paying interest at 12 per cent. on the mortgage and that he had been paying similar amounts for the last many years. It is not suggested that that was another mortgage between the parties on which this interest was paid.

39. Then, again an extract from the property register card, Exh. D to the plaint, has been produced in relation to the property in suit, wherein it is mentioned that an equitable mortgage was executed on the 10th of June, 1954, in favour of Fatimabai and Safiabai daughters of Ismailji Nagri.

40. Now, it would appear that in 1974 an engrossment of a Release Deed

was prepared by Messrs. Dadla and Co., who are admitted to be the then common Attorneys of the parties, presumably with the object of the defendant paying off the plaintiff the principal sum of Rs. 11,000/- along with interest due. As a matter of fact, the engrossment contained at the foot thereof a receipt which reads as follows:—

"Received the day and year first hereinabove written of and from the within named Borrower the sum of Rupees eleven thousand being the full consideration money within mentioned to be by him paid to me."

41. If reference is made to the last paragraph of the engrossment of the Deed of Release, it will be noticed that there is a reference to Bank of India Pay Slip No. NGP 0065050 dated the 22nd of February, 1974, for the amount, i.e., Rupees 11,000/-.

42. It is significant that the Bank of India Pay Slip as shown on the separate receipt for interest amount of Rupees 5,000/- which was also prepared bears the number of the Bank of India slip as NGP 0065051 dated 22-2-1974 for Rs. 5,000/-.

43. It is the plaintiff's case that these two documents, that is to say, the engrossment of the Deed of Release and the Receipt for interest both duly stamped, were sent to the plaintiffs for her signature and in fact she signed the engrossment as well as the receipt. It is also significant that the defendant had kept ready with himself the Bank Pay Slips bearing consecutive serial numbers both dated the 22nd of February, 1974. In the face of this it is idle to suggest that the plaintiff has failed to make out a prima facie case that there was a registered document which shows that the principal sum of Rs. 11,000/- was advanced by her to her brother Yusufally and that in February, 1974, the repayment of the amount together with the interest due thereon was imminent. It is stated that the defendant refused to go along with the reconveyance transaction because of some collateral dispute between him and the plaintiff's son.

44. It was vehemently suggested by Mr. Kotwal on behalf of the defendant that the Indenture of Mortgage itself shows that the interest payable was at the rate of 6 per cent. On this basis, he argues that if the amounts paid by him are allocated partly by way of interest at 6 per cent. and partly by way of return of capital, then it will be found that he had repaid the entire amount due. The

defendant seeks to place reliance on a statement of account prepared by him, which is Exh. 1 to his affidavit in reply.

45. It requires to be noticed that this statements of account as prepared by the defendant is at variance with his certificate dated the 20th of December, 1966, where he refers to Rs. 1,320/- as interest for the year 1965-66, being the interest at the monthly rate of Rs. 110/-. The amount of Rs. 110/- on the principal sum of Rs. 11,000/- clearly shows the calculation of interest to be at the rate of 12 per cent. and indeed it is the plaintiff's case that the defendant Yusufally was paying her interest at Rs. 110/- per month for all these years upto 1971 and it was only in 1971 that the defendant for the first time sought to contend that he would pay interest at the rate of Rs. 55/- per month, which she did not accept.

46. It is appropriate now to notice the conduct of the defendant. While taking me through the history of the case Mr. Kotwal stated that the suit property originally belonged to the plaintiff Fatubai, her sister Safiabai and their mother Rakhibai in the following shares:—

Fatubai	4 annas,
Safiabai	4 annas,
Rakhibai	8 annas.

47. On the 20th of October, 1951, Rakhibai died so that the interest of the plaintiff and the defendant and other brothers and sisters in the suit property under the relevant law came to be as follows:— Yusufally, the defendant, 2 annas; Ibrahim, other brother: 2 annas; Abdul Karim, another brother 2 annas; Fatubai, the plaintiff, 5 annas; and Safiabai, the other sister 5 annas.

48. It was on this footing that on the 30th of November, 1951, that is to say, within 20 days of the death of Rakhibai, a deed of partition was got executed wherein the suit property was valued at Rs. 34,692-8-0 and a sum of Rs. 7,000/- was deducted as being the amount due and payable to Atikabi (a stranger to whom the property had been mortgaged) and the consideration for the conveyance of the suit property to the defendant Yusufally was fixed at Rs. 25,795/-. In other words, even though the defendant Yusufally had only a share of 2 annas he managed to obtain the property all for himself.

49. As to the consideration amount payable by him, the partition deed shows that Rs. 25,795/- were paid. It requires to be noted that the defendant now contends that the amount was in fact not paid at

that time. He does not say why it was not paid.

50. As to loan amount shown in the Indenture of mortgage, his first contention is that Rs. 11,000/- was not loaned to him by the plaintiff and his second contention is that he has returned Rupees 8,653/- which, according to him, was all that was due to the plaintiff.

51. I asked Mr. Kotwal why a mortgage deed for Rs. 11,000/- was executed in so far as the plaintiff Fatubai is concerned, when, according to the defendant, all that was due to her was Rupees 8,653/- on the basis of the Partition Deed. His answer was that this was so because there were cordial relations between the brother and sister at that time. I regret, I am unable to accept an answer of this kind. It may have been possible to contend that as between a brother and a sister an odd amount may be rounded off to the nearest rupee or even the nearest hundred, but there is no explanation as to why if the defendant's contention is true that only Rs. 8,653/- were due to the plaintiff, the amount was not paid at the time of the execution of the partition deed and again why a mortgage was executed for Rs. 11,000/- in so far as Fatubai, the plaintiff, is concerned and Rs. 11,000/- in so far as the other sister, Safiabai was concerned.

52. It is difficult to believe the defendant's case as to the alleged circumstances and the reasons surrounding the execution of the partition deed dated the 30th of November 1951 and the Indenture of mortgage dated the 10th of June, 1952. It is also difficult to believe the defendant's version that the arrangement was that he was to pay Rs. 110/- per month partly towards capital and partly towards interest on Rs. 8,653/-.

53. The conduct of the defendant clearly shows that he took advantage of his own sisters, arranged for the whole of the property to be conveyed to him, paid interest for some time and thereafter declined to pay the principal sum as well as interest on the mortgage deed on plea that somehow in his own way of thinking he had repaid the full amount which was due from him.

54. There is no dispute that the defendant has not paid anything to the plaintiff from May 1971 and on his own view of his rights and obligations he has no intention of doing so.

55. On consideration of the totality of the facts and circumstances as spread

across the record, a prima facie case has clearly been made out by the plaintiff that the principal amount on the mortgage is due and that the interest thereon is in arrears from May, 1971. It has also been shown that the conduct of the defendant has been to assert his ownership of the property without meeting his obligations under the arrangement as evidenced by the Partition deed and the Indenture of mortgage. There is also the fact that in the Deed of mortgage itself there is a covenant that on the defendant's failure to pay the amount due on the mortgage (and the principal amount was payable in 1956) he was duty bound to execute an English mortgage which would have entailed his handing over possession of the mortgaged property to the plaintiff and the other sister Safiabai.

56. The record prima facie shows that the suit property is tenanted by several persons and that there are a number of disputes and some amount of litigation. There is also the contention that the property is not in good condition.

57. In these circumstances, I consider it just and equitable that a receiver should be appointed.

58. The learned Judge was in error when he approached the matter on only one ground, i.e., whether the security was liable to deteriorate. The learned Judge failed to consider the several other factors which are spread over the record and in particular that the interest was in arrears and the conduct of the defendant prima facie improper.

59. The order of the learned Judge dated the 15th of July, 1975, in so far as he did not appoint a receiver and rejected prayer (a) of the Notice of Motion is set aside and the Notice of Motion is made absolute not only in terms of prayer (b) but also in terms of prayer (a).

60. I also find that this is a matter which should be heard expeditiously because on a prima facie view of the case the plaintiff Fatubai has been deprived of her moneys for a considerable period of time.

61. I, therefore, direct that the suit be expedited and it should, as far as may be, heard in the month of March, 1976.

62. In the result the appeal is allowed with costs.

Appeal allowed.

AIR 1977 BOMBAY 177**DESHPANDE AND MRIDUL, JJ.**

Anandrao Dinkarrao Shinde and another, Petitioners v. P. G. Patil and others, Opponents.

Special Civil Appln. No. 184 of 1976, D/- 23-1-1976.

(A) Shivaji University Act (1974), Section 86 — Reference by Vice-Chancellor suo motu without requisition — Not incompetent.

Section 86 enables the Vice-Chancellor to make a reference suo motu to the Chancellor on the questions of interpretations detailed therein. Making of such reference is discretionary. Proviso to Section 86, however, makes it obligatory on him to make such reference when there is a requisition. Thus the main section and its proviso are respectively directory and mandatory provisions. Looked at this way, when the Vice-Chancellor made a reference suo motu to the Chancellor without the requisition of not less than 25 members of senate, the reference cannot be said to be incompetent.

(Para 4)

(B) Shivaji University Act (1974), repealing Act of 1962, Section 12 (4) — Prohibition against holding office of Dean for two consecutive terms — Prohibition applies to Deans elected under repealed Act and holding such offices at commencement of new Act.

Section 12 (4) prevents holding of the office of the Dean for two consecutive terms, thereby prohibiting the then holder of the office from contesting such election afresh. Ordinarily the words 'consecutive terms' would mean the terms undergone and worked out under the new Act and the term held under the repealed Act would be irrelevant. The words cannot include such terms without some indication of any such Legislative intent. The intention, however, to keep the offices of Deans going is indicated by the sweeping provisions of Section 91 (ii) and (xi). Moreover, Section 91 (xi) creates a fiction of their having been appointed under the new Act and for its purposes.

(Paras 5, 8, 12)

This apart, under Section 7 (b) of the Bombay General Clauses Act, repeal of any enactment does not "affect the previous operation of any enactment so repealed, or anything duly done or suffered thereunder". This would be of course so, as indicated in the opening part of this

section "unless a different intention appears". There is no such different intention in the new Act to affect operation of the repealed Act adversely against the continuance of so elected Deans or the election held for the said office. The Deans elected under the repealed Act and holding offices at the commencement of the new Act would attract the prohibition against the eligibility to contest election for the next consecutive term. 1952 AC 109, Relied on. (Para 12)

Cases Referred: Chronological Paras
(1957) 3 All ER 617 = (1957) 1 WLR 1219

14
1952 AC 109 = (1951) 2 All ER 587 13

M. L. Pendse, for Petitioners; Raja S. Bhonsale (for Nos. 1 and 2) and A. C. Agarwal, Asst. Govt. Pleader (for No. 3), for Opponents.

DESHPANDE, J.:— The petitioners were elected as Deans respectively for the Faculties of Commerce and Arts in the Shivaji University at Kolhapur on 10th November, 1972. These elections were held under the provisions of the Shivaji University Act of 1962 (hereinafter referred to as 'the Repealed Act') and the Statutes framed thereunder. Section 25 thereof provided that there should be a Dean for each Faculty and that he should be elected by the Faculty from amongst its members. The term of the office of the Dean was left to be prescribed by the Statutes. Under Statute 104, the term of the Dean was limited to three years. It was, however, open for the Dean to seek re-election. On 31st May, 1974, the 1962 Act was repealed by the Shivaji University Act of 1974 (referred to hereinafter as 'the new Act'). Under Section 12 of the new Act also, a Dean for each Faculty is to be elected by the Faculty from amongst its members other than the student members. Under sub-section (3) itself the term of the office of the Dean is limited to three years and sub-section (4) prevents any person from holding the office of the Dean for two consecutive terms.

2. The Registrar of the Shivaji University issued a notice on 5th January, 1975, calling upon the members of all Faculties to elect Deans for the respective Faculties. Under the said notice such elections were to be held on 27th January, 1976, and nominations were invited before 10th January, 1976, last date for withdrawal of the nominations being fixed on 13th January, 1976. The said notice also indicated that the persons holding office of the Dean at the commencement

of the 1974 Act would not be eligible to contest the election to the said office.

3. It appears that some doubt had arisen about the true import of Section 12 (4) and the eligibility of existing Deans to contest elections, even before the issuance of the above notice. The Vice-Chancellor referred this question of interpretation to the Chancellor under Section 86 of the new Act. The Chancellor declared that the prohibition under Section 12 (4) also applied to the Deans, elected under the repealed Act and, holding such offices at the commencement of the new Act. Direction in the notice to the above effect is based on this decision of the Chancellor. Validity of this decision and the above direction in the notice is challenged in this Special Civil Application by the above petitioners, who desire to contest elections.

4. Mr. Pendse, the learned advocate for petitioners contends that the reference by the Vice-Chancellor to the Chancellor without the requisition of not less than 25 members of senate is not competent as also the decision thereon. It is not disputed before us that the reference was made by the Vice-Chancellor suo motu under Section 86 without such requisition and the letter dated 19-2-1975 conveys the Chancellor such a decision thereon. It was also not disputed that prohibition, stipulated in the notice of the Registrar against the existing Deans from contesting the election afresh, is based on this decision. Close reading of Section 86 indicates that it enable the Vice-Chancellor to make reference to the Chancellor on the question of interpretations detailed therein either (1) on the motion of any person or body directly attracted or (2) suo motu. Making of such reference, however, appears to be discretionary and entirely a matter of his choice. This is what the word "may" should indicate. The proviso to this section, however, makes it obligatory on him to make such reference when there is a requisition. This is what the word "shall" indicates. Thus the main section and its proviso are respectively directory and mandatory provisions, the obligatory situation arising, only when there is a requisition for the same. Looked at this way, it should be difficult to hold that the reference made by the Vice-Chancellor suo motu was in any manner irregular or incompetent. It is, however, not necessary to pursue this point further as the decision is not conclusive and is open to examination in this writ petition on its own merits.

5. As indicated earlier, it was open for the petitioners to contest the election afresh after the expiry of the term of three year period, under the repealed Section 25 read with statute 104. Section 12 (4) of the Act, however, prevents holding of the office for two consecutive terms, thereby prohibiting the then holder of the office from contesting such election afresh. Ordinarily the words 'consecutive terms' would mean the terms undergone and worked out under the new Act and the term held under the repealed Act would be as much irrelevant as such terms of Dean held under other enactments and in other Universities. The words cannot include such terms without some indication of any such Legislative intent.

6. Mr. Bhonsale and Mr. Agarwal, the learned Advocates for the respondents, contend that acts done, elections and offices held, including elections of offices of Deans under the repealed Act, are deemed to have been done and held under the new Act by virtue of saving provisions of the new Act. Reliance was placed on Section 91 (ii) (a) and 91 (xi) of the Act in support of this contention. It is obvious that in the event of there being any legislative fiction, of the offices held under the repealed Act being treated as under the new Act, the fiction shall have to be given effect to, and in that case by virtue of such fiction the Deans elected under the Repealed Act and holding office at the commencement of the Act would be deemed to have been prevented from contesting the election afresh. In that case by seeking election, they would virtually be trying to hold office for consecutive terms prohibited under Section 12 (4) of the Act. This necessitates close examination of the two clauses of Section 91.

7. Section 91 (ii) (a) is as follows:

"All members of the Senate, the members of the Syndicate and the Academic Council, the Boards of Studies and other authorities, bodies and committees of the University constituted under the said Act, and in office immediately before the commencement of this Act, shall be deemed to be respectively the members of the Senate, of the Executive and Academic Councils, the Boards of Studies and other corresponding authorities, bodies and committees of the University, and shall, until the date, being not later than six months from the date on which this Act comes into force, on which the Vice-Chancellor declares that the Senate has been duly constituted, exercise all the powers

and perform all the duties conferred on the authorities, bodies and committees under this Act;"

Under Sections 17 and 22 of the repealed Act, Deans of all the Faculties were the ex-officio members of the Senate, and the Academic Council respectively. Under the above clause, the Deans like other members of these two bodies, are deemed to have become the members of corresponding bodies under the new Act, and also are enabled to exercise the powers conferred on them as such members under the new Act. It however does not save, their elections to the offices, or their holding of the office on the strength thereof, or continuity therein. In other words, the clause only saves the membership of the Deans of the above two bodies and of other bodies in which membership is held by them ex-officio, obviously to ensure the continuity and functioning of such bodies till the same are reconstituted under the new Act. The clause, however, pre-supposes that such membership is otherwise subsisting and the holders of the offices of Deans are otherwise enabled to hold them under some other provision. This clause does not require the elections of these Deans held under the repealed Act to be deemed to have been held under this Act, nor does it enable the Deans to discharge and perform their several other statutory functions as such Deans. The Deans cannot also be considered to be "authorities" referred to in this clause, as they are not one of the authorities notified under Section 16 of the repealed Act and Section 19 of the new Act, though ordinarily Deans could have easily been held to be such authorities. There is also much substance in the contention of Mr. Pendse that Deans cannot appropriately be brought under the connotation of the word "bodies" sought to be saved under this clause. Section 91 (ii) (a), therefore, cannot be pressed into service for deeming the Deans elected under the repealed Act to have been elected under this Act.

8. Section 91 (xi) is as follows:

"The appointment of the Registrar and all other officers and employees of the University constituted under the said Act, and validly made under that Act, and subsisting immediately before the commencement of this Act, shall be deemed to have been made under and for the purposes of this Act; and the Registrar and such other officers and employees shall continue to hold office and to act, subject to the conditions governing the

terms of their office or employment, except in so far as such conditions may be altered by a competent authority."

This clause is aimed at saving the appointment of the Registrar and all other officers and employees, provided (1) the same are validly made under the repealed Act, and (2) the same were subsisting at the commencement of the Act. Such appointments made under the repealed Act are required, under this clause, to have been "under and for the purposes of this Act". Under Section 10 of the repealed Act and under Section 8 of the new Act, Deans are expressly shown to be the 'officers' of the University along with the Vice-Chancellor and the Registrar and others. This clause thus ensures continuity of the Deans elected under the repealed Act, even after its repeal. The clause creates a fiction of their having been appointed under the new Act and for its purposes.

9. Mr. Pendse, however, contends that the clause is essentially aimed at saving, the appointments of salaried servants and not of elected honorary officers. He firstly relies on the use of the expression "appointment" and emphasises how inappropriate it is to warrant inclusion therein of the elected officials like the Deans. The contention is, no doubt, attractive and plausible. It, however, loses its edge once it is borne in mind that officers under both the enactments include even such elected Deans along with salaried servants like Registrar and Librarians. The Deans ordinarily would answer the connotation of the word "authority" whose constitution under the repealed Act is to be deemed to have been continued under the Act by force of clause (ii) (a) of Section 91. We had to reject such contention because of his being excluded from the purview of the "authorities" under Section 19 of the Act and corresponding Section 16 of the repealed Act. For this very reason, Deans cannot be excluded from the purviews of Officers covered by clause (xi) of Section 91. It is true that ordinarily person elected to an office is not described as being appointed thereto. Even so, such expression cannot be said to be wholly inappropriate and unknown to the legal dictionary to indicate occupation of post by process of election. According to Oxford English Dictionary, Volume I, page 409, item 8, the word "appointment" includes the process of "nominating to, or placing in,

an office". A person can be placed in office as such effectively by nomination, selection, promotion as by election, and each one of these processes can be described broadly by the word "appointment". Provisions of Sections 253, 255, 285 (b) of the Companies Act 1956 are instances in point which speak of appointment of Directors, though majority of them are elected.

10. Secondly, salaried 'officers' also happen to be "employees". It was not necessary to introduce the word "officers", if clause were intended to cover only salaried employees. Reliance was also placed on the words of the clause indicating that officers and employees were to continue to hold offices and act "subject to conditions governing the term of their offices or employment" till the same are altered by competent authority. Apparently, this gives an impression as though the clause seeks to protect the service conditions of the salaried employees. But there is nothing to exclude, the reference being even to the terms of offices of the Deans,

11. It was also argued that even when the Vice-Chancellor and the Registrar are included in the list of 'officers' under both the enactments, the term of each one of them is specifically saved under clauses (i) and (xi). Absence of such specific reference, according to Mr. Pendse, indicates the legislative intentment of not saving the elections of the Deans held under the repealed Act. We are unable to see any merit in this contention. Both these officers are of undoubted importance to the functioning of the University and Legislature seems to have made specific provision for their continuance, out of abundant precautions. In fact, clauses (ii) and (xi) in between them exhaust all the Committees, authorities, bodies and officers and employees whose appointments and constitutions under the repealed Act are sought to be saved and continued under the new Act. It is difficult to find any good reason or basis as to why the legislature could have intended to exclude Deans alone from the saving clauses. The circumstance that the membership of all the members, including that of the Deans of the Senate and the Council, is saved, indicates the legislative intentment to ensure continuance and saving of even the holder of the said offices.

12. This apart, under clause (b) of Section 7 of the Bombay General Clauses

Act, repeal of any enactment does not "affect the previous operation of any enactment so repealed, or anything duly done or suffered thereunder". This would be of course so, as indicated in the opening part of this section "unless a different intention appears". We have already discussed above how there was no trace of any such different intention in the new Act to affect operation of the repealed Act adversely against the continuance of so elected Deans or the election held for the said office. In fact, the intention to keep such offices going is what is indicated by the sweeping provisions of sub-clauses (ii) and (xi) of Section 91. The Deans elected under the repealed Act and holding offices at the commencement of the new Act would attract the prohibition against the eligibility to contest election for the next consecutive term. The decision of the Chancellor and the notice of the Registrar, both are thus valid.

13. Mr. Pendse then contends that such deeming provisions may at the most save the elections held under the repealed Act and enable the incumbents to hold office till the elections under the new Act are held. But, contends Mr. Pendse, these cannot have the drastic effect of importing any prohibition against the right to stand for election. The contention is devoid of any merit. As held in *East End Dwellings Co. Ltd. v. Pinbury Borough Council*, (1952) AC 109, the Courts are bound to give full effect to the legislative fictions within their limits and corollaries and direct consequences thereof also need to be recognised as part of the said fiction. One such plain consequence of the election under the repealed Act being deemed to have been held under the new Act, and for its purposes, would be to prevent the so elected person from contesting the election under the new Act, the term under which would amount to a consecutive term within the mischief of Section 12 (4) of the new Act.

14. Mr. Pendse also faintly suggested that any such interpretation would result in giving retrospective effect to Section 12 (4) without any basis of warrant therefor in the new Act. Reliance was placed in this connection on the judgment in the case of *Re: A Solicitor's Clerk*, (1957) 3 All ER 617. We are unable to see how the question of any retrospectivity arises herein at all. Ratio of the above case itself militates against any such contention. Disqualification of the Solicitor's Clerk on the basis of a provisions introduced in 1956 for conviction

for larceny and embezzlement suffered in 1953, was held to be valid, it being found to have involved no question of retrospectivity. The case thus does not help. Drawing on preenactment, acts and omissions of any individual, for the requisites of disqualification does not involve giving retrospective effect to such enactment.

15. There is thus no merit in this petition.

16. Rule discharged.

17. There will be no order as to costs in the circumstance of this case.

Petition dismissed.

AIR 1977 BOMBAY 181

(AT NAGPUR)

DHARMADHIKARI AND SAWANT, JJ.

R. P. Ghosh, Applicant v. Smt. Pramilaibai Ravindra Puri and others, Opponents.

Civil Revn. Appln. No. 327 of 1972, D/- 2-8-1976.*

(A) T. P. Act (1882), Section 106 — Suit for ejectment by legal representatives of deceased landlord — Termination of tenancy by original landlord for bona fide occupation — Permission under Cl. 13 (3) (vi) of C. P. and Berar Letting of Houses and Rent Control Order obtained — Death of landlord — Suit by legal representatives competent — Notice enures for benefit of successors in title. (C. P. and Berar Letting of Houses and Rent Control Order 1949, Clause 13 (3) (vi)).

Where a landlord having obtained the permission of the Rent Controller for terminating the tenancy of the tenant for bona fide occupation of himself and his family under Clause 13 (3) (vi) of the C. P. and Berar Letting of Houses and Rent Control Order terminates the tenancy by validly serving a notice under Section 106 of the T. P. Act and dies thereafter, a suit for ejectment brought by his legal representatives is competent.

(Para 14)

In such a case since the proceedings under the C. P. and Berar Letting of Houses and Rent Control Order are already decided and the orders passed therein have become final they are bind-

*(To set aside order of M. R. Ektare, Sm. C. C. Nagpur, in Civil Suit No. 586 of 1971, D/- 11-7-1972.)

ing on the parties. Further in pursuance of the permission granted by the Rent Controller, the original landlord had also issued a quit notice under Section 106 of the Transfer of Property Act to the tenant. Before the death of the original landlord the tenancy of the tenant also stood terminated. Thereafter the legal representatives filed a suit for ejectment against the tenant. After the death of the landlord his legal Representatives the plaintiffs became the owners of the house. They also became the landlords of the suit property and were entitled to receive the rent of the house. A notice to quit under Section 106 of the Transfer of Property Act is to be given by the lessor to lessee. The lessor will obviously include the successor-in-title, that is, heirs. Therefore, the plaintiffs were entitled to serve such a notice upon the defendant. If the notice was already given, then it enures for the benefit of successors-in-title of the original lessor. Furthermore the permission was sought by the original landlord from the Rent Controller on the ground that he wanted the premises for his bona fide residence and of his family, as they had no other house of their own in the city. Obviously exclusive jurisdiction is vested upon the Rent Control authorities to decide the rights of the parties arising out of the Rent Control Order. A decision of the Rent Controller in this behalf is binding upon a Civil Court and it is not open for Civil Court to go behind the said order. AIR 1971 SC 2361 and 1960 Nag LJ (Note) 109 and AIR 1974 All 195, Rel. on; AIR 1973 SC 2110, Dist. (Paras 10, 11)

(B) Transfer of Property Act (1882), Section 106 — Notice of termination of tenancy — Service of notice by Registered Post proved futile — Tenant refusing to accept another notice when tendered — Affixation of notice on conspicuous part of the premises, held, was valid service, as the landlord had no other alternative.

(Para 7)

(C) Transfer of Property Act (1882), Section 106 — Termination of tenancy — Notice — Reasons for determination of tenancy need not be mentioned in the notice. (Para 9)

(D) T. P. Act (1882), Section 106 — Suit for ejectment — Permission under Clause 13 (3) (vi) of C. P. and Berar Letting of Houses and Rent Control Order obtained — Filing of suit before Civil Court after giving notice under Section 106 is not a continuation of proceeding before the Rent Controller — It is an in-

dependent and distinct proceeding. AIR 1973 SC 2110, Dist. (C. P and Berar Letting of Houses and Rent Control Order, 1949, Clause 13 (3) (vi)). (Para 9)

Cases Referred: Chronological Paras
AIR 1976 Mad 205 = (1976) 1 Mad LJ 128 12

AIR 1976 Raj 32 = 1975 Raj LW 392 12

AIR 1974 All 195 = 1974 All LJ 368 13

AIR 1973 SC 2110 = (1973) 3 SCR 679 5, 8, 9, 12, 13

AIR 1971 SC 2361 = (1970) 3 SCR 815 11

AIR 1969 Bom 194 = 1969 Mah LJ 30 5

1960 Nag LJ (N) 109 11

A. Shelot, for Applicant; R. S. Buxy, for Opponents.

DHARMADHIKARI, J.— The non-applicants-plaintiffs filed a suit for ejectment, damages, mesne profits etc., against the applicant-defendant. It is an admitted position that the applicant-original defendant was a tenant of the premises on a monthly rent of Rs. 14/- per month. Original Landlord Ravindra Puri filed an application, amongst other grounds, under Clause 13 (3) (vi) of the Central Provinces and Berar Letting of Houses and Rent Control Order, 1949, referred to hereinafter as the Rent Control Order, seeking permission to serve a notice terminating the tenancy of the applicant-defendant on the ground that he required the premises for his and his family's bona fide personal occupation. Such a permission was granted to late Ravindra Puri by the Rent Controller on 30-3-1970. An appeal filed against the said order was dismissed by the appellate authority on 27-8-1970. Thereafter Ravindra Puri served a notice upon the defendant-tenant under Section 106 of the Transfer of Property Act. When the initial notice came back with a postal endorsement that the tenant had already left the place on 15-12-1970 a fresh notice was affixed to the conspicuous part of the suit house, when according to the plaintiffs, the defendant was inside the house and he refused to accept the notice when tendered. Thus, according to the plaintiffs, the tenancy of the defendant-tenant was validly terminated by a notice dated 13-12-1970 which was affixed to his house on 15-12-1970 terminating his tenancy with effect from 1st January 1971. In the suit the plaintiffs had also claimed notice charges, damages, mesne profits etc.

2. The defendant-tenant resisted the suit and contended that the quit notice was not validly served upon him. He further contended that the original

Landlord Ravindra Puri having died on 4-2-1971, that is, after the service of notice under Section 106 of the Transfer of Property Act, the suit filed by his legal representatives is not maintainable. According to the applicant-tenant, the permission was secured by late Ravindra Puri on the ground that he required the premises for his bona fide personal occupation. It is on this ground alone the permission was granted by the Rent Controller. Ravindra Puri died on 4-2-1971 after securing the permission and serving the notice. The ground on which the permission was sought and granted to late Ravindra Puri was personal to him and, therefore, after his death the cause of action did not survive. The permission granted by the Rent Controller stood exhausted with the death of late Ravindra Puri and it was obligatory on the part of his legal representatives, the present plaintiffs-non-applicants, to prove their own bona fide need independently. Since this has not been done and since a fresh permission from the Rent Controller is not obtained by the legal representatives of deceased Ravindra Puri the present suit is not maintainable.

3. It is pertinent to note at this stage that as Ravindra Puri died on 4-2-1971, the present suit for ejectment was filed by his legal representatives, namely his widow and his minor children. At the trial on behalf of the plaintiffs, Smt. Pramilaibai, plaintiff No. 1 and Madan Thakur (P. W. 2) were examined. A certified copy of the order passed by the Rent Controller was also placed on record. On the other hand, on behalf of the defendant, the defendant himself entered into the witness-box.

4. After appreciating all the evidence on record, the learned Judge of the Small Cause Court, Nagpur, came to the conclusion that on 15-12-1970 the notice was tendered to the defendant-tenant and he refused to accept it, and therefore it was affixed at a conspicuous place on the house occupied by the defendant as a tenant. In this view of the matter, the learned Judge recorded a finding of fact that the quit notice was validly served on the defendant on 15-12-1970. The learned Judge also negatived the contention raised on behalf of the defendant that the suit was not maintainable, because the cause of action was personal to late Ravindra Puri and after his death the present plaintiffs, his legal representatives, had no locus standi to file the present suit unless they obtained a fresh per-

mission from the Rent Controller, In the result, therefore he passed a decree against the defendant ordering him to deliver vacant and peaceful possession of the suit premises and also to pay the damages. Against this judgment and decree of Small Cause Court, Nagpur, a revision application was filed by the defendant-tenant under Section 25 of the Small Cause Courts Act.

5. When the matter came up for hearing before the Single Judge of this Court, as the learned Judge found that the matter involves an important question of law relating to the question as to whether the legal representatives of the landlord can proceed to institute a suit after obtaining the permission of the Rent Controller on the ground of bona fide need and requirements of the landlord, who died before the suit is filed and as the learned Judge further found that in view of the subsequent decision of the Supreme Court in *Smt. Phool Rani v. Naubat Rai Ahluwalia*, (AIR 1973 SC 2110), the earlier decision of this Court in *Husseinbhai v. Navayug Chitrapat Co. Ltd.*, 1969 Mah LJ 30 = (AIR 1969 Bom 194) requires re-consideration, the matter was referred to the Division Bench.

6. Shri Shelot, the learned counsel for the applicant-tenant, contended before us that the impugned notice was not served upon the tenant in accordance with the provisions of Section 106 of the Transfer of Property Act.

7. In our opinion there is no substance in this contention. Once the evidence adduced on behalf of the plaintiffs and particularly the evidence of Madan Thakur (P. W. 2), is accepted, it is quite obvious that on 15-12-1970 the plaintiffs tried to serve a notice on the defendant-tenant. The said notice was dated 13-12-1970. The defendant refused to accept the said notice when tendered and, therefore, as no other alternative was left to the landlord, the said notice was affixed to the conspicuous part of the premises, which are occupied by the defendant as a tenant. It is pertinent to note that on earlier occasion when a notice by registered post was sent to the defendant-tenant on his office address, it came back with an endorsement that he had left. In these circumstances, in our opinion, the landlord was fully justified in affixing the notice to the conspicuous part of the premises as per the provisions of Section 106 of the Transfer of Property Act, when the tenant refused to accept the same when it was again tendered to him on

15-12-1970. In this view of the matter, in our opinion, the learned Judge of the Small Causes Court was fully justified in coming to the conclusion that the service of the notice on the tenant was perfectly legal and valid.

8. It was then contended by Shri Shelot that under the provisions of the Rent Control Order it was late Ravindra Puri who had filed an application under Clause 13 (3) (vi) on the ground that he needed the house for the purpose of his bona fide occupation. After securing such a permission he had also served a notice under Section 106 of the Transfer of Property Act. However, thereafter before institution of the suit itself he died on 4-2-1971 and the suit came to be filed on 9-3-1971 by his legal representatives. Therefore, according to Shri Shelot, the permission granted by the Rent Controller was on the ground which was personal to deceased Ravindra Puri. In this view of the matter, the legal representatives of the landlord have no locus standi to institute a suit or to proceed further with the proceedings because the cause of action which was personal to deceased Ravindra Puri had perished with him. In support of his contentions Shri Shelot has strongly relied upon a decision of the Supreme Court in *Smt. Phool Rani v. Sh. Naubat Rai Ahluwalia*, (Cit. supra) (AIR 1973 SC 2110). It is not possible for us to accept these contentions.

9. For properly understanding the controversy involved in this revision application it will be worth-while to refer to certain important provisions of the Rent Control Order. The terms "Landlord" and "tenant" are defined in Clauses 2 (4) and (5) respectively of the Rent Control Order, which read as under

2 (4) "Landlord" includes the person who is receiving or is entitled to receive the rent of a house whether on his own account or on behalf of himself and others or as an agent or trustee, or who could so receive the rent or be entitled to receive the rent if the house were let to a tenant; and

2 (5) "Tenant" means any person by whom or on whose account rent is payable for a house and includes a sub-tenant and a person continuing in possession after the term of his tenancy has expired."

The relevant provisions of Clauses 13 (1), (2) and 13 (3) (vi) of the Rent Control Order, which deal with the seeking of previous written permission of the Rent Controller read as under;

"13 (1) No landlord shall, except with the previous written permission of the Controller,—

(a) give notice to a tenant determining the lease or determine the lease if the lease is expressed to be determinable at his option; or

(b) where the lease is determinable by efflux of the time limited thereby, require the tenant to vacate the house by process of law or otherwise if the tenant is willing to continue the lease on the same terms and conditions.

(2) A landlord who seeks to obtain permission under sub-clause (1) shall apply in writing to the Controller in that behalf:

Provided that where the tenancy is for a specified period agreed upon between the landlord and the tenant, no application under items (vi) and (vii) of sub-clause (3) shall be entertained by the Controller before the expiry of such period.

13 (3) If after hearing the parties the controller is satisfied—

* * * * *

(vi) that the landlord needs the house or a portion thereof for the purpose of his bona fide occupation, provided he is not occupying any other house of his own in the city or town concerned; he shall grant the landlord permission to give notice to determine the lease as required by sub-clause (1)."

From the bare reading of Clause 13, it is obvious that a prohibition is imposed upon a landlord to give notice to determine the lease of the tenant unless he obtains a previous written permission of the Rent Controller. The order passed by the Rent Controller, subject to the provision of an appeal and review, is final. The Rent Control Order confers an exclusive jurisdiction upon the authorities constituted under the Rent Control Order to decide the issues arising out of said order. It is obvious from the provisions of Clause 13 that the permission sought by the landlord for giving a notice to the tenant determining the lease on the grounds enumerated therein can be granted by the Rent Controller alone. Unless the Rent Controller is satisfied that conditions laid down in Clause 13 are fulfilled, it is not open to him to grant such a permission. Once such a permission is granted by the Rent Controller, then the landlord is at liberty to serve a notice upon the tenant terminating his tenancy as per the provisions of the Transfer of Property Act. It is the Transfer of Pro-

perty Act which then applies. Section 106 of the Transfer of Property Act does not require that a reason for determining the tenancy should be specifically stated in the notice itself. It is not necessary under the Law to set out the grounds for termination in a notice to quit. The contents of notice to quit and its service etc., are wholly governed by the provisions of the Transfer of Property Act. The provisions of the Rent Control Order do not come into play nor they can affect the question of notice to quit, its requirement or its service etc. Once a valid permission from the Rent Controller is obtained, the provisions of the Rent Control Order are in addition to those of the Transfer of Property Act. Therefore, before a tenant can be evicted by the landlord, he must comply with the provisions of Section 106 of the Transfer of Property Act. The Rent Control Order does not in any way abrogate Chapter V of the Transfer of Property Act which deals with leases. The notice under Section 106 of the Transfer of Property Act is essential for bringing to an end the relationship of a landlord and a tenant. Unless the relationship is validly terminated, the landlord does not get right to obtain possession of premises by evicting the tenant. Section 106 of the Transfer of Property Act does not provide for the satisfaction of any additional condition. The Rent Control Order only provides that such a notice cannot be given unless a written permission of Rent Controller is obtained. It does not lay down any further condition so far as the quit notice under Section 106 of the Transfer of Property Act is concerned. The filing of a suit for ejectment is an independent action. The combined effect of this is that it contemplates two distinct proceedings, one relating to granting of a written permission by the Rent Controller to give notice to determine the lease under the provisions of the Rent Control Order and thereafter filing of a suit for ejectment before a competent Civil Court after giving necessary notice under Section 106 of the Transfer of Property Act. The Rent Controller or the authority constituted under the Rent Control Order has no authority or jurisdiction to eject a tenant or deliver possession of the property to the landlord. This is the province of a Civil Court. The filing of the ejectment suit after giving a notice under Section 106 of the Transfer of Property Act is not the continuation of the proceedings instituted before the Rent Controller, but it is an independent

and distinct proceeding which is governed by the Code of Civil Procedure and the Transfer of Property Act. Therefore, in our opinion the law laid down by the Supreme Court in *Smt. Phool Rani v. Sh. Naubat Rai Ahluwalia*, (AIR 1973 SC 2110) (cit. supra) will have to be understood in this context. If so read, we are further of the opinion that the said decision is obviously distinguishable.

10. In the said case the Supreme Court was concerned with the proceedings instituted under the Delhi Rent Control Act, 1958 and particularly under Section 14 (1) (e) of the said Act. In the case before the Supreme Court a landlord had filed an application against a tenant seeking possession of certain premises on the ground of personal requirements and during the course of the said proceeding the landlord died and in that context the Supreme Court observed that legal representatives of landlord (since deceased) have no right to continue the proceeding as initiated by the landlord for ejectment of the tenant under Section 14 (1) (e) of Delhi Rent Control Act. The provisions of the Delhi Rent Control Act and the Rent Control Order are not *pari materia*, nor they are identical. In the case before us the proceedings under the Rent Control Order had come to an end when the permission was granted by the Rent Controller and was confirmed by the Appellate Court on 27-8-1970, that is, long before the death of the original landlord Ravindra Puri. In the case before the Supreme Court the matter was still pending before the Tribunal constituted under the Delhi Rent Control Act. As the matter was pending before the Tribunal constituted under the said Act, the order passed had not achieved finality. In para. 9 of the said judgment the Supreme Court, therefore, observed that "though the plaintiff died during the pendency of the appeal, it is as if he died during the pendency of the suit because the suit was dismissed on a preliminary issue concerning the validity of the notices to quit, was remanded in appeal for trial on the merits". As those proceedings were pending in a suit, the provision of Order 22, Rule 1, Code of Civil Procedure, applied to the proceedings and in that context ultimately the Supreme Court observed that "legal representatives of a landlord (since deceased) have no right to continue the proceeding as initiated by the landlord for ejectment of the tenant under Section 14 (1) (e) of Delhi Rent Control Act because the bona fide re-

quirement of the premises for the residence of himself (landlord) and his family members (together) is his personal requirement". In this context reference could usefully be made to the following observations of the Supreme Court in paras. 13, 14, 17, 19 (Partly) and 20:

"13. Several decisions were cited before us but those falling within the following categories are to be distinguished:

(i) cases in which the death of the plaintiff occurred after a decree for possession was passed in his favour; say, during the pendency of an appeal filed by the unsuccessful tenant;

(ii) cases in which the death of the decree-holder landlord was pleaded as defence in execution proceedings; and

(iii) cases in which, not the plaintiff but the defendant-tenant died during the pendency of the proceedings and the tenant's heirs took the plea that the ejectment proceedings cannot be continued against them.

14. Cases of the first category are distinguishable because the decisions therein are explicable on the basis, though not always so expressed, that the estate is entitled to the benefit which, under a decree, has accrued in favour of the plaintiff and therefore, the legal representatives are entitled to defend further proceedings, like an appeal, which constitute a challenge to that benefit.

17. Cases of the second category are distinguishable because the decisions therein are, by and large, based on the principle that an executing court has no jurisdiction to go behind the decree. It must execute the decree as it finds it, save in exceptional cases as, for example where the decree on the face of it is without jurisdiction.

19. Cases of the third category are governed by totally different considerations. The landlord's right to evict the tenant on the grounds available under the Rent Act does not come to an end with the death of the tenant. That right is enforceable against those in whom the tenant's interest resides for the time being.

20. We have referred to some of the decisions in three categories not with a view to determining their correctness but only in order to show that they rest on different principles or could be explained in reference to such principles. We are concerned with a matter not involving the application of any of those principles. For reasons already stated, we are of the view

that considering the nature of the claim made in the instant case and the bundle of facts which constitute the plaintiff's cause of action, his right to sue will not survive to his legal representatives."

As already observed, in the case before us the proceedings instituted under the Rent Control Order were already decided and the orders passed therein had become final. The orders passed by the authorities under the Rent Control Order were binding on the parties. In pursuance of the permission granted by the Rent Controller, the original landlord had also issued a quit notice under Section 106 of the Transfer of Property Act to the tenant. Before the death of the original landlord Ravindra Puri, the tenancy of the defendant-tenant also stood terminated. These were the accomplished facts which had achieved finality and thereafter the legal representatives filed a suit for ejectment against the tenant. It is not disputed before us, nor it could be disputed, that after the death of Ravindra Puri, the plaintiffs became the owners of the house. They also became the landlords of the suit property and were entitled to receive the rent of the house. A notice to quit under Section 106 of the Transfer of Property Act is to be given by the lessor to lessee. The lessor will obviously include the successor-in-title, that is, heirs. Therefore, the plaintiffs were entitled to serve such a notice upon the defendant. If the notice was already given, then it enures for the benefit of successors-in-title of the original lessor.

11. It is also pertinent to note in the present case that the permission was sought by the original landlord from the Rent Controller on the ground that he wanted the premises for his bona fide residence of his family, as they have no other house of their own in the city. Obviously exclusive jurisdiction is vested upon the Rent Control Authorities to decide the rights of the parties arising out of the Rent Control Order. A decision of the Rent Controller in this behalf is binding upon a Civil Court and it is not open for Civil Court to go behind the said order. In this context a reference could be usefully made to a decision of the Supreme Court in *Ramji Das v. Trilok Chand*, (AIR 1971 SC 2361). After making a detailed reference to the provisions of U. P. (Temporary) Control of Rent and Eviction Act, 1947, the Supreme Court observed as under:

"3. The proceeding before the District Magistrate under Section 3 (2) and before the Commissioner under Section 3 (3) of the U. P. (Temporary) Control of Rent and Eviction Act are quasi-judicial in character. By Section 3 (4) of the Act the decision of the Commissioner under sub-section (3) of Section 3, subject to any order passed by the State Government under Section 7-F of the Act, is declared final. The respondent did not prefer any petition before the State Government under Section 7-F of the Act and on that account the order passed by the Additional Commissioner, exercising powers of the Commissioner under Section 3 (3), became final. Section 16 of the Act provides that no order made under the Act by State Government or the District Magistrate shall be called in question in any court. It is true that the finality of the order declared by Section 3 (4) and Section 16 will not exclude the jurisdiction of the High Court in exercise of the jurisdiction under Article 226 of the Constitution to issue an appropriate writ quashing the order. But subject to interference by the High Court, the decision must be deemed final and is not liable to be challenged in any collateral proceeding.

4. In our view, the High Court was in error in holding that the decision of the Rent Control and Eviction Officer was, in the suits filed by the appellant, open to the objection that the officer did not consider the needs of the tenant". The Rent Control and Eviction Officer had jurisdiction to hear and decide the matter. Even if we assume that he committed an error in the exercise of his jurisdiction, the error could be corrected only in a proceeding under Section 7-F of the Act by approaching the State Government and by way of a writ petition to the High Court, but the order made by the Rent Control and Eviction Officer and confirmed by the Additional Commissioner could not be challenged in suit." Similar view was taken by this Court in *Mohd. Usman v. Bhalida Abdul Karim*, (1960 Nag LJ (Note) 109).

12. Once it is held that the decision of the Rent Controller so far it relates to the matter within his exclusive jurisdiction is concerned, is final and could not be challenged in a suit or in any collateral proceedings then, in our opinion, the same matter cannot be reopened in a Civil Suit instituted by the landlord after obtaining a permission from the Rent Controller. So far as a suit for ejectment is concerned, the cause of action is not

the ground on which the permission is granted by the Rent Controller, but the termination of tenancy of the tenant under the provisions of Transfer of Property Act. The same gives an occasion for and forms the foundation of suit. So far as the ejectment suit is concerned, the grounds of ejectment are irrelevant. To such a suit the provisions of the Civil Procedure Code and Transfer of Property Act will apply and not the provisions of the Rent Control Order. If this is so, then, in our opinion, the death of the landlord after valid termination of the tenancy of the tenant will not perish the cause of action itself. Once it is held that the reasons for grant of permission are not relevant while deciding an ejectment suit, then, in our opinion, to such a case the law laid down by the Supreme Court in *Smt. Phool Rani's case* (AIR 1973 SC 2110) will not apply. Obviously the matter might stand on somewhat different footing if the landlord seeks permission to serve a notice upon the tenant to determine his lease under Cl. 13 (3) (vi) of the Rent Control Order for his bona fide personal occupation and during the pendency of the said proceedings before the authorities constituted under the Rent Control Order the landlord dies. Of course in that case also much will depend upon the pleadings of parties, the evidence on record and the stage of proceedings etc. In this context reliance was placed by the learned Counsel for the non-applicants upon the decisions of Madras and Rajasthan High Courts in *Vijayaraghavan v. Mohamed Yakub*, (AIR 1976 Mad 205) and *Ramsharan v. Ramavtar* (AIR 1976 Raj 32). However, we are not called upon to decide such a question in this revision application and therefore we need not express any opinion in this behalf. In the case before us that stage was over and permission was already granted to deceased Ravindra Puri and the same had also become final.

13. Such a view seems to have been taken by Allahabad High Court in *Syed Mohd. Ibne Ali v. Smt. Zanaab Begum*, (AIR 1974 All 195). After making a reference to the decision of the Supreme Court in *Smt. Phool Rani v. Naubat Rai Ahluwalia*, (AIR 1973 SC 2110) (cit. supra) the learned Judge in para. 5 of the judgment observed as under:

"Coming to the last point I find that this ground was not taken in the grounds of appeal. However, Sri S. Rahman urged that since it was a legal ground he may

be allowed to argue. He relied upon the case of *Smt. Phool Rani v. Naubat Rai Ahluwalia*, AIR 1973 SC 2110. In my view this ruling does not apply to the facts of the case. In that case the plaintiff had moved an application under the Delhi Rent Control Act seeking permission against the tenant for ejectment of certain premises on the ground of personal requirement. The plaintiff died during the pendency of the application. The question involved was whether the cause of action would survive to the legal representatives or whether the application abated. Their Lordships observed at page 2114 that "we have referred to some of the decisions in three categories, not with a view to determining their correctness but only in order to show that they rest on different principles or could be explained in reference to such principles. We are concerned with a matter not involving the application of any of those principles. For reasons already stated, we are of the view that considering the nature of the claim made in the instant case and the bundle of facts which constitute the plaintiff's cause of action, his right to sue will not survive to his legal representatives. "In the case before me permission to sue had already been obtained by the deceased plaintiff and after obtaining such permission he had filed a suit for ejectment. He died during the pendency of the suit. Here the two proceedings are entirely different, namely, there was one stage when permission proceedings were pending before the Rent Control and Eviction Officer. That stage had passed and permission had been granted to the landlord. Without obtaining that permission suit at that time could not have been filed for ejectment. Having obtained that permission the suit was filed and in this second stage, namely, when suit for ejectment was pending the plaintiff died. Obviously in such a case right to sue survived to the heirs of the landlord."

14. In the case before us also the permission was already granted by the Rent Controller and in pursuance of that permission the deceased landlord had also terminated the tenancy of the defendant tenant and, therefore, in our opinion, the legal representatives of deceased landlord Ravindra Puri were entitled to file a suit for ejectment of the defendant-tenant.

15. In the view which we have taken, therefore, there is no substance in this revision application. The revision

application fails and is dismissed with costs.

Revision application dismissed.

AIR 1977 BOMBAY 188

(AT NAGPUR)

MASODKAR, J.

Vasant Rao Dattaji Dhanwatay and another, Applicants v. Shyam Rao Dattaji Dhanwatay and others, Opponents.

Civil Revn. Appln. No. 137 of 1976, D/- 8-10-1976.*

Partnership Act (1932), Chap. VI, Section 44 — Suit for dissolution of registered partnership consisting of more than 7 partners but below 20 — Jurisdiction of Civil Court to entertain the suit — Suit if barred by part X of Companies Act. (Companies Act (1956), Part X, Sections 583, 590 and 11 (2)) — (Civil P. C. (1908), Section 9).

A suit seeking reliefs of dissolution of registered partnership consisting of eight partners and a declaration that the firm stood dissolved as and from a particular date is not within the prohibition of Section 11 of the Companies Act. The partnership can be dissolved by recourse to Chapter VI of the Partnership Act. There is no bar whatsoever of such dissolution enacted either expressly or impliedly by the provisions of Part X of the Companies Act. Unlike the Companies Act, there is no specified Court contemplated by the Partnership Act and it is to the Court under Section 9 of the Code of Civil Procedure, the party will have to approach to have relief under Section 44 or under any of the provisions of Chapter VI of the Partnership Act.

(Paras 10, 12)

If there be a legal relationship of partners called "a firm" either registered or unregistered, such a relationship can be brought to an end by the process of dissolution contemplated by Chapter VI of the Partnership Act and nothing in Part X of the Companies Act affects that position. Section 583 of the Companies Act by itself operates on a circumscribed sphere and contingencies. It is not a provision of universal application. Being a provision enacting specified remedy, it will have to be strictly construed and only ap-

*(To set aside order of H. S. Pande, Civil J., Sr. Divn., Nagpur in C. S. No. 9 of 1974, D/- 8-3-1976.)

plied to the matters expressly governed. Moreover, there is a provision of Section 590 which clarifies by enacting a saving that the provisions with regard to dissolutions or winding up of Partnership made by any other Act is not affected by anything enacted by Part X of the Companies Act. (Para 11)

The winding up under Section 583 of unregistered companies which may include a partnership of more than seven members can only be subject to the provisions of sub-section (3) and sub-section (4) of Section 583 of the Companies Act. Thus there is a limited remedy and relief provided by the provisions of Section 583 and the provisions are not applicable to all sorts of cases. The whole scheme of Part X, firstly, operates on the restricted class of cases of unregistered companies and by express provisions of Section 590 saves the enactments which provide for the machinery to wind up partnership, association or company. The provisions of Part X of the Companies Act do not ipso facto affect the operation of the provisions of the Act like the Partnership Act. (Para 5)

Cases Referred: Chronological Paras

1975 Mah LJ 337 2
AIR 1971 Bom 237 = 73 Bom LR 42 10

V. R. Manohar and D. M. Lapalikar, for Applicants; S. G. Ghate, for Opponents Nos. 1 to 6; R. K. Thakur, for the Receiver.

ORDER:— Ex facie an interesting but on closer scrutiny an infirm question of law is raised by the present revision. The entire controversy submitted has something to do with the application of provisions of Part X of the Indian Companies Act, 1956 (hereinafter called the Companies Act), as urged, excluding the operation per force the statute of Chapter VI of Indian Partnership Act, 1932 (hereinafter called the Partnership Act). Indeed, the main plank of submission is that in a suit purporting to have been filed under Chapter VI of the Partnership Act, if the partnership in issue consists of more than seven partners, but below twenty, on the date of the suit for dissolution of such partnership, per force the provisions of Part X of the Companies Act are attracted and by virtue of the provisions of Section 582 read with Section 583, the ordinary civil court would have no jurisdiction to entertain the suit and the only relief can be provided by the competent Company Court with regard to winding up or dissolution.

2. Few facts need be stated to appreciate the submission. The present applicants instituted in fact the present Civil Suit No. 9 of 1974 in the Court of Civil Judge, Senior Division, seeking relief, inter alia, of dissolution of partnership and seeking further a declaration that the firm "Shivraj Fine Art Litho Works" Nagpur stood dissolved as and from the midnight of January 9, 1974. The plaint filed by these applicants then alleged that the said partnership firm was a registered firm known as "Shivraj Fine Art Litho Works" and carried on business in lithographic and art printing business at Nagpur and Bombay. Thereafter the original plaintiffs — the present applicants — moved an application purporting to be under Order 23, Rule 1, of Code of Civil Procedure, seeking to withdraw this suit. Before the order could be made, defendants to the original suit applied for transposition as plaintiffs in that suit. The Court appears to have accepted the prayer of the plaintiff with regard to their withdrawal and the prayer of the defendants with regard to their transposition in the suit. The matter came to this Court and eventually the orders of the trial Court in that regard were affirmed in Civil Revision Application No. 501 of 1974 decided on 22-1-1975 = 1975 Mah LJ 337. After the transposition so ordered and without filing any written statement the present applicants, who are now defendants in that suit, appear to have moved an application at Exh. 163, questioning that in view of the provisions of Part X of Companies Act, the suit was unentertainable by the Court. It is rather strange that the Court purported to decide that application without insisting upon the applicants-defendants to file their written statement. Normal course of procedure is that the defendants once properly arrayed should be directed to file written statement and even by written statement such a defendant is entitled to raise the question of jurisdiction. Whatever may be the position it appears that by order below Exh. 163, the learned Judge negatived the contention. That order is questioned by this revision.

3. As stated above, the only question is whether the suit is entertainable. For the purpose of deciding this revision, it is assumed that on the date of the filing of the suit the partnership firm was registered and further it had eight members as partners.

4. The answer to the question depends on properly appreciating the two

enactments and the provisions of those two chapters mentioned above.

5. Indeed a little closer reading of the provisions and contemplation of Part X of the Companies Act would indicate that under the facts and circumstances the objection has absolutely no force. Part X of the Companies Act deals with winding up of unregistered companies. For the purpose of that part, Section 582 defines what are deemed to be "unregistered companies". Clause (b) thereof gives an inclusive definition of that term and states the unregistered company includes any partnership, association or company consisting of more than seven members at the time when the petition for winding up the partnership, association or company is presented before the Court. Provisions of Section 583 deal with the winding up of such unregistered companies. It does not permit unregistered companies to be wound up under the provisions of the Act, except the winding up contemplated by the Court within the contemplation of Section 425 (1) (a) of the Act. In other words, the winding up under Section 583 of unregistered companies which may include a partnership of more than seven members can only be subject to the provisions of sub-section (3) and sub-section (4) of Section 583 of the Companies Act. Those sub-sections indicate that unregistered companies cannot be wound up under the provisions of the Act voluntarily or subject to the supervision of the Court. Both these phrases have reference to Section 425 (1) (b) and (c) of the Act. Sub-section (4) of Section 583 shows that unregistered companies can be wound up only on the stated grounds contained in clauses (a) to (c) of that sub-section. Clauses (a), (b) and (c) which are enumerative indicate the circumstances on the proof of which alone the process of winding up can at all be taken before the Company Court. Thus it would appear that there is a limited remedy and relief provided by the provisions of Section 583 and the provisions are not applicable to all sorts of cases. It is amply made clear that even these restrictive provisions applicable under specified circumstances and upon specified conditions will not affect the operation of any other enactment that would provide for any partnership, association or company being wound up by virtue of the provisions of Section 590 of the Companies Act. Indeed the provisions of Section 590 which are also the part enacted would save the enactments with regard to partnerships conferring autho-

rity or jurisdiction in the matter of winding up. The whole scheme of Part X, firstly, operates on the restricted class of cases of unregistered companies and by express provisions of Section 590 saves the enactments which provide for the machinery to wind up partnership, association or company. Thus it would be ample to observe that the provisions of Part X of the Companies Act do not ipso facto affect the operation of the provisions of the Act like the Partnership Act.

6. There are good reasons to construe the provisions of both these Acts together to find out the principle with regard to provisions of such a saving enacted by Section 590 of Companies Act.

7. As far as the law of commerce, economic gains etc., is concerned, it is clear that joint commercial or economic activity for the purpose of gain can be carried on by more than one individual. When such joint activity ensues with a view to earn gain, law contemplates so as to avoid the public mischief involving uncertainty and obvious dangers to the innocent third parties in transacting business that such joint ventures should have a legal personality. With that view in object and in contemplation, so as to subserve the public purpose of avoiding possible economic and commercial mischief, provisions of Section 11 of the Companies Act enact statutory prohibition with regard to associations and partnerships of persons exceeding certain number of persons to carry on by sub-section (1) the business of banking, and by sub-section (2) to carry on any other business for the purpose of acquisition of gain. Nay the provisions of sub-sections (4) and (5) indicate culpability and provide a penalty against the individuals who act in contravention of the provisions of sub-sections (1) and (2). Sub-section (2) of Section 11 inhibits association or partnership of more than 20 persons to carry on business other than the business of banking, having its object for acquisition of gain, unless such association or partnership is registered as a company under Act or it is formed in pursuance of some other Indian Law. It is not necessary for the purpose of the present revision to consider the scope and amplitude of the words "formed in pursuance of some other Indian Law"; suffice it to say that presumably and ex facie these words indicate the formation of the companies or associations or partnerships by the law. Now "company" which is a juridical person is required to be formed

and registered to be the company as such because of Section 3 of the Act. The term "company" which is now the part of the definition in that provision indicates a company formed and registered under this Act and also an existing company as defined by sub-clause (ii). That clause deals with the companies which are formed and registered under the acts mentioned in sub-clause (ii). Thus to be a company proper, two requirements are indicated. Firstly it should be formed or constituted in the manner provided by the Act and secondly it must be registered. Unless both these statutory conditions are fulfilled, for the purpose of the Act, there is no company. The Act thus primarily contemplates companies which are registered companies. Provisions of Section 11 are enacted to further this intention that under the provisions of the Act the juridical entity, called the "company" must necessarily exist for the purpose of legal control, as is envisaged by other parts of act, the basic object being to safeguard the public interest to which a reference has already been made.

8. Logically it follows that below the number of persons stated in sub-sec. (2) of S. 11, there can be a company, association or partnership consisting of more than one person carrying on the business having its object to acquire the gain. Such a joint commercial activity of persons for the purposes of gain would not be an illegal company, association or partnership. These entities, loosely so called, or joint ventures can be eventually subjected to the process of winding up by recourse to the provisions of Part X of the Companies Act and for the purpose of that part, those are treated as unregistered companies. If it is a case of partnership which can legally exist, it follows that by virtue of Section 590, if there be a law providing for machinery for its legal dissolution, the operation of that laws is not in any manner affected. That would also apply with regard to any other association of persons which can legally be wound up.

9. Turning to the provisions of the Partnership Act, this position is further reinforced. The provisions of that Act are enacted for the purpose of, as is stated in the preamble "to define and amend the law relating to partnership". The concept of partnership in law and by the statute, is nothing but a relation of persons which arises upon an agreement to share the profits of a business carried on by all or any of them acting for all. That Act

enacts Chapter VI and provides for dissolution of a firm. Under the Act there are registered firms and the provision is made by Chapter VII with regard to such registration. The effect of non-registration of firm is indicated by Section 69 and by sub-section (3) of that section it is made clear that a firm though unregistered, can be brought to dissolution and for such dissolution non-registration is no bar. Thus under the provisions of Chapter VI of the Partnership Act, a non-registered firm or a partnership can be dissolved.

10. As argument was advanced, it may be indicated that the process of winding up is really in law a step towards dissolution though under the company jurisprudence it is possible that the process of winding up may result in reconstruction of the companies and not reach the stage of dissolution proper. As far as the provision of Chapter VI of the Partnership Act is concerned, the effects indicated by Section 46 which deals with the right of the persons to have business wound up after dissolution can only be said to be declaratory in this regard. For the purpose of partnership law, as stated above, which is nothing but a relation of parties flowing from the agreement to share profits of the commercial activity, the winding up of the business of the partnership is treated part and parcel of the dissolution itself. (See Santdas v. Sheodayal, AIR 1971 Bom 237 at p. 240). The Partnership Act thus provides not only for the registration of the firms but also provides for dissolution of the firms whether registered or unregistered. There can be dissolution by an agreement (Section 40) or by law (Section 41) called "compulsory dissolution" or upon happening of certain events (Sections 42 and 43); or dissolution can be effected by Court (Section 44) on the stated contingencies mentioned in clauses (a) to (g) of Section 44. Unlike the Companies Act, there is no specified Court contemplated by the Partnership Act and it is to the Court under Section 9 of the Code of Civil Procedure, the party will have to approach to have relief under Section 44 or under any of the provisions of Chapter VI of the Partnership Act.

11. This brief review of the provisions of the Partnership Act along with the provisions of the Companies Act relevant for the purpose indicates that if there be a legal relationship of partners called "a firm" either registered

or unregistered, such a relationship can be brought to an end by the process of dissolution contemplated by Chapter VI of the Partnership Act and nothing in Part X of the Companies Act affects that position. I have already indicated how Section 583 of the Companies Act by itself operates on a circumscribed sphere and contingencies. It is not a provision of universal application. Being a provision enacting specified remedy, it will have to be strictly construed and only applied to the matters expressly governed. Moreover, there is a provision of Section 590 which clarifies by enacting a saving that the provisions with regard to dissolutions or winding up of partnership made by any other Act is not affected by anything enacted by Part X of the Companies Act.

12. Now that being the position and there being a suit seeking reliefs under Chapter VI of the Partnership Act, even assuming that there were eight partners on the date of the suit, that is not within the prohibition of Section 11, Companies Act and it can be dissolved by recourse to Chapter VI of the Partnership Act and there is no bar whatsoever of such dissolution enacted either expressly or impliedly by the provisions of Part X of the Companies Act.

13. In this view of the matter, there is no merit in the present revision and the same is dismissed with costs.

Revision dismissed.

AIR 1977 BOMBAY 191

HAJARNAVIS, J.

Hanmanta Laxman Thorat and others, Appellants v. Dhondavvabai Hanmanta Thorat and others, Respondents.

Second Appeal No. 434 of 1975, D/-30-9-1976.*

Hindu Marriage Act (1955), Section 16 — Parents' property — Child of a void marriage is not entitled to a share in property of which father is a coparcener.

(Para 5)

P. S. Patankar, for Appellants; M. L. Pendse (for Nos. 1 and 2) and Miss V. V. Kulkarni for N. D. Hombalkar (for No. 3), for Respondents.

*(Against order of B. D. Borude, Extra Asst. J., Sholapur in C. A. No. 139 of 1972.)

BU/BU/A588/77/RSK

JUDGMENT:— This is defendants' appeal against an appellate decree of the Extra Assistant Judge, Sholapur, dismissing their appeal against the decree passed by the Civil Judge, Junior Division, Akkalkot, declaring that the respondents Nos. 1 and 2 and the appellant No. 1 have 1/3rd share each in the suit land and the sale effected by defendant No. 1 in favour of defendant No. 5 in respect of Survey No. 36/1 was not binding on the plaintiffs.

2. The respondent No. 2—original plaintiff No. 2 is a son of respondent No. 1 — original plaintiff No. 1 and the appellant No. 1 Hanmanta. It is the case of the plaintiffs that this Hanmanta married appellant No. 2 — original defendant No. 2 Nagavva while the marriage between him and respondent No. 1 Dhondavvabai was subsisting. The appellants Nos. 3 and 4 are the sons of appellants Nos. 1 and 2. Original defendant No. 5 was the purchaser of Survey No. 36/1. It is not disputed and both the Courts below have found that Survey No. 36/1 and Survey No. 145/1 of village Malkavathe, Taluka Sholapur, District Sholapur were ancestral property of the appellant No. 1's family. It was also found as a fact by both the Court below and it is not disputed in the Second Appeal that this property was obtained by the appellant No. 1 in partition with his father and brothers in 1958. It was also not disputed that just prior to the filing of the suit, the appellant No. 1 and the respondents Nos. 1 and 2 formed a joint family. It appears that the appellant No. 1 took appellant No. 2 as a wife while the marriage between appellant No. 1 and respondent No. 1 was subsisting and that led to the disputes between the appellant No. 1 and respondent No. 1. She, therefore, instituted a suit on behalf of her minor son and herself claiming 1/3rd share each in the two fields mentioned above. She has also stated in the plaint that Survey No. 36/1 was sold by appellant No. 1 to respondent No. 3 — original defendant No. 5 without any legal necessity and that sale was not binding on their shares. The suit was resisted by the defendants on numerous grounds which it is not necessary to enumerate.

3. The learned trial Judge, on consideration of the evidence led by the parties, held that the property was ancestral property and that the appellant No. 1 had got this property in partition with his father and brothers. The trial Judge also held that the plaintiffs and appellant No. 1 were entitled to 1/3rd share

each in the property. He also held that the sale effected by the appellant No. 1 in favour of the defendant No. 5 was effected without any legal necessity and was not binding on the plaintiffs. He, therefore, decreed the plaintiffs' suit. Aggrieved by that decree, the defendants filed an appeal which was heard by the Extra Assistant Judge, Sholapur. He affirmed the finding recorded by the trial Court and dismissed the appeal. It is against this judgment and decree that the present appeal has been filed by the appellants.

4. Mr. Patankar, the learned counsel for the appellants, urged that both the Courts below have committed an error in granting decree for partition without being satisfied that it was necessary in the interest of the minor coparcener and that it was for his benefit that the partition should be effected. It is true that the plaintiff No. 2 was and is a minor and, therefore, the Courts below ought to have made enquiries into the matter. The appellant No. 1 has taken appellant No. 2 as a wife while his marriage with the respondent No. 1 was subsisting. It does appear that he was more devoted to appellant No. 2 than to respondent No. 1 and her child. The satisfaction of the Courts was eloquent from the facts of this case and the manner in which they have dealt with this case. It was not necessary to record any finding, in terms, that it was for the benefit of the minor. The Courts below have, therefore, not committed any error in ordering the partition.

5. Mr. Patankar, the learned counsel for the appellants, then invited my attention to Section 16 of the Hindu Marriage Act which reads:

6. "Where a decree of nullity is granted in respect of any marriage under Section 11 or Section 12, any child begotten or conceived before the decree is made who would have been the legitimate child of the parties to the marriage if it had been dissolved instead of having been declared null and void or annulled by a decree of nullity shall be deemed to be their legitimate child — notwithstanding the decree of nullity:

Provided that nothing contained in this section shall be construed as conferring upon any child of a marriage which is declared null and void or annulled by a decree of nullity any rights in or to the property of any person other than the parents in any case where, but for the

passing of this Act, such child would have been incapable of possessing or acquiring any such rights by reason of his not being the legitimate child of his parents." He submitted that even if the second marriage of the appellant is void, his children born out of that marriage will be deemed to be legitimate children as provided by the section. Therefore, appellants Nos. 3 and 4 will be entitled to shares equal to that of respondent No. 2 who is a legitimate child of appellant No. 1. It is not possible to accept this contention. He has not shown how circumstances under which the children begotten of the marriage which was null and void and which was declared to have been void and which entitled them equal shares in the parents' property exist in the case. Then again in the present case, it is not the property of the father of the children, viz., appellants Nos. 3 and 4 and respondent No. 2 but it is a coparcenary property of appellant No. 1 and respondents Nos. 1 and 2. That being so, it is not correct for the appellants to say that the appellants Nos. 3 and 4 are also entitled for a share in the property. These are the only points which were urged by the learned counsel for the appellants.

6. In the result, the appeal is dismissed and the decree passed by the Appellate Court is affirmed. Under the circumstances of the case, there will be no order as to costs.

Appeal dismissed.

AIR 1977 BOMBAY 193 =

1977 LAB. I. C. 654

FULL BENCH

**KANTAWALA, C. J., TULZAPURKAR
AND KANIA, JJ.**

Chandrakant Sakharan Karkhanis and others, Petitioners v. State of Maharashtra and others, Opponents.

Special Civil Appns. Nos. 201 and 687 of 1971. D/- 14-4-1976.

(A) Constitution of India, Art. 309 — Circulars, orders or resolutions laying down rules about recruitment or fixation of seniority — Duly authenticated but not expressly stating that they are made under Proviso to Art. 309 — Also not published in Government Gazette — Whether can be treated as rules framed under Proviso to Art. 309.

Circulars, Orders or Resolutions or parts thereof laying down the rules or principles of general application, which have to be observed in the recruitment or fixation of seniority of Government servants generally or a particular class of them, and which have been duly authenticated by a signature under the endorsement "By order and in the name of the Governor of Maharashtra" and intended to be applicable straightway can amount to rules framed in exercise of the powers conferred under the proviso to Art. 309, although the said Circulars, Orders or Resolutions do not expressly state that the same are made or issued in exercise of the powers conferred under the proviso to Art. 309 and are not published in the Government Gazette. Spl. C. A. No. 815 of 1972, D/- 15-1-1974 (Bom) and (1969) 3 SCC 134, Explained. (Para 32)

Whether Circulars, Resolutions and Orders are really in the nature of executive instructions or directions issued by the State Government in exercise of executive power or amount to statutory rules framed by the Governor under the proviso to Art. 309, will have to be resolved by taking into account four aspects, namely (a) subject-matter, (b) general applicability, (c) form and formalities, if any, and (d) publication. The question is which of these aspects will have to be regarded as essential or decisive and which are relevant but not decisive. (Para 17)

Before any Circular, Order or Resolution could be said to contain rules framed under the proviso to Art. 309, it would be absolutely essential to find out whether the contents of such Circular, Order or Resolution mainly or substantially deal with the topic of recruitment rules and/or service conditions of Government employees. Secondly, it will have to be considered whether such Circular, Order or Resolution contains rules or principles of general applicability or not, for, ordinarily unless the rules or principles comprised in such Circular, Order or Resolution partake of the character of general applicability such instrument would not be regarded as containing rules framed under the proviso to Art. 309. 1972 Lab IC 618 (SC) and AIR 1966 SC 1942, Rel. on. (Para 19)

There is no particular charm in the expression 'By order and in the name of the Governor' and its absence in any particular Circular, Order or Resolution

would not be conclusive one way or the other, for, even if such expression is absent it is well settled that the fact that the instrument has been issued under the authority of the Governor can be proved by other evidence if necessary and if it is so proved, there would be no question of the relevant Circular, Order or Resolution getting vitiated by reason of its absence. Its presence also cannot be regarded as decisive on the point as to whether the contents of the instrument should be regarded as amounting to Rules under Art. 309 or as containing executive instructions and the same will have to be regarded as of no consequence.

(Para 20)

No particular form is necessary in which a rule under the proviso to Article 309 should be framed and the rules governing recruitment and service conditions framed under the proviso to Article 309 can take any form of either a letter or a Memorandum or a Circular or an Order or a Resolution and it is not necessary that these should be styled as Rules framed under the proviso to Art. 309 of the Constitution.

(Para 21)

The aspect whether the source of power viz. proviso to Art. 309 has been specifically referred to in the instrument in question though a relevant factor would not be a decisive factor to decide the question whether the contents of the instrument could be regarded as rules framed under the proviso to Art. 309. 1973 Lab IC 427 (SC), Rel. on; AIR 1966 SC 602 and 1972 Lab IC 618 (SC), Referred.

(Para 25)

The power which is conferred upon the President or the Governor under Art. 309 being legislative in character and the rules that are to be framed thereunder being tantamount to laws regulating recruitment and other service conditions of the Government employees in public services or posts which will have general applicability, the publication of such rules is absolutely essential, but it will be too narrow a view to take that such publication must necessarily be in the official gazette.

(Para 26)

(B) Constitution of India, Art. 166 — Maharashtra Government Rules of Business (Framed on 26-6-1975), R. 9 — Rule is only directory.

The Maharashtra Government Rules of Business framed on 26-6-1975 are only directory. In fact the provisions of Article 166 of the Constitution themselves are directory in nature and the rules framed by the Governor under cl. 3 of

Art. 166 must be regarded as rules having been framed for more convenient transaction of business of the Government and as such directory and not mandatory in character. Any non-compliance thereof would be a mere procedural defect but would not confer any right upon any citizen to approach the Court under Article 226 of the Constitution. AIR 1947 FC 38 and 1970 Lab IC 568 (SC) and AIR 1970 SC 1102 and AIR 1968 Cal 35, Rel. on.

(Para 22)

Cases Referred: Chronological Paras

1975 Lab IC 669 = AIR 1975 SC 1116 15

(1974) Spl. C. A. No. 815 of 1972, D/- 15-1-1974 (Bom) 14, 24, 29

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(1972) Misc. Petn. No. 549 of 1969, D/- 31-7-1972 (Bom) 21 28

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AIR 1951 SC 467 = 1952 Cri LJ 54 26

AIR 1947 FC 38 = 48 Cri LJ 886 22

In Spl. Civil Appln. No. 201 of 1971

Ashok Desai with D. K. Ghaisas for Y. S. Chitale, for Petitioners; N. H. Gurusahani with W. S. Devnani, Asst. Govt. Pleader (for No. 1); K. K. Singhvi with Mrs. P. K. Singhvi and B. N. Singhvi for C. J. Sawant (for Nos. 2 to 5), for Opponents.

In Spl. Civil Appln. No. 687 of 1971

K. K. Singhvi with Mrs. P. K. Singhvi and B. N. Singhvi for C. J. Sawant, for Petitioners; N. H. Gurusahani with W. S. Devnani, Asst. Govt. Pleader (for No. 1)

and Ashok Desai with D. K. Ghaisas (for Nos. 2 to 4), for Respondents.

TULZAPURKAR, J.:— The three questions referred to our Full Bench by the Division Bench are these:

(1) Whether the Circulars, Orders or Resolutions or parts thereof laying down rules or principles of general application, which have to be observed in the recruitment or fixation of seniority of Government servants generally or a particular class of them, and which have been duly authenticated by a signature under the endorsement "By order and in the name of the Governor of Maharashtra" and intended to be applicable straightway are or amount to the rules framed in exercise of the powers conferred under the proviso to Article 309 of the Constitution of India, although the said Circulars, Orders or Resolutions do not expressly state that the same are made or issued in exercise of the powers conferred under the proviso to Article 309 of the Constitution of India and are not published in the Government Gazette?

(2) Whether the said Circulars, Orders or Resolutions or parts of them as set out in Question No. 1 above must be deemed to be rules made in exercise of the powers conferred under the proviso to Article 309 of the Constitution of India?

(3) Whether the said Circulars, Orders or Resolutions or parts thereof as set out in Question No. 1 above have the same force or effect in law as a rule or rules made in exercise of the powers conferred under the proviso to Article 309 of the Constitution of India?

2. Though three questions as set out above have been referred to this Bench, in our view, the substantial question that needs an answer is the first one, the other two being of ancillary character.

3. At the outset it may be observed that these questions arise out of more or less a perpetual dispute going on between direct recruits and promotees in the Secretariat departments of the Government of Maharashtra. The dispute to some extent is aggravated by apparently inconsistent or conflicting circulars, orders or resolutions issued from time to time. In order to appreciate how these questions have arisen for determination it would be sufficient if the facts pertaining to Spl. Civil Appln. No. 201 of 1971 are briefly stated: The petitioners in this Special Civil Application are Lower Division Clerks in the Education

and Social Welfare Department of the State of Maharashtra (respondent No. 1) and who have been promoted as Junior Assistants. Petitioner No. 2 amongst them was the first to be so promoted on 3rd November 1961 while petitioners Nos. 1 and 5 were the last to be so promoted on 6th January 1964. It also appears that petitioners Nos. 2, 3 and 6 have been provisionally confirmed as Junior Assistants from 2nd August 1968. Respondent Nos. 2 to 5 are the direct recruits having been directly recruited in employment as Junior Assistants on selection by the Maharashtra Public Service Commission. Of these the first to be appointed was respondent No. 3 who was appointed on 19-3-1962 and the last to be appointed was respondent No. 2 who was appointed on 19-4-1966. The petition deals with the question of seniority in the posts of Junior Assistants between the petitioners on the one hand and the respondents on the other i.e. between promotees and direct recruits. According to the petitioners, as a result of the policy and the circulars, orders and resolutions issued by the 1st respondent from time to time, some of them, like petitioners Nos. 2, 3 and 6 for example, who have already been confirmed in the posts as Junior Assistants, are liable to be deconfirmed after long and meritorious service in the said posts on account of allegedly arbitrary and invalid rules and resolutions passed by the 1st respondent and some of the petitioners are even in the danger of being reverted on account of such arbitrary and unjust rules and resolutions, which are the subject-matter of the petition and such result is likely to arise in the following facts and circumstances:

4. It is common ground that prior to 23rd April 1921 the Lower Division Clerks were not promoted to the posts of Junior Assistant, which belonged to the Upper Division. By an order dated 23rd April 1921 issued by the Finance Department it was, *inter alia*, stated thus:

"4. The Government desires that clerks in the Lower Division should, if they prove their fitness, have an opportunity of promotion to the Upper Division.

They are accordingly pleased to direct that in all Departments of the Secretariat (except the Separate Department) every fourth appointment of the Upper Division should be filled by promotion of a clerk from the Lower Division, provided there is a clerk really fit

for such promotion. This provision should be strictly observed and no clerk should be selected about whose complete fitness for the Upper Division there is any doubt."

It is not necessary to refer to the rest of the order as it is not material for our purpose. It may however be stated that this order dated 23-4-1921 has been authenticated under the signature of the Under-Secretary to Government, Finance Department, who has put his signature under the endorsement "By order of the Governor of Bombay."

5. On 5th August 1939 the then Government of Bombay published in the Official Gazette certain rules called the Bombay Civil Service Classification and Recruitment Rules, 1939. These Rules were framed in exercise of the powers conferred by cl. (b) of sub-sec. (1) and cl. (b) of sub-sec. (2) of Sec. 241 and Section 255 of the Government of India Act, 1935 and in supersession of the Bombay Civil Services Classification and Recruitment Rules issued in 1929. These Rules came into force with effect from 1st September 1939. Rule 138 of these Rules provided that the Secretariat Ministerial Staff could be divided into two divisions — Upper and Lower — and further provided that as far as Upper Division was concerned, recruitment was to be made by promotion from persons in the Lower Division or by nomination from candidates selected by the Commission. It also stated that the candidates must be University Graduates in Arts, Law, Science or Commerce.

6. On 21st November 1941 a resolution was issued by the Political and Services Department of the then Government of Bombay directing that the principles stated therein should be observed in determining the seniority of direct recruits and promoted officers in the Provincial Services except the Bombay Service of Engineers. The said principles were as follows:

"(1) In the case of direct recruits appointed substantively on probation, the seniority should be determined with reference to the date of their appointment on probation.

(2) In the case of officers promoted to substantive vacancies, the seniority should be determined with reference to the date of their promotion to the substantive vacancies provided there has been no break in service prior to their confirmation in those vacancies." It may be stated that this resolution has

been signed by the then Chief Secretary to the Government of Bombay under the endorsement "By order of the Governor of Bombay."

7. It appears that on 22nd May 1957 the then Government of Bombay in exercise of the powers conferred by the proviso to Art. 309 of the Constitution of India amended the Rules of 1939 and by this amendment the new Rule 138 came to be framed in place of old original Rule 138. The material portion of the said amended Rule 138 provides as follows:

The Ministerial staff in the Secretariat and attached offices is divided into two Divisions—

(A) Upper and (B) Lower.

(A) (1) Upper Division—

(i) Superintendents — Appointments shall be made by promotion from among Senior Assistants.

(ii) Senior Assistants—Appointments shall be made by promotion from among Junior Assistants.

(iii) Junior Assistants—Appointments shall be made either:—

(a) by nomination on the results of a competitive examination held by the Bombay Public Service Commission, or

(b) by promotion from among members of the Lower Division:

Provided that not more than one out of every four vacancies in the posts of Junior Assistants shall ordinarily be filled by promotion.

We are not concerned with the rest of the contents of the said substituted Rule 138. This notification by which 1939 Rules were amended has been duly authenticated by the then Chief Secretary to the Government under the endorsement "by order and in the name of the Governor of Bombay."

8. According to the petitioners, the 1921 order was substantially incorporated in the aforesaid notification dated 21-5-1957 issued under Art. 309 of the Constitution and even after the issuance of this notification dated 21-5-1957 the self-same principle determining the seniority of direct recruits vis-a-vis the promoted officers enunciated in the Government Resolution dated 21-11-1941 was followed by the 1st respondent, namely that seniority was fixed on the principle of length of service from the date of appointment in the case of direct recruits and from the date of continued officiation in the case of promotees and even the ratio of 3:1 was ordinarily

followed while making appointments in the cadre of junior Assistants, though the ratio was not intended to be rigidly or mandatorily followed.

9. It appears that on 11-3-1958 a Circular was issued by the then Government of Bombay, Political and Services Department, which stated that in order to facilitate the absorption in Upper Division of Upper Division Clerks/Assistants allocated from the former States of Madhya Pradesh, Hyderabad, Saurashtra and Kutch, Government was pleased to direct that till the end of August 1958 no direct recruit should be appointed to the cadre of Junior Assistants in the Departments of the Secretariat and allied Offices and that all vacancies occurring in that cadre should be filled by promotion from among Lower Division Clerks in each Department or office on the basis of seniority fixed under the Allocated Government Servants' (Absorption, Seniority, Pay and Allowances) Rules, 1957 and such other factors as were normally taken into consideration in making these appointments. Para 2 of this Circular sets out that for want of candidates selected by the Public Service Commission for a long time past, a number of non-Public Service Commission candidates might have been appointed in the various Departments and Offices in the Upper Division direct and the Government was pleased to direct that all these persons should be discharged forthwith and that the vacancies released by them should be filled in the manner set out earlier. This Circular was also authenticated by the signature of the then Chief Secretary to the Government of Bombay under the endorsement "By Order and in the name of the Governor of Bombay". By another Circular issued by the Political and Services Department of the then Government of Bombay on 13-5-1958 it was stated that candidates recommended by the Bombay Public Service Commission on the basis of the Competitive Examination held in December 1957 for the posts of Junior Assistants in the Upper Division of the Subordinate Secretariat Service were available for allotment. Paragraph 2 of this Circular recorded that prior to the reorganisation of the States the Departments of the Secretariat had to promote Lower Division Clerks to the posts of Junior Assistants in excess of the ratio of 3:1 prescribed for their promotion to the Upper Division of the Subordinate Secretariat Service, because of the urgency of the work

and the non-availability of selected candidates and that such persons had still been continued in their posts. The said Circular further recorded in the same paragraph that it had been decided that the position regarding the out-of-turn promotions given to the Lower Division Clerks in the old Bombay State since 1st January 1956 should be revised so as to restore the ratio of 3:1 prescribed for promotion of Lower Division Clerks to the Upper Division of the Subordinate Secretariat Service. This Circular was authenticated by the signature of the Assistant Secretary to the Government under the endorsement "By order and in the name of the Governor of Bombay."

10. It may be stated that on 14th August 1959 by a Resolution passed in the Political and Services Department of the then Government of Bombay, the ratio of 3:1 was altered. The said Resolution, inter alia, provided as follows:

"..... According to the existing rules, recruitment to the posts of Junior Assistants in the Secretariat Department is made either by nomination on the basis of the results of the "Competitive Examination held by the Public Service Commission or by promotion from among members of the Lower Division, the ratio of direct recruits to promotees being 3:1. It is observed by Government that according to the present ratio of promotion, the members of the Lower Division have not been able to secure promotions to the Upper Division to an appreciable extent although they have put in a fairly long service, resulting in stagnation in the Lower Division to some extent." Paragraph 2 of the said Resolution runs as follows:

"The question has been very carefully examined by Government and with a view to reducing the stagnation in the Lower Division, it has been decided to hold a special Competitive Examination on departmental basis for the members in the Lower Division for their promotion to the posts of Junior Assistants in Secretariat Departments. After the results of this departmental examination are known, recruitment to Upper Division will be made for a period of one year by the direct method (through the Public Service Commission), promotion according to the present rule of seniority-cum-merit and the departmental competitive examination, in the ratio of 2:1:1. In following this ratio, the inten-

tion is that vacancies of Junior Assistants in Secretariat Departments should be filled for one year on the basis of one by direct recruit, one by promotion according to seniority-cum-merit, one again by direct recruit and one through the departmental competitive examination. The present 3:1 ratio will not operate during this period."

It may be stated that this Resolution dated 14-8-1959 bears the signature of the Assistant Secretary to Government under the endorsement "By Order and in the name of the Governor of Bombay."

11. The petitioners have then referred to yet another Circular dated 25th September 1961 that was issued by the General Administration Department, whereby it was stated that "Recruitment to the posts of Junior Assistants in Secretariat Departments must be made either by nomination through Public Service Commission or by promotion from among members of the Lower Division, the ratio of direct recruits to promotees being 3:1 i.e. 25% of the vacancies (both permanent and temporary) occurring in the Upper Division being available for promotion to the members of the Lower Division". But since it was noticed that no uniform method was followed by the various Secretariat Department in regard to the fixation of inter se seniority in the cadre of Junior Assistants between direct recruits and such promotees, a clarification was sought to be given. It was clarified that the ratio of promotion prescribed by Government was only for regulating promotion of members of the lower division to the upper division and it was not intended that the ratio should be used for fixing the seniority of promotees vis-a-vis direct recruits in the upper division. Seniority of persons promoted to the upper division had to be fixed with reference to the date of continuous officiation and in the case of those appointed by direct recruitment from the date of appointment. If any members of the lower division were promoted in excess of the prescribed ratio on account of non-availability of direct recruits they were liable to be replaced by the Public Service Commission selectees, and when direct recruitment through the Public Service Commission was made next and candidates became available, the department should maintain the proportion by replacing all those who had been promoted in excess of the prescrib-

ed proportion by direct recruits. However, it was pointed out that the promotees who remained in the upper division would count for seniority purposes their continuous service from the date of promotion to the upper division. It was directed that the above procedure should be followed by all departments in fixing the seniority inter se of direct recruits and promotees. It may be stated that this Circular bears the signature of the Assistant Secretary to the Government of Maharashtra, General Administration Department, under the endorsement "by order and in the name of the Governor of Maharashtra". According to the petitioners, the practice that was indicated in this circular was not supported either by the language of the 1921 Rules or the 1957 Rules nor was it based on any principle and according to them, directions in the said circular to the effect that if any members of the lower division were promoted in excess of the prescribed ratio on account of non-availability of direct recruits they were liable to be replaced by the Public Service Commission selectees and accordingly if a Public Service Commission candidate became available he should replace a person promoted are erroneous, illegal and void. The petitioners have however asserted that they have no dispute with the said resolution in so far as it relates to the fixation of inter se seniority between direct recruits and promotees. So far as directions contained therein with respect to the reversion of promotees whenever direct recruits became available in order to maintain the said ratio of 3:1 are concerned these are not only contrary to the language of the Resolutions of 1921 or 1957 but also to the actual practice that was being followed by the Government. In other words, according to the petitioners, this Resolution or Circular of 1961 goes beyond the scope of 1921 and 1957 Resolution and makes mandatory what was contemplated only to be directory and thus introduced arbitrariness and unreasonableness involving consequences of great injustice to the petitioners.

12. According to the petitioners, there is yet one more Circular bearing No. SSS.1267-J dated 27th March 1969 which has been issued by Government in General Administration Department, dealing with the topic of fixation of seniority of direct recruits and promotees inter se, which prejudicially affects them. According to the petitioners, by this Cir-

cular the General Administration Department purported to remove the alleged considerable misunderstanding of principal object of the orders issued in the earlier Government Circular dated 25th September 1961. By this circular dated 27-3-1969 the Government was pleased to clarify that the basic intention underlying the circular was to emphasise that the length of continuous officiating service shall be the criterion for determining the inter se seniority in respect of only those promotees who fall within the accepted ratio of 3:1 vis-a-vis direct recruits (one promotee as against three direct recruits in total vacancies of 4 at a time). It further stated that the procedure laid down in that circular had already envisaged that all promotees, in excess of the accepted ratio, shall be liable to be replaced by the next batch of direct recruits selected by the Public Service Commission, so that the fortuitous promotions given to the excess promotees shall be corrected and these excess promotees shall not get a further fortuitous advantage of inter se seniority vis-a-vis direct recruits by virtue of the length of their officiating service as Assistant, on an ad hoc basis, due to non-availability of the necessary number of direct recruits to fill up the available vacancies in accordance with the accepted ratio of 3:1. Para 2 of this Circular stated thus:

"Government is accordingly pleased to direct that all Departments of the Secretariat should review the current seniority lists and revise them, with effect from the date of the Circular, viz. 25th September, 1961, in accordance with the accepted ratio and the principle of the replacement of excess promotees by Public Service Commission recruits as and when available. This will require (a) an assessment of the vacancies which were available and were filled (i) on and after September 25, 1961 to December 31, 1961 and (ii) each Calendar year thereafter from 1962 to 1968 and (b) the re-fixation of seniority on the principle that against available vacancies in each of the periods, one promotee and three direct recruits shall be assigned their due seniority according to their respective entitlement in the accepted ratio of 3:1 and the excess promotees who were appointed, on an ad hoc basis to fill up the vacancies, will be given a seniority of the year when their turn comes in their entitlement of 1 out of 4 vacancies. All Departments of the Secretariat are, there-

fore, requested to review and revise the current seniority lists in accordance with the principle and the procedure, in pursuance of this clarification of the Circular No. SSS-1061-J of 25th September, 1961, and finalise the revised seniority lists by April 31, 1969, at the latest."

Pursuant to this Circular the consequential seniority list dated 30th March 1970 came to be issued. The petitioners having felt aggrieved by Circular dated 27th March 1969 and the consequential seniority list dated 30th March 1970 as well as by Circular dated 25th September 1961 approached this Court for getting the said impugned Circulars and the Seniority List quashed after examining the legality, validity and/or propriety thereof and out of the several grounds on which these circulars or Resolutions or Orders that were challenged the principal ground was these impugned Circulars, Resolutions or Orders were in the nature of executive instructions or administrative instructions and as such could not override the statutory 1957 Rules which had been framed in exercise of the powers conferred under the proviso to Art. 309 of the Constitution; in other words, several Circulars, Resolutions and Orders issued by the Government from time to time which operated to the prejudice of the rights of the petitioners either in the matter of their promotional chances to the Junior Assistant cadre or in the matter of their seniority have been challenged by the petitioners on the ground that these did not have any force of law and at any rate being inconsistent with the statutory rules framed in exercise of the powers conferred under the proviso to Art. 309 of the Constitution cannot affect their rights.

13. It may be stated that in the other Special Civil Application No. 687 of 1971 filed by the employees, who are all Junior Assistants having been recruited directly pursuant to their selection by the Public Service Commission, they have referred to a number of Circulars, Orders and Resolutions and have, on the other hand, challenged such of the Circulars, Orders and Resolutions which have been operating to the prejudice of their rights as direct recruits vis-a-vis promotees and the challenge inter alia is on the same ground that such Circulars, Orders and Resolutions are in the nature of executive instructions or administrative instructions and these could not have the effect of overriding statutory rules

framed under the proviso to Art. 309 of the Constitution.

14. Since on this principal ground of challenge which was put forward by the petitioners in both the petitions conflicting views have been expressed by sets of Division Benches of this Court, this reference to Full Bench has become necessary. As has been pointed out in the referring judgment, at least in regard to rules framed under Government Resolution dated 29-7-1963, conveniently called 'the 1963 Rules', one Division Bench (Kantawala and Kania, JJ.) in Misc. Petn. No. 549 of 1969 (Bom) has held these Rules to be Rules framed under the proviso to Art. 309 of the Constitution while another Division Bench (Deshpande and Joshi, JJ.) in Spl. C. A. No. 815 of 1972 (Bom) has taken the view that these very Rules are in the nature of executive instructions and that is how the three questions reproduced at the commencement of this judgment have come to be referred to this Bench. It may be stated that on a perusal of the principal question that has been referred to us certain aspects have been accepted or admitted about which presumably there was no dispute between the parties when the matter was argued before the Division Bench. In the first place, there was no dispute between the parties that all these impugned Circulars, Orders or Resolutions or parts thereof deal with the subject of 'Recruitment Rules and Conditions of Service' of persons appointed to public services and posts in connection with the affairs of the State and it was also not disputed that these contain or lay down rules or principles of general applicability. It was also not disputed that these Circulars, Orders or Resolutions have been duly authenticated by signature of an authorised officer under the endorsement "By order and in the name of the Governor of Maharashtra" and that these were intended to be applicable straightway. The rival contentions, however, that were urged before the Division Bench pertained only two aspects of these Circulars, Orders and Resolutions, the aspects being that these Circulars, Orders or Resolutions did not expressly state that these had been issued in exercise of the powers conferred under the proviso to Art. 309 of the Constitution and that these had not been published in the Government Gazette. It may be stated that on behalf of the petitioners in both the matters a two-fold contention was urged: (a) that

in order that these Circulars, Orders or Resolutions should have the force of rules made under the proviso to Art. 309 a statement ought to have been expressly made therein to the effect that these had been so made under the said provision and (b) that these (Circulars, Orders or Resolutions) ought to have been published in the Government Gazette and that since no such express statement was found in these Circulars, Orders or Resolutions and since these had not been published in the Government Gazette, all these Circulars, Resolutions or Orders were really by way of executive instructions or administrative instructions issued by the Government on the topic of 'Recruitment Rules and Conditions of Service' and did not amount to any rules framed in exercise of the powers conferred under the proviso to Art. 309. In support of this contention certain observations made by the Division Bench of this Court consisting of Deshpande and Joshi JJ. in their judgment delivered in Spl. Civil Appln. No. 815 of 1972 (Bom) were relied upon. Apart from the aforesaid Division Bench judgment, reliance was also placed upon certain decisions of the Supreme Court as well as a decision of Andhra Pradesh High Court. On the other hand, on behalf of the State of Maharashtra, it was urged that these several Circulars, Orders and Resolutions or parts thereof, since these contained rules or principles of general applicability and contents thereof touched the subject-matter of recruitment and service conditions of Government servants in employment of State of Maharashtra generally or particular class thereof, and since these had been duly authenticated by a duly authorised officer by order and in the name of the Governor of Maharashtra, will have to be regarded as rules framed under the proviso to Art. 309 of the Constitution and it was urged that it was immaterial whether any express statement was or was not made in these very circulars, orders or resolutions stating that these had been made or issued in exercise of the powers conferred by the proviso to Art. 309 of the Constitution and it was pointed out that making of such a statement could never be regarded as sine qua non before these could be regarded as rules framed under the proviso to Art. 309 of the Constitution. As regards the non-publication in the gazette, it was conceded that due publication of these instruments containing rules was neces-

sary but it was not essential that these ought to be published in the Government Gazette which was merely one of the modes of publication. In support of this rival view, reliance was placed upon three Division Bench judgments and two single Judges' judgments of this Court, and few decisions of the Supreme Court.

15. In order to decide the principal question which has been referred to us, certain relevant provisions of the Constitution will have to be noted. The most important provision touching the issue is the provision contained in Article 309 and the proviso thereto, which run thus:

"309. Subject to the provisions of this Constitution, Acts of the appropriate Legislature may regulate the recruitment, and conditions of service of persons appointed, to public services and posts in connection with the affairs of the Union or of any State:

Provided that it shall be competent for the President or such person as he may direct in the case of services and posts in connection with the affairs of the Union, and for the Governor of a State or such person as he may direct in the case of services and posts in connection with the affairs of the State, to make rules regulating the recruitment, and the conditions of service of persons appointed, to such services and posts until provision in that behalf is made by or under an Act of the appropriate Legislature under this article, and any rules so made shall have effect subject to the provisions of any such Act."

It will appear clear that Art. 309 in terms deals with the topic of 'Recruitment and conditions of service of persons serving the Union or a State' and the main provision confers power upon the appropriate Legislature, subject to the provisions of the Constitution, to enact legislative measures for the purpose of regulating the recruitment and conditions of service of persons appointed to public services and posts in connection with the affairs of the Union or the State. Secondly it is the proviso to Art. 309 which confers power either on the President or on the Governor to make rules regulating the recruitment and conditions of service of persons appointed to such services and posts in connection with the affairs of the Union or in connection with the affairs of the State respectively until the appropriate Legislature has enacted a

legislation covering the subject. Thirdly the proviso indicates that the rules that may be framed either by the President or the Governor, as the case may be, have been given full effect but that would be subject to the provisions of any such legislative enactment that may be passed by the appropriate Legislature. On the aspect as to what is the nature and scope of the power conferred either upon the President or the Governor under the proviso to Art. 309 there are two decisions of the Supreme Court to which it would be profitable to make a reference immediately. In the case of *B. S. Vadera v. Union of India*, reported in AIR 1969 SC 118 = (1969 Lab IC 100), the Supreme Court in para 24 of its judgment has clarified the nature, extent and scope of rule-making power to be exercised under the proviso to Art. 309 in the following words:

"It is also significant to note that the proviso to Article 309, clearly lays down that 'any rules so made shall have effect, subject to the provisions of any such Act'. The clear and unambiguous expressions, used in the Constitution, must be given their full and unrestricted meaning unless hedged-in by any limitations. The rules, which have to be 'subject to the provisions of the Constitution', shall have effect, 'subject to the provisions of any such Act'. That is, if the appropriate Legislature has passed an Act, under Article 309, the rules, framed under the Proviso, will have effect, subject to that Act; but, in the absence of any Act, of the appropriate Legislature, on the matter, in our opinion, the rules, made by the President, or by such person as he may direct, are to have full effect, both prospectively and retrospectively. Apart from the limitations, pointed out above, there is none other, imposed by the proviso to Article 309, regarding the ambit of the operation of such rules. In other words, the rules, unless they can be impeached on grounds such as breach of Part III, or any other constitutional provision, must be enforced, if made by the appropriate authority."

Legislative character of rules which either the President or the Governor has been empowered to make under the proviso to Art. 309 has been reiterated by the Supreme Court in one of its latest decisions in the case of *Raj Kumar v. Union of India* reported in AIR 1975 SC 1116 = (1975 Lab IC 669). In that case the appellant who was appointed as Airport Ticket Clerk in the Civil Aviation

Department, Government of India, on 14-8-1967, was served with a notice terminating his services 'forthwith' on 15-6-1971 and it was directed that he shall be paid a sum equivalent to the amount of pay and allowances for a period of one month (in lieu of the period of notice) calculated at the same rate at which he was drawing them immediately before the date on which the order was served on or, as the case may be, tendered to him. But the pay and allowances were not paid to him at the same time as the service of the order of termination of his services. His appeal against the termination as well as representations having failed he filed a writ petition which was dismissed by the High Court in limine and in the appeal before the Supreme Court the question that arose for determination was whether the proviso to sub-rule (1) of Rule 5 of the Central Civil Services (Temporary Service) Rules 1965, which had been amended with retrospective effect from 1st May 1965 was a valid one or not. The effect of amendment was that on 1st May 1965 as also on 15th June 1971 the date on which the appellant's services were terminated forthwith it was not obligatory to pay to him a sum equivalent to the amount of his pay and allowances for the period of the notice at the rate of which he was drawing them immediately before the termination of the services or as the case may be for the period by which such notice falls short and on the question of validity of amended rule which was given retrospective effect this is what the Supreme Court has observed:

"There is no doubt that this rule is a valid rule because it is now well established that rules made under the proviso to Article 309 of the Constitution are legislative in character and therefore can be given effect to retrospectively." These two decisions clearly bring out the legislative character of rules which either the President or the Governor as the case may be has been empowered to frame under the proviso to Art. 309 and the latter case also makes it clear that even such a rule so framed under the proviso to Art. 309 could be given retrospective effect; in other words, the rule-making power conferred upon the President or the Governor as the case may be under Art. 309 partakes of the nature of plenary legislative power conferred upon the authority concerned.

16. Having broadly indicated the nature and scope of the power conferred

upon the President or the Governor as the case may be under the proviso to Art. 309 of the Constitution in the matter of framing rules regulating the recruitment and conditions of service of persons appointed to public services and posts in connection with the affairs of the State, it will be proper to refer to certain other relevant articles of the Constitution which pertain to the scope and extent of the executive power of a State and these provisions would become material, inasmuch as, the rival contention on behalf of the petitioners in the two petitions has been that several Circulars, Orders and Resolutions are executive instructions issued in exercise of the executive powers of the State. The relevant Articles are Articles 162 and 166 of the Constitution. Art. 162 which deals with the extent of executive power of State runs thus:

"162. Subject to the provisions of this Constitution, the executive power of a State shall extend to the matters with respect to which the Legislature of the State has power to make laws:

Provided that in any matter with respect to which the Legislature of a State and Parliament have power to make laws, the executive power of the State shall be subject to, and limited by, the executive power expressly conferred by this Constitution or by any law made by Parliament upon the Union or authorities thereof."

Under the aforesaid article it has been declared in unequivocal terms that the executive power of a State shall extend to the matters with respect to which the Legislature of the State has power to make laws and it cannot be disputed that having regard to item 41 (State Public Services, State Public Service Commission) occurring in List II of Seventh Schedule the State Legislature has power to make laws touching the subject of State public services and consequently under Art. 162 the executive power of a State does extend to topic of State public services in respect of which the State Executive can issue executive instructions or directions. The manner in which such executive instructions or directions could be issued pertaining to a matter covered by item like 41 occurring in List II of Seventh Schedule has been clearly indicated under Art. 166 of the Constitution. Art. 166 deals with the conduct of business of the Government of State and it runs thus:

"166. (1) All executive action of the Government of a State shall be expressed to be taken in the name of the Governor.

(2) Orders and other instruments made and executed in the name of the Governor shall be authenticated in such manner as may be specified in rules to be made by the Governor, and the validity of an order or instrument which is so authenticated shall not be called in question on the ground that it is not an order or instrument made or executed by the Governor.

(3) The Governor shall make rules for the more convenient transaction of the business of the Government of the State, and for the allocation among Ministers of the said business in so far as it is not business with respect to which the Governor is by or under this Constitution required to act in his discretion."

Relying on sub-cl. (2) of Art. 166 of the Constitution it was pointed out by counsel for the petitioners that several Circulars, Orders or Resolutions in the instant case would fall within the expression 'orders and other instruments' occurring in sub-cl. (2) of Art. 166 and there was no dispute before us that all these Circulars, Orders and Resolutions in the instant case have been made and executed in the name of the Governor and have also been authenticated in the prescribed manner by a duly authorised officer in that behalf.

17. In order to bring out the distinction between legislative character of rules that could be framed by the President or the Governor as the case may be under the proviso to Art. 309 and executive instructions or directions which could be issued in the name of the Governor by a properly authenticated instrument under Art. 166, counsel referred us to Business Rules of the State of Maharashtra framed in exercise of powers conferred by clauses (2) and (3) of Article 166 of the Constitution and the latest set of business rules of the Government of Maharashtra which have been framed on 26th June 1975 were produced before us for the purpose of bringing out this distinction. These Maharashtra Government Rules of Business framed on 26-6-1975 are expressly stated to have been made in exercise of power conferred by clauses (2) and (3) of Art. 166 of the Constitution. In particular, reliance was placed upon Rule 9 read with the Second

Schedule to the Rules and Rule 14. Rule 9 of these Business Rules runs thus:

"9. All cases referred to in the Second Schedule shall be brought before the Council—

(i) by the direction of the Governor under clause (c) of Article 167

(ii) by the direction of—

(a) the Chief Minister; or

(b) the Minister-in-charge of the case with the consent of the Chief Minister;

Provided that, no case in regard to which the Finance Department is required to be consulted under Rule 11 shall, save in exceptional circumstances under the directions of the Chief Minister, be discussed by the Council unless the Finance Minister has had opportunity for its consideration."

Item 3 in the Second Schedule being material was referred to and that item runs as follows:

"Proposals for the making or amending the rules regulating the recruitment and the conditions of service of—

(a) persons appointed to the Secretariat Staff of the Assembly or the Council (Article 187 (3));

(b) officers and servants of the High Court under Article 229, provisos to clauses (1) and (2);

(c) persons appointed to the Public Service and posts in connection with the State (proviso to Article 309)."

Item 12 in the Second Schedule may also be referred to and it runs thus:

"Proposals for Legislation including the issue of an Ordinance under Article 213 of the Constitution."

Rule 14 of the Rules of Business runs thus:

"The Secretary of the Department concerned is in each case responsible for the careful observance of these rules and when he considers that there has been any material departure from them, he shall personally bring the matter to the notice of the Minister-in-charge and the Chief Secretary."

Relying on Rule 9 read with Item 3 of the second Schedule quoted above, Counsel for the petitioners pointed out that certain formality has been prescribed by these Rules for the purpose of initiating the proposals for making or amending the rules regulating the recruitment and the conditions of service of persons appointed to public services and posts in connection with the State (Rules under the proviso to Art. 309) and according to Rule 9 such proposals have to be brought before Council of Ministers. Having re-

gard to the aforesaid material provisions of the Constitution, namely provisions contained in Art. 309 together with the proviso thereunder as well as the provisions contained in Art. 166 and the relevant provisions contained in the Maharashtra Government Rules of Business, it will appear clear that the rule-making power conferred upon the Governor under the proviso to Art. 309 which is legislative in character and the power to issue Circulars, Resolutions or Orders containing executive instructions in exercise of the executive power conferred upon the State under Art. 166 do overlap so far as the subject-matter of Rules of recruitment and conditions of public services of State Government employees are concerned, but at the same time it cannot be disputed that all executive instructions or directions issued by the State Government in exercise of its executive power conferred under Art. 166 touching this subject-matter or topic must yield to rules that may be framed by the Governor under the proviso to Art. 309 of the Constitution. In their turn, the rules framed by the Governor under the proviso to Art. 309 would be subject to any enactment made by appropriate legislature under substantive provision contained in Art. 309 of the Constitution itself. In other words, to the extent to which and in so far as executive instructions or directions issued by the State Government in exercise of its power under Art. 166 would be inconsistent with Rules that may be framed by the Governor under the proviso to Article 309 of the Constitution, such instructions will have to be disregarded and similarly to the extent to which and in so far as the Rules framed under the proviso to Art. 309 would be inconsistent with the provisions of enactment of appropriate legislature the Rules will have to be disregarded and it is because of this position which emerges clearly on record that the petitioners sought to urge before the Division Bench that several of the Circulars, Orders and Resolutions issued by the State Government that operated to their prejudice being executive instructions or directions could not prevail over the statutory rules that have been framed by the Governor in exercise of the rule-making power conferred under the proviso to Art. 309 and that is why the question has assumed considerable importance as to whether the several Circulars, Resolutions and Orders in question are really in the na-

ture of executive instructions or directions issued by the State Government in exercise of executive power or amount to statutory rules framed by the Governor under the proviso to Art. 309 of the Constitution and this basic question, in our view, will have to be resolved by taking into account three or four aspects, namely (a) subject-matter, (b) general applicability, (c) form and formalities, if any and (d) publication. The question is which of these aspects will have to be regarded as essential or decisive and which are relevant but not decisive.

18. We shall consider the first two aspects together. The first question will be whether the Circulars, Orders or Resolutions in question deal with the topic or subject-matter of recruitment rules and service conditions of Government employees, for, unless any such instrument mainly or substantially deals with such topic it can never be regarded as any rule framed under the proviso to Art. 309 of the Constitution. In our view, even if any such instrument were to state expressly that it has been issued in exercise of the powers conferred under the proviso to Art. 309, the same would not amount to framing of rules under the said provision if the same did not deal with the subject of recruitment and service conditions of Government employees. A reference in this behalf could be made to a decision of the Supreme Court, in the case of R. N. Nanjundappa v. T. Thimmaiah reported in AIR 1972 SC 1767 = (1972 Lab IC 618), where the question that arose for consideration was whether the purported rule that dealt with regularization of a particular appointment by stating that 'notwithstanding any rules the appointment was regularised' could be regarded as a rule framed under the proviso to Art. 309 or not. The Rules in question were framed by the Governor of Mysore expressly stating that these had been framed 'in exercise of the powers conferred by the proviso to Art. 309 of the Constitution of India and all other powers enabling him in this behalf'. The title of the Rules read "These rules may be called The Mysore Education Department Services (Technical Education Department) (Special Recruitment) Rules, 1967" and the material Rule, being Rule 2, ran thus:

"2. Provisions relating to regularization of appointment of Principal, School of Mines, Oorgaum Kolar Gold Fields.

Notwithstanding any rule made under the proviso to Article 309 of the Constitution of India, or any other rules or Order in force at any time, Dr. T. Thimmiah, B. Sc. (Hons.) Ph. D. (Lond.) F.G.S. shall be deemed to have been regularly appointed as Principal, School of Mines, Oorgaum, Kolar Gold Fields, with effect from 15-2-1958.

By order and in the name of
the Governor of Mysore.

Sd. S. N. Sreenath,
Under Secretary to Government,
Education Department."

19. An attempt was made on behalf of the State to sustain the validity of the aforesaid Rules, both under the proviso to Art. 309 of the Constitution as also under the executive power conferred upon the State under Art. 162 read with Art. 166 of the Constitution, but the Supreme Court negatived the State's contention on both the aspects of the matter. In para 23 of the judgment this is what the Supreme Court has stated:

"It was contended on behalf of the State that under Article 309 of the Constitution the State has power to make a rule regularising the appointment. Shelter was taken behind Art. 162 of the Constitution and the power of the Government to appoint. No one can deny the power of the Government to appoint. If it were a case of appointment of a candidate by competitive examination or if it were a case of appointment by selection recourse to rule under Article 309 for regularisation would not be necessary. Assume that Rules under Article 309 could be made in respect of appointment of one man but there are two limitations, Art. 309 speaks of rules for appointment and general conditions of service. Regularisation of appointment by stating that notwithstanding any rules the appointment is regularised strikes at the foot of the rules and if the effect of the regularisation is to nullify the operation and effectiveness of the rules, the rule itself is open to criticism on the ground that it is in violation of current rules. Therefore, the relevant rules at the material time as to promotion and appointment are infringed and the impeached rule cannot be permitted to stand to operate as a regularisation of appointment of one person in utter defiance of rules requiring consideration of seniority and merit in the case of promotion and consideration of appointment by selection or by competitive examination."

Again in para 26 the Court observed thus:

"The contention on behalf of the State that a rule under Article 309 for regularisation of the appointment of a person would be a form of recruitment read with reference to power under Article 162 is unsound and unacceptable. The executive has the power to appoint. That power may have its source in Article 162. In the present case the rule which regularised the appointment of the respondent with effect from 15th February, 1958 notwithstanding any rules cannot be said to be in exercise of power under Article 162. First, Article 162 does not speak of rules whereas Article 309 speaks of rules. Therefore, the present case touches the power of the State to make rules under Article 309 of the nature impeached here. Secondly, when the Government acted under Article 309 the Government cannot be said to have acted also under Article 162 in the same breath. The two Articles operate in different areas. Regularisation cannot be said to be a form of appointment. Counsel on behalf of the respondent contended that regularisation would mean conferring the quality of permanence on the appointment whereas counsel on behalf of the State contended that regularisation did not mean permanence but that it was a case of regularisation of the rules under Article 309. Both the contentions are fallacious. If the appointment itself is in infraction of the rules or if it is in violation of the provisions of the Constitution illegality cannot be regularised. Ratification or regularisation is possible of an act which is within the power and province of the authority but there has been some non-compliance with procedure or manner which does not go to the root of the appointment. Regularisation cannot be said to be a mode of recruitment. To accede to such a proposition would be to introduce a new head of appointment in defiance of rules or it may have the effect of setting at naught the rules."

It would thus appear clear from the aforesaid decision that the Supreme Court has clearly taken the view that regularisation of an appointment by stating 'notwithstanding any rules the appointment is regularised' cannot be regarded as any item covered by the topic of recruitment rules or conditions of service, a subject-matter spoken of by Article 309. In other words, unless the subject-matter or topic dealt with in any

Circular, Order or Resolution is in essence the recruitment rules or service conditions of Government employees, no Circular, Order or Resolution can ever be regarded as any rule framed under the proviso to Art. 309 of the Constitution. Reference may be made to another earlier decision of the Supreme Court in the case of *B. N. Nagarajan v. State of Mysore*, reported in AIR 1966 SC 1942, where the question whether Mysore Public Service Commission (Functions) Rules, 1957, particularly Rule 4 (1) thereof, were rules made under the proviso to Art. 309 of the Constitution or not was answered in the negative and one of the grounds on which the Court came to the conclusion that they were not rules made under Art. 309 was that those rules really dealt with the functions of the Commission rather than laying down any rules regarding recruitment to services or posts. The High Court had taken the view that to the extent to which the rules dealt with the topic of regulating recruitment to Civil Services under the State, the source of the power could only be the proviso to Art. 309 of the Constitution, but this view of the High Court was overruled by the Supreme Court and the Supreme Court on a proper construction of the relevant rules came to the conclusion that substantially the rules dealt with the functions of the Commission rather than laying down the rules regarding recruitment to services or posts and therefore the said rules were not rules made under Art. 309 of the Constitution. From these two decisions it would appear clear that before any Circular, Order or Resolution could be said to contain rules framed under the proviso to Art. 309, it would be absolutely essential to find out whether the contents of such Circular, Order or Resolution mainly or substantially deal with the topic of recruitment rules and/or service conditions of Government employees. Secondly, it will have to be considered whether such Circular, Order or Resolution contains rules or principles of general applicability or not, for, ordinarily unless the rules or principles comprised in such Circular, Order or Resolution partake of the character of general applicability such instrument would not be regarded as containing rules framed under the proviso to Art. 309. The first mentioned decision undoubtedly suggests that rules under Art. 309 could be made in respect of recruitment of one man or prescribe service conditions for

one man but even so the rules must be general in operation, though they might apply to a class comprising a single Government servant and that is why we are of the view that the instrument must contain rules which have general applicability. The character of general applicability would, therefore, be an essential feature to be considered while deciding whether the contents of the instrument amount to rules framed under Art. 309 or not.

20. The next aspect deals with form and formalities, if any, that are required to be followed or gone through while framing rules under the proviso to Art. 309. Several things will have to be considered under this topic. The first thing that need be considered is whether the instrument must be issued 'By Order and in the name of the Governor' or not. While considering this aspect it must be stated at once that the position in law is well established that there is no particular charm in the expression 'By order and in the name of the Governor' and its absence in any particular Circular, Order or Resolution would not be conclusive one way or the other, for, even if such expression is absent it is well settled that the fact that the instrument has been issued under the authority of the Governor can be proved by other evidence if necessary and if it is so proved, there would be no question of the relevant Circular, Order or Resolution getting vitiated by reason of its absence. But the more important question which we have to consider is whether the presence of such endorsement at the foot of the instrument will necessarily mean that the instrument contains rules framed under the proviso to Art. 309 of the Constitution. In this behalf our attention was invited by counsel for the petitioners to the fact that the 1939 Rules that were issued by means of a notification as well as the amendments that were effected to the said Rules by another notification dated 27-5-1957, were expressly stated to have been framed and issued under the proviso to Art. 309 of the Constitution and both the notifications contained the requisite endorsement at the foot of the said notification and it was pointed out that the contents of these amounted to Rules because these had been issued in exercise of the power under Art. 309 and dealt with the topic of recruitment and conditions of service of Government employees and not because these contained the endorsement 'By order and in

the name of the Governor, and the signature of the duly authorised officer, for, according to counsel for the petitioners, even Circulars, Orders or Resolutions containing executive instructions issued in exercise of the executive power under Art. 166 (2) of the Constitution are also required to be issued in the name of the Governor and are further required to be authenticated in the prescribed manner by a duly authorised officer in that behalf. It was, therefore, urged by counsel on behalf of the promotees that some of the Circulars, Orders and Resolutions which varied the ratio or altered the seniority to their prejudice, though issued in the name of the Governor and authenticated by a duly authorised officer in that behalf, should be regarded as containing merely executive instructions not amounting to any rules framed under Art. 309; similar argument was advanced by counsel for the direct recruits qua some other Circulars, Orders or Resolutions that are operating to their prejudice which contain the requisite endorsement and authentication. On behalf of the State it was fairly conceded that the presence of the endorsement 'By order and in the name of the Governor' and authentication by a duly authorised officer at the foot of the instrument would be equivocal and not decisive of the question whether the instrument contains Rules under Art. 309 or mere executive instructions issued in exercise of the executive power under Art. 162. Since the manner of authenticating any rule framed by the Governor under the proviso to Art. 309 happens to be the same as the manner of authenticating the issuance of executive instructions in exercise of executive power of the State, in our view, the presence of the aforesaid type of endorsement and authentication at the foot of any instrument cannot be regarded as decisive on the point as to whether the contents of the instrument should be regarded as amounting to Rules under Art. 309 or as containing executive instructions and the same will have to be regarded as of no consequence.

21. Another important thing required to be considered by us under this topic is whether any particular form or any particular formality has been prescribed as being required to be used or gone through for framing rules or laying down general principles touching the subject-matter of recruitment and service conditions of Government employees

under the proviso to Art. 309 of the Constitution. On this aspect of the matter it will have to be observed that the proviso to Art. 309 nowhere prescribes nor indicates any particular form in which such a rule should be framed nor does it prescribe any particular procedure or formality which is required to be gone through before rule thereunder could be framed. However, a two-fold contention was sought to be urged by counsel for the petitioners before us in this behalf. In the first place, it was urged that almost all the decisions of the Supreme Court on the subject have dealt with the cases where letters, memoranda or resolutions had been issued by the State Government dealing with the topic of recruitment rules and conditions of service and all these instruments have invariably been regarded as containing executive instructions or directions and not amounting to any rules framed under the proviso to Art. 309 of the Constitution. Secondly it was urged that even if the proviso to Art. 309 does not indicate any procedure or formality as being required to be gone through, the Maharashtra Government Rules of Business, particularly Rule 9 read with Second Schedule thereto, clearly prescribes some sort of formality which is required to be gone through before rules could be properly framed under the proviso to Art. 309 of the Constitution and relying on these two aspects it was urged by counsel for the petitioners before us that if rules or general principles governing recruitment and service conditions of Government employees took the form of letters, memoranda, Circulars or Resolutions, it would be proper to regard these instruments as containing executive instructions issued by the State Government under Art. 162 and it was further urged that having regard to Rule 9 read with Second Schedule to the Maharashtra Government Rules of Business it should be held that unless the procedure or formality indicated therein was gone through, such rules or general principles so enunciated or issued should not be regarded as rules framed under the proviso to Art. 309. In our view, it is not possible to accept either of these submissions. In the first place, though by and large it has so happened that the majority of the cases which were decided by the Supreme Court were those which were concerned with letters, memoranda, Circulars or Resolutions and in many of these cases the instruments were held to contain exe-

cutive instructions in the matter of service conditions but in our view, that is neither here nor there and the particular form cannot be regarded as decisive of the matter. In fact it would be apposite to refer to one decision of the Supreme Court which was concerned with a memorandum which has been held to incorporate a rule having been framed under the proviso to Art. 309. In the case of *E. Venkateswararao Naidu v. Union of India* reported in AIR 1973 SC 698 the question that arose for consideration was whether a certain office memorandum issued by the Ministry of Home Affairs, Government of India, raising age of compulsory retirement of Central Government servants from 55 to 58 with certain restrictions or limitations and subject to certain conditions could be regarded as a rule having the force of a rule made under the proviso to Article 309 of the Constitution or not. Originally under Rule 56 of the Fundamental Rules it was provided that except as otherwise provided in the other clauses of that Rule that date of compulsory retirement of a Government servant, other than a ministerial servant, was the date on which he attained the age of 55 years. On November 30, 1962 the Government of India, Ministry of Home Affairs, issued an office Memorandum under which the age of compulsory retirement of Central Government servants was raised from 55 to 58 years, subject to the three exceptions mentioned in paragraph 2 thereof. Paragraph 6 of the Memorandum provided:

"Notwithstanding anything contained in the foregoing paragraphs, the appointing authority may require a Government servant to retire after he attains the age of 55 years on three months' notice without assigning any reason. This will be in addition to the provisions already contained in R. 2 (2) of the Liberalized Pension Rules 1950 to retire an officer who has completed 30 years' qualifying service and will normally be exercised to weed out unsuitable employees after they have attained the age of 55 years. The Government servant also may, after attaining the age of 55 years, voluntarily retire after giving three months' notice to the appointing authority."

It was further specifically provided in the memorandum that the same would take effect from December 1, 1962. On July 21, 1965 Fundamental Rule 56 was

amended by the Sixth Amendment so as to incorporate, with modifications, the provisions of the aforesaid Office Memorandum. The appellant who was born on 15th July 1910 attained the age of 55 on the corresponding date in 1965 and he hoped to continue in the service of the respondent until attaining the age of 58, but on 22nd July 1965 while he was holding the post of Assistant Inspecting Commissioner, Income-tax he received a notice dated 15th July 1965 compulsorily retiring him from service with effect from 21st October 1965. He challenged the notice by filing a writ petition in Orissa High Court where he failed. In the appeal which was carried to the Supreme Court one of the contentions urged was that the notice retiring him compulsorily was invalid as the office memorandum on the strength of which it was issued did not have the force of a rule made under Art. 309 of the Constitution. This contention was based on para 8 of the memorandum which provided that "The amendment of the relevant rules covering the All India Services so as to make these orders applicable to the members of those services is being undertaken in consultation with the State Governments". This contention though expressly raised was negatived by the Supreme Court. After referring to the provisions contained in the main part of Art. 309 as well as the proviso thereto the Supreme Court observed thus:

"The rules so made by the President are effective subject to the provisions of any such Act. Paragraph 2 of the Office Memorandum in terms recites that "the President is pleased to direct that the age of compulsory retirement of Central servants should be 58 years," subject to certain exceptions. Paragraph 8 of the Memorandum merely re-states with particularity the true legal position which obtains under the proviso to Article 309. Nothing stated in that paragraph is capable of the construction that the Office Memorandum was not to be effective until Fundamental Rules were consequently amended. In fact, by Paragraph 7 the provisions of the Memorandum were given express effect from December 1, 1962."

It will thus appear clear from this decision of the Supreme Court that the age for compulsory retirement had been raised to 58 years subject to certain exceptions by means of office memorandum, which merely contained the President's

directions that the age of compulsory retirement of Central Government servants should be 58 years subject to certain exceptions. It will also become clear that notwithstanding the fact that paragraph 8 of the Memorandum contemplated the necessary amendment of the relevant rules covering the All India Services so as to make these orders applicable to the members of those services being separately undertaken in consultation with the State Government, the operative part of the memorandum which was to be found in para 2 was regarded by the Supreme Court as having the force of rule made under Art. 309 of the Constitution, principally on the basis that para 2 which was operative contained specific direction of the President about raising of the retirement age and para 7 gave effect to that provision from 1st December, 1962. It would thus appear clear that the rule in this particular case which was regarded as a rule under the proviso to Art. 309 of the Constitution had taken the form of office memorandum. Apart from this decision of the Supreme Court there are three Division Bench decisions of this Court in which though the rules or general principles governing the recruitment and service conditions of Government employees had taken the form of either a circular or a resolution, the instruments have been held as incorporating rules framed under the proviso to Art. 309 of the Constitution. Appeal No. 23 of 1960 (arising out of Suit No. 387 of 1953) which was decided on 10-8-1961 (Bom) by a Division Bench of this Court consisting of Chinnani, C. J. and Mody, J., dealt with a case of circular which was issued under the signature of the Chief Secretary to the Government of Bombay, on 9th December 1938 which contained provisions for transferring or suspending a Government servant during the pendency of a departmental enquiry of a serious charge against him. Similarly Spl. C. A. No. 845 of 1967 (Bom) (Guru Prasad Kapoor v. Commr. (Revenue), Aurangabad) which was decided on 23-3-1968 by a Division Bench consisting of Tarkunde and Nathwani, JJ. dealt with a case of resolution dated 30th July 1959 to which recruitment rules for the posts of Deputy Collectors were appended, while Misc. Petn. No. 549 of 1969 decided on 31-7-1972 (Bom) by Kantawala, J. (as he then was) and Kania, J. dealt with a case concerning recruitment rules and seniority, principles which had been issued in the

form of two resolutions dated 28-7-1954 and 29-7-1963 respectively. In all these three cases though the rules or general principles touching recruitment or service conditions of Government employees had taken the form of a Circular or Resolution, these have been regarded and have been held to amount to rules framed under the proviso to Art. 309. In our view, therefore, the aforesaid decisions make the position quite clear that no particular form is necessary in which a rule under the proviso to Art. 309 should be framed and the rules governing recruitment and service conditions framed under the proviso to Art. 309 can take any form of either a letter or a Memorandum or a Circular or an Order or a Resolution and it is not necessary that these should be styled as Rules framed under the proviso to Art. 309 of the Constitution.

22. As regards formality or procedure indicated in Rule 9 of the Maharashtra Government Rules of Business read with second schedule thereto, compliance whereof was urged as a necessity the question will have to be considered whether the Business Rules framed by the Government of Maharashtra under clauses 2 and 3 of Art. 166 of the Constitution are mandatory or directory and how far compliance of the relevant rule on which reliance has been placed by counsel for the petitioners could be regarded as mandatory having regard to the fact that no particular procedure as such has been prescribed by the proviso to Art. 309 of the Constitution itself. We have already indicated above that so far as Art. 309 is concerned, the proviso thereunder does not prescribe or indicate any particular procedure that is required to be gone through before any rule could be framed thereunder. It is true that under Rule 9 of the Maharashtra Government Rules of Business it has been provided that all cases referred to in the Second Schedule shall be brought before the Council of Ministers in one or the other manner indicated in that rule and item (3) of the Second Schedule in terms refers to proposal for making or amending the rules regulating the recruitment and the conditions of service of persons appointed to the Public Service and posts in connection with the State (Proviso to Art. 309). In other words, ordinarily having regard to this provision, any proposal for making or amending the rules regulating the recruitment and

service conditions of persons appointed to the public service and posts in connection with the State is required to be made and brought before the Council of Ministers. If regard be had to item No. 12 in the Second Schedule also it will appear clear that ordinarily even the proposals for legislation including the issuance of an Ordinance under Art. 213 of the Constitution—which item pertains to the domain of legislative field of the Governor—the same is required to be brought before the Council of Ministers under Rule 9. The question is what is the true legal effect of these Business Rules which have been framed by the State Government in exercise of the powers conferred by clauses 2 and 3 of Art. 166 of the Constitution? In our view, these Business Rules will have to be regarded as directory. At the outset it could be stated that cl. 3 of Art. 166 of the Constitution in terms provides that the Business Rules which are to be made by the Governor for regulating the conduct of business of the Government of a State are intended for “the more convenient transaction of the business of the Government of the State” and these Rules also provide for the “allocation among Ministers of the said business in so far as it is not business with respect to which the Governor is by or under this Constitution required to act in his discretion”. It will thus appear clear that these Business Rules are intended for the more convenient transaction of the business of the Government and therefore ordinarily it will be difficult to take the view that these Business Rules framed under clauses (2) and (3) of Art. 166 of the Constitution are of a mandatory nature. The question as to whether the provisions of Art. 166 itself are mandatory or directory in character and the further question as to whether the rules framed thereunder can be regarded as mandatory or directory have come up for consideration before the Courts on more than one occasion and the tenor of the judicial decisions appears to be that the provisions of Art. 166 of the Constitution are themselves directory in nature and so are the rules framed thereunder. Three or four decisions may be referred to in this connection; one of the Federal Court, two of the Supreme Court and the fourth one of the Calcutta High Court. In the case of *J. K. Gas Plant Manufacturing Co. (Rampur) Ltd. v. Emperor* reported in AIR 1947 FC 38 the Federal Court was concerned with similar Rules

of Business that were made under Section 40 (2) of the Government of India Act, 1935 read with Schedule 9 thereto. Head-note (b), which deals with Sch. 9 and Sec. 40 (1) of the Government of India Act, of the report runs as follows:

“Schedule 9, S. 40 (1) is not mandatory. It does not prescribe the manner and form in which orders of the Governor-General must be made in order to be valid. Hence an order of the Governor-General cannot be invalid merely because it is not expressed to be made by the Governor-General.”

One of the questions that was raised before the Federal Court was whether the Distribution Order that was made and approved by one member of the Council only and not by the Governor-General in Council at all will have to be regarded as invalid for non-compliance with the relevant Business Rules and this is what the Federal Court has observed in regard to this question:

“Some attempt was then made on behalf of the appellants to suggest that on some evidence tendered to the Tribunal by the Crown before the charges were framed, it might be deduced that the Distribution Order was made and approved by one Member of the Council only, and not by the Governor-General in Council at all and might therefore be invalid. In this connection reference was made to the Rules of Business made under the powers conferred on the Governor-General by sub-section (2) of Section 40 which purported to authorise such action by one Member of the Council, and, it was suggested that any such delegation of authority to one Member only was ultra vires. It was submitted that the only Rules of Business which were authorised by the sub-section were rules in respect of business actually transacted by Members of the Council when in Council assembled, emphasis being laid on the expression “business in his Executive Council”, and it was contended that no order could be made except at a meeting of the Council. In our judgment there is no substance in this point. We are of opinion that in sub-section (2) the phrase “business in his Executive Council” really means business of the Governor-General in Council, and that the sub-section gives authority for rules of business to be made for the more convenient transaction of such business. In the circumstances it is unnecessary for the Court to consider the alleged evidence on the point.”

In the case of *State of U. P. v. Om Prakash Gupta* reported in AIR 1970 SC 679 = (1970 Lab IC 568) the Supreme Court has observed that that Court had repeatedly held that the provisions of Article 166 (1) (2) (similar to sub-sections (1) and (2) of Section 59 of the Government of India Act, 1935), are directory and substantial compliance with these provisions was sufficient. So far as sub-cl. (3) of Art. 166 of the Constitution is concerned, in the case of *A. Sanjeevi Naidu v. State of Madras* reported in AIR 1970 SC 1102 the Court has made the following observations:

"Under the Constitution, the Governor is essentially a constitutional head and the administration of State is run by the Council of Ministers. The Constitution has authorised the Governor under Article 166 (3) to make rules for the more convenient transaction of business of the Government of the State and for the allocation amongst its Ministers, the business of the Government. All matters excepting those in which Governor is required to act in his discretion have to be allocated to one or the other of the Ministers on the advice of the Chief Minister. Apart from allocating business among the Ministers, the Governor can also make rules on the advice of his Council of Ministers for more convenient transaction of business. He cannot only allocate the various subjects amongst the Ministers but may go further and designate a particular official to discharge any particular function."

The Court has also expressed the view that the cabinet is responsible to the Legislature for every action taken in any of the ministries and that is the essence of joint responsibility; that does not mean that each and every decision must be taken by the cabinet. Neither the Council of Ministers nor an individual Minister can attend to the numerous matters that come up before the Government. Those matters have to be attended to and decisions taken by various officials at various levels. When those officials discharge the functions allotted to them, they are doing so as limbs of the Government and not as persons to whom the power of the Government had been delegated. In the case of *Arun Kumar Bhattacharjee v. State of West Bengal* reported in AIR 1968 Cal 35 the statement of law with regard to Rules of Business has been enunciated by the Calcutta High Court thus:

"The rules of business have been made for the convenience of public business. The opening words of clause (3) of Article 166 make it clear that the rules of business are framed by the Governor for more convenient transaction of business of the Government of the State. These rules have not been framed, and indeed were not intended, to create or confer a right upon a public servant to come and apply for a writ under Article 226 of the Constitution for violation of these rules."

The aforesaid decisions make the position quite clear that the provisions of Art. 166 of the Constitution themselves are directory in nature and further that the rules framed by the Governor under cl. (3) of Art. 166 must be regarded as rules having been framed for more convenient transaction of business of the Government and are directory in character and not mandatory and any non-compliance thereof would be a mere procedural defect but would not confer any right upon any citizen to approach the Court under Art. 226 of the Constitution. We are not really concerned in this case with the question as to whether for any breach of the Business Rules any citizen can approach this Court by means of a writ or not, but we are merely concerned with the true nature or character of the Business Rules framed by the Governor under clauses (2) and (3) of Art. 166 and the aforesaid decisions clearly show that they are directory in nature or character. Since these Business Rules cannot be regarded as mandatory, it would not be possible to take the view that if any rules were framed by the Governor under the proviso to Art. 309 without strictly following the procedure prescribed by such Business Rules, the same will not be effective or not have the force of law or that any rule framed in violation of strict compliance with the formality prescribed by such Business Rules will not amount to a rule framed under the proviso to Art. 309 of the Constitution; a substantial compliance therewith would be enough. It may be stated that the Division Bench of this Court consisting of Chainani, C. J. and Mody, J. in Appeal No. 23 of 1960 decided on 10-8-1961 (Bom) has in terms taken the view that no particular form nor any particular formality has been prescribed which is required to be gone through for the purpose of making a rule under the proviso to Art. 309 of the Constitution and the same view has been reiterated

by a single Judge while disposing of Misc. Petn. No. 308 of 1967 decided on 19-9-1967 (Bom). In this last mentioned case (Misc. Petn. No. 308 of 1967 (Bom)) a specific contention was raised by the learned Advocate-General who appeared for the State of Maharashtra in that matter that no particular form for framing rules under Art. 309 of the Constitution had been prescribed by the Constitution or by any other law nor any formalities have been prescribed as being required to be gone through before any Rule framed by the Governor acting under that power becomes effective, which contention was accepted by the Court. Having regard to the aforesaid discussion, therefore, it is not possible to accept the contention urged by counsel for the petitioners before us that Rules or general principles embodying the recruitment rules or rules pertaining to service conditions of Government employees if they are to be regarded as rules under the proviso to Art. 309 they should always be in the form of Rules or be styled as 'Rules under Art. 309' or that any particular formality or procedure must be gone through before these could have the force of rules under the proviso to Art. 309 of the Constitution. We would, however, like to clarify here that neither before the Division Bench nor before us was any contention raised that any of the Circulars, Orders or Resolutions concerned in the case had been issued without following the procedure laid down by the Business Rules framed by the Governor under Art. 166 (3) of the Constitution and no one has gone into the question whether while issuing such Circulars, Orders or Resolutions there was or has been a substantial compliance with such procedure or not.

23. The last two aspects which have to be considered in the context of the principal question referred to us by the Division Bench are whether there should be express reference or statement in the Circular or Order or Resolution issued by the duly authorised officer that the instrument has been issued under the proviso to Art. 309 or that the rules or general principles contained therein have been framed in exercise of the powers conferred under the proviso to Art. 309 and whether publication of such Circular, Order or Resolution in the Government Gazette is absolutely essential before the rules or general principles contained therein could have the force of rules framed under Art. 309 of the Con-

stitution. Since some of the decided cases on which reliance was placed during the course of argument before us deal with both these aspects together we might also deal with and dispose of these aspects together.

24. On behalf of the petitioners it was specifically contended that one of the essential characteristics of a valid rule under the proviso to Art. 309 would be that not merely the rule must be made under or in exercise of the proviso to Art. 309 of the Constitution but the rule or the instrument containing the rule must expressly state that the same has been issued under or in exercise of the power conferred by the proviso to Art. 309. It was also contended by counsel for the petitioners that any such rule or the instrument containing rules must be published in the official gazette and unless both these requirements were satisfied the rule or instrument containing the rules could not be regarded as a valid rule or rules framed under the proviso to Art. 309. As a corollary to this contention it was further urged that any amendment to the rules which have been expressly made under the proviso to Art. 309 and have been published in the Gazette must also be made by another instrument which must follow the same procedure viz. that it must be expressly made under the proviso to Art. 309 and should be so published in the gazette. On the other hand, Mr. Gurusahani appearing for the State contended that so long as the letter, memorandum, Circular, Order or Government Resolution, whatever be the nature of the instrument, substantially deals with the subject-matter of recruitment and service conditions concerning Government employees and so long as such instrument is duly authenticated and signed by an authorised officer in the name of the Governor it would amount to making valid rules under the proviso to Art. 309 of the Constitution and that it is not necessary to mention or specify the source of the power therein, that is to say, it is not necessary to mention in the instrument itself that the same has been issued under the proviso to Art. 309 of the Constitution. On the question of publication it was fairly conceded by Mr. Gurusahani that unquestionably the rules or the instrument containing the rules must of necessity be published but it was not necessary that publication must be in the Official Gazette.

25. On behalf of the petitioners on the aspect of mentioning the source of power counsel placed strong reliance upon two decisions of the Supreme Court and on the aspect of publication reliance was placed upon one decision of Supreme Court, one of Andhra Pradesh High Court and the decision of the Division Bench of this Court consisting of Deshpande and Joshi, JJ. rendered in Spl. C. A. No. 815 of 1972 (Bom). In the case of B. N. Nagarajan v. State of Mysore reported in AIR 1966 SC 1942 the Supreme Court was dealing with Mysore Public Service Commission (Functions) Rules, 1957, particularly Rule 4 (1) thereof and the question was whether these particular rules were rules regarding recruitment to services under the proviso to Art. 309 of the Constitution. We have already referred to this case in another context and have pointed out that having regard to the subject-matter dealt with by those rules in question, the Supreme Court came to the conclusion that those rules really dealt with the functions of the Commission rather than laying down the rules regarding recruitment of service or posts and as such could not be regarded as rules having been framed under the proviso to Art. 309 of the Constitution. But counsel for the petitioners pointed out that there was yet another ground on which those rules were held as not being rules framed under the proviso to Art. 309 of the Constitution and that ground was that those rules did not expressly say so. Dealing with that aspect raised before it this is what the Supreme Court has observed:

"The High Court held that there can be little doubt that to the extent the Rules deal with the topic of regulating recruitment to Civil Services under the State, the source of the power could only be the proviso to Art. 309 of the Constitution. In our opinion, these rules are not rules made under Art. 309. First, the rules do not expressly say so, and secondly, the rules are dealing with the functions of the Commission rather than with laying down the rules regarding recruitment to services or posts."

Reference was also made to the decision of the Supreme Court in Prabhakar Yeshwant Joshi v. The State of Maharashtra, reported in 1969 (3) SCC 134 where in connection with a Government Resolution dated 29-4-1960 which set down the principles for recruitment to the Bombay Service of Engineers Class I

and Class II the Court has made certain observations in para 12 of its judgment on which considerable emphasis was laid. Relying on these decisions counsel for the petitioners urged that a specific reference in the body of the instrument to the effect that the contents thereof have been issued under the proviso to Art. 309 would seem necessary before the rules or general principles contained in such instrument can amount to a rule under the proviso to Art. 309 of the Constitution. It is not possible to accept this submission for the simple reason that there is nothing indicated in the proviso to Art. 309 that while framing the rules thereunder any express reference must be made that these rules have been so framed under the said power. In our view, the fact that a specific or express reference has been made to the source of the power or absence thereof in the instrument containing the rules would undoubtedly be a relevant factor but that same cannot be regarded as decisive of the matter; the question would turn really upon whether the instrument substantially deals with the recruitment and other service conditions of Government employee and has been duly authenticated and promulgated and if that is so then the instrument will have to be regarded as containing rules framed under the proviso to Art. 309 of the Constitution even in the absence of any express reference to the source of the power under which these have been framed and conversely even if there be an express reference to the source of power, such as the proviso to Art. 309, if the instrument in fact does not deal with the topic of recruitment and service conditions of Government employee, the instrument would not be regarded as containing rules under the proviso to Art. 309. In this context we may point out that in the case of State of Mysore v. Padmanabhacharya reported in AIR 1966 SC 602 though the particular notification dated 25-3-1959 with which the Court was concerned in that case expressly made a reference to the source of power under which the same had been issued, namely "In exercise of the powers conferred by the proviso to Article 309 of the Constitution of India....." even then, the Supreme Court took the view that the contents of that notification did not amount to any rule framed under the proviso to Art. 309 of the Constitution. What was purported to be done by the notification dated 25-3-1959 in that

case was that certain persons who had been wrongly retired were treated to have been rightly retired and the Supreme Court took the view that this power of validating an order which was invalid when it was made did not flow from the power conferred on the Governor to make rules regulating recruitment and conditions of service of persons appointed to services and posts in connection with the affairs of the State. The Court went on to observe thus:

"It is certainly not a rule regulating recruitment of such persons; nor can it be said to be a rule regulating conditions of services of such persons. The rules relating to recruitment and conditions of service contemplated by the proviso to Art. 309 are general in operation, though they may be applied to a particular class of Government servants. But what this notification or rule does is to select certain Government servants who had been illegally required to retire and to say that even if the retirement had been illegal, that retirement should be deemed to have been properly and lawfully made. We are of opinion that such a declaration made by the Governor—and that is all that the notification or the rule does—cannot in any sense be regarded as a rule made under the proviso to Art. 309 governing the conditions of service of persons appointed to services and posts in connection with the affairs of the State. In this view of the matter it is not necessary to decide whether a rule of this kind which is purely retrospective could be made as a rule governing conditions of service of persons appointed in connection with the affairs of the State."

It will thus appear clear that in this decision though expressly and in terms the notification in question was said to have been issued "In exercise of the powers conferred by the proviso to Art. 309 of the Constitution", having regard to the contents of the notification the Court took the view that it was not a rule framed under the proviso to Art. 309. To the same effect is the decision of the Supreme Court in *Dr. Thimmiah's case* in AIR 1972 SC 1767 = (1972 Lab IC 618). The converse case is the one to which we have already made a reference earlier being *E. Venkateswararao Naidu v. Union of India* reported in AIR 1973 SC 698 = (1973 Lab IC 427), where, as we have already pointed out, the office memorandum which had been issued by

the President was regarded as having the force of a rule framed under the proviso to Art. 309, notwithstanding the fact that there was no reference to the source of power, namely that the same has been issued under the proviso to Art. 309 of the Constitution. It seems to us clear, therefore, that the aspect whether the source of power viz. proviso to Art. 309 has been specifically referred to in the instrument in question though a relevant factor would not be a decisive factor to decide the question whether the contents of the instrument could be regarded as rules framed under the proviso to Art. 309.

26. Dealing next with the aspect of publication, counsel for the petitioners invited our attention to a decision of the Supreme Court in *I. N. Saksena v. State of Madhya Pradesh* reported in AIR 1967 SC 1264 and a decision of Andhra Pradesh High Court reported in AIR 1968 Andh Pra 350 = (1968 Lab IC 1393) (*P. Radhakrishna v. State of Andhra Pradesh*). In the former case the Court was concerned with a memorandum which had been issued by the Government of Madhya Pradesh addressed to all the Collectors and different departments which contained a decision of the Government raising the age of compulsory retirement to 58 years and on the question as to whether the memorandum itself amounted to a rule under the proviso to Art. 309 of the Constitution, one of the grounds on which the Supreme Court took the view that the said memorandum could not amount to a rule under Art. 309 of the Constitution was that this memorandum had never been published in the gazette. It must however be mentioned that that was not the principal reason why the memorandum was not regarded as amounting to a rule framed under the proviso to Article 309. From the phraseology employed in the memorandum and the contents thereof the Court came to the conclusion that the phraseology and the contents thereof clearly indicated that the memorandum contained a decision of the Government, intimation of which was given to all the Collectors and different departments and what is more, it was stated in the memorandum that necessary amendments to the State Civil Service Regulations will be issued in due course. It was relying upon these factors taken cumulatively that the Court took the view that the memorandum did not amount to a rule framed under the proviso to Arti-

cle 309. The other decision on which reliance was placed by counsel for the petitioners is a decision of Andhra Pradesh High Court in *P. Radhakrishna v. State of Andhra Pradesh* reported in AIR 1968 Andh Pra 350 = (1968 Lab IC 1393), where the Court has observed thus:

"In order to have a validly made rule under Article 309, the Governor and not the Government must first of all exercise the powers vested in him under Article 309 and make a rule regulating the recruitment etc. to the services and then publish the same in the official gazette or in any other prescribed manner for the purpose of informing the public."

There can be no doubt that since rules framed under the proviso to Art. 309 touch the recruitment and service conditions of Government employees generally and since the power exercised by the President or the Governor as the case may be under the said provision is legislative in character, it is essential that there must be publication of the rules so framed under that power. But the question is whether it is absolutely essential that such rules must be published in the official gazette. Even the aforesaid decision of Andhra Pradesh High Court, on which reliance was placed by counsel for the petitioners, makes it clear that in order to have a validly made rule under Art. 309, the Governor must first of all exercise the powers vested in him under Art. 309 and made a rule regulating the recruitment, etc. to the services and then published the same in the official gazette or in other manner that may be prescribed for the purpose of informing the public. It is thus clear that publication could either be in the official gazette or in any other manner that may be prescribed. As we have stated above, the power which is conferred upon the President or the Governor under Art. 309 of the Constitution being legislative in character and the rules that are to be framed thereunder being tantamount to laws regulating recruitment and other service conditions of the Government employees in public services or posts which will have general applicability, the publication of such rules is absolutely essential, but, in our view, it will be too narrow a view to take that such publication must necessarily be in the official gazette. We may point out that there is nothing in the proviso to Art. 309 of the Constitution which prescribes this

particular mode of publication in the official gazette nor has the counsel been able to draw our attention to any other provision of law which prescribes this particular mode of publication before the rules framed in exercise of that power become effective. That there should be publication of every act which is of legislative character cannot be gainsaid and this position in law has been clearly laid down by the Supreme Court in the case of *Harla v. The State of Rajasthan* reported in AIR 1951 SC 467. In that case the Court was concerned with a Resolution that was passed by Council of Ministers on 11-12-1923, whereby the Council purported to enact the Jaipur Opium Act and the question was whether the mere passing of the Resolution without due promulgation or publication of the measure was sufficient to make it law. In the context of that question the Supreme Court has made the following observations in para 8 of its judgment:

"We do not know what laws were operative in Jaipur regarding the coming into force of an enactment in that State. We were not shown any, nor was our attention drawn to any custom which could be said to govern the matter. In the absence of any special law or custom, we are of opinion that it would be against the principles of natural justice to permit the subjects of a State to be punished or penalised by laws of which they had no knowledge and of which they could not even with the exercise of reasonable diligence have acquired any knowledge. Natural justice requires that before a law can become operative it must be promulgated or published. It must be broadcast in some recognisable way so that all men may know what it is; or, at the very least, there must be some special rule or regulation or customary channel by or through which such knowledge can be acquired with the exercise of due and reasonable diligence. The thought that a decision reached in the secret recesses of a chamber to which the public have no access and to which even their accredited representatives have no access and of which they can normally know nothing, can nevertheless affect their lives, liberty and property by the mere passing of a Resolution without anything more is abhorrent to civilised man. It shocks his conscience. In the absence therefore of any law, rule, regulation or custom, we hold that a law cannot come into being in this way. Pro-

mulgation or publication of some reasonable sort is essential."

In view of the above observation there could be no doubt that even for the rules that are framed by the President or the Governor as the case may be under the proviso to Art. 309 of the Constitution since the power is of legislative character and since the rules that are so framed are to affect Government employees in public services, it is absolutely essential that promulgation or publication of some reasonable sort of these rules would be essential. But as we have said above, there is no particular mode of publication prescribed either by the proviso to Art. 309 of the Constitution or by any other law on the subject. It is unquestionably necessary that there should be some publication in the sense that the rules so framed, whatever form they take, say a letter, memorandum, Circular, Order or Resolution, must be made known to all the persons who are likely to be affected thereby and such persons must have access to these rules or to these instruments; in that sense promulgation or publication of rules is undoubtedly essential. But there is no requirement that publication should be in a particular manner viz. by publication in the official gazette.

27. A brief reference may now be made to the three Division Bench decisions of this Court, where both these aspects were canvassed and the Division Benches have taken the view that specific reference to the source of power was not essential and that publication in the official gazette was also not regarded as an essential aspect. The first of the decisions in which the question arose was Appeal No. 23 of 1960 which was decided by Chief Justice Chainani and Mody, J. on 10-8-1961 (Bom). As stated earlier, that was a case which dealt with the question as to whether Circular dated 9-12-1938 which provided for transfer of a Government servant and his suspension during departmental enquiry on a serious charge could be regarded as a rule framed under the relevant provisions of the Government of India Act, 1935 and continued under Art. 313 of the Constitution or not. A specific contention was raised on behalf of the plaintiff that this particular Circular contained executive instructions issued by the Government, that it did not have the force of a rule and that consequently it did not continue in force after the coming into

force of the Constitution under Art. 313 of the Constitution. Repelling that contention the Division Bench observed thus:

"The circular affects conditions of service. It contains general directions which all Government servants under the control of the Government of Bombay had to follow. It was also issued by order of the Governor of Bombay, who was the authority competent to make rules in this behalf. No other formality was required for making a rule on this subject. Although, therefore, the circular is not issued in the form of a rule, as it affects conditions of service of all persons serving in connection with the affairs of the Bombay Province and as it was issued by the authority competent to make rules in this behalf, it can, in our opinion, be regarded as rule. If it is so regarded, as we think it should be, it continued to remain in force under Article 313 of the Constitution."

28. In Spl. C. A. No. 845 of 1967 which was decided on 23-3-1968 (Bom) by Tarkunde and Nathwani, JJ, the Court was concerned with a Resolution dated 30th July 1959 to which recruitment rules to the posts of Deputy Collectors were appended and the said Resolution was issued by order and in the name of the Governor of Bombay and the same could have been issued only under the proviso to Art. 309 of the Constitution which was the only provision under which the Governor of Bombay could have issued the rules appended to the Resolution. A specific contention was raised before the Division Bench that there was no reference to Art. 309 of the Constitution either in the Resolution or the rules and that neither the Resolution nor the rules were published in the Government gazette, and, therefore, the Resolution together with its annexure did not amount to any rules framed under the proviso to Art. 309. Reliance was placed in support of the contention upon the decision of the Supreme Court in Saksena's case (AIR 1967 SC 1264). The Division Bench distinguished the Supreme Court decision in Saksena's case on two or three grounds. It was pointed out that in Saksena's case the Court was concerned with the Memorandum which was issued by the Government of Madhya Pradesh to all the Collectors in the State and which raised the age of compulsory retirement of Government servants to 58 years, that is to say, the memorandum had been issued in the form of a letter

and not in the form of rules, whereas in the case before the Division Bench they were concerned with a Resolution to which were appended the regular rules which were designed to regulate recruitment to the posts of Deputy Collectors. Secondly it was pointed out that before the Supreme Court Memorandum itself announced that necessary amendments to the State Civil Services Regulations would be 'issued in due course' and the memorandum was subsequently followed by a Notification issued expressly in exercise of the power conferred by the proviso to Art. 309 of the Constitution, which notification did not contain one of the clauses included in the Memorandum while in the case before it there was no subsequent Notification under Art. 309 of the Constitution but the Resolution dated 30-7-1959 itself directed that the Political and Services Department should 'issue necessary correction slips to the Bombay Civil Services Classification and Recruitment Rules'. After pointing out these features of distinction the Division Bench proceeded to observe thus:

"Since the Political and Services Department was competent to make any rule under Article 309 of the Constitution, this provision in the Resolution clearly meant that the Resolution by itself had brought about the necessary amendments in the Bombay Civil Services Classification and Recruitment Rules."

In another part of the judgment after referring to the Division Bench judgment in Appeal No. 23 of 1960 (Bom) the Court observed as under:

"For similar reasons we are of the view that the Resolution and Recruitment Rules of 30th July 1959 were statutory rules under the proviso to Article 309 of the Constitution, although no express reference to Article 309 has been made therein." The Court went on to observe further thus:

"Although, in our view, the said Resolution and recruitment rules do not cease to have statutory force on the grounds urged by Mr. Singhavi, it appears to us desirable to emphasise that such rules should normally be issued expressly under the proviso to Article 309 and should also be published in the Government Gazette. Mention of the proviso to Article 309 would make it easy to distinguish such rules from administrative instructions. Moreover, these rules have the force of law, and it

is obviously necessary that those who are governed by the law should have the means of knowing what the law is. In the present case the petitioner and his legal advisers, for no fault of theirs, were unaware of many of the Government Resolutions which regulated the petitioner's conditions of service, including his right to promotion to the post of Deputy Collector. The first affidavit filed on behalf of the State Government did not also refer to some of the Resolutions which had a direct bearing on the issues arising in this case. We shall have to take these facts into consideration in deciding what order should be made as to the costs of this petition."

It would thus appear from what has been quoted above, that the Division Bench was clearly of the view that neither a specific reference to source of power was regarded as absolutely essential nor was a publication thereof in the official gazette absolutely essential but it was highly desirable that normally such rules should be issued expressly under the proviso to Art. 309 and should also be published in the Government Gazette. In other words, these aspects were regarded by the Division Bench as highly desirable but they did not affect the question of validity of the rules or the fact that the rules had been framed under the proviso to Art. 309 of the Constitution. The third decision of the Division Bench in Misc. Petn. No. 549 of 1969 rendered by Kantawala, J. (as he then was) and Kania, J. on 31-7-1972 (Bom) dealt with a case of recruitment rules and seniority principles which were contained in two Resolutions, one dated 28-7-1954 and the other dated 29-7-1963 respectively and a specific contention was raised that these recruitment rules and seniority principles which had been issued in the form of two Government Resolutions were not statutory rules at all but were mere administrative instructions and the same could not be treated as binding as the same were in conflict with Bombay Civil Services Rules framed under the proviso to Art. 309 of the Constitution. A two-fold contention was specifically urged that both in the case of recruitment rules and seniority principles there was no statement made in the Resolutions dated 28-7-1954 and 29-7-1963 respectively to the effect that these rules or principles had been framed in exercise of the power conferred on the Governor under Art. 309 of the Constitution and further these rules and

principles had not been published in the official gazette. Relying upon the relevant portions of the judgments in the two cases (Appeal No. 23 of 1960 (Bom) and Spl. C. A. No. 845 of 1967 (Bom)) the Division Bench negated the contention and concluded thus:

"In view of these decisions and the reasons given by us above, we are of the view that both the Recruitment Rules and the Seniority Principles in paragraph A referred to above are statutory rules framed in exercise of the power conferred under the proviso to Article 309 of the Constitution, notwithstanding the fact that there is no express statement in the respective resolutions that these were framed in exercise of the powers conferred under Article 309 or the proviso thereto and notwithstanding the fact the same have not been published in the official gazette."

To the similar effect are the two judgments of single Judges, one in Misc. Petn. No. 308 of 1967 decided on 19-9-1967 (Bom) and the other in Misc. Petn. No. 672 of 1968 which was decided on 13-11-1973 (Bom). It is not necessary for us to refer to these two decisions of the single Judges in great detail as it would suffice to say that in both these matters each learned single Judge has followed the view taken in the judgment delivered by the Division Bench in Appeal No. 23 of 1960 (Bom).

29. Reference may now be made to the decision of the Division Bench, which, as said above, has taken a contrary view, namely that delivered by Deshpande and Joshi JJ. in Spl. C. A. No. 815 of 1972 decided on 15-1-1974 (Bom). The Court in that case was concerned with rules that were framed under Government Resolution dated 21-11-1941 which were referred to in the judgment as the 1941 Rules, under Government Resolution dated 29-4-1960 which were referred to in the judgment as the 1960 Rules and under Government Resolution dated 29-7-1963 which were referred to in the judgment as the 1963 Rules and the contention was that these Rules — the 1941 Rules, the 1960 Rules and the 1963 Rules—were in the nature of executive instructions and not statutory rules framed by the Governor in exercise of the power conferred under Art. 309 of the Constitution. It does appear that that contention was accepted and since even the 1963 Rules were held to be executive instructions, the decision comes in apparent conflict with the view

taken by the Division Bench consisting of Kantawala, J. (as he then was) and Kania, J. in Misc. Petn. No. 549 of 1969 (Bom), where the very 1963 Rules had been held to be statutory rules framed under the proviso to Art. 309 of the Constitution. The finding that the 1963 Rules which were issued in the form of Government Resolution dated 29-7-1963 amount to pure executive instructions is to be found in the following observations made by Deshpande and Joshi, JJ.:

"..... Unlike the temporary incumbents of the posts in the cadre of Deputy Engineers, direct recruits get vested right not only to the posts with reference to which the appointments were made but also to the place in seniority list prepared in terms of Rule 8 (iii) (of 1960 Rules). This process thus involves even affecting the vested rights of the direct recruits appointed before 29-7-1963. Such divesting could not be done by such executive Fiat (viz. Resolution of 29th July 1963). This obviously leads to an inference that 1963 Rules were never intended to be applied to the Engineering Services and provision in clause (B) was made in the opening paragraph of the said 1963 Rules to make this clear."

It does appear that by adopting the aforesaid process of reasoning the Division Bench consisting of Deshpande and Joshi, JJ. could be said to have taken the view that so far as the 1963 Rules which were issued under the Government Resolution of 29th July 1963 amounted to mere executive instructions and the very Rules have been held to amount to Rules framed under the proviso to Article 309 of the Constitution by the Division Bench consisting of Kantawala and Kania, JJ. in Misc. Petn. No. 549 of 1969 (Bom) and it was precisely because of this conflict that the matter was referred to the Full Bench by the Division Bench. However, if regard is had to certain other passages which occur in that judgment it would appear clear that the particular view was taken on the basis of certain concession made by counsel appearing for both the parties before that Bench and the point also does not seem to have been argued seriously by counsel for respondents Nos. 2 and 3. These aspects would become clear if paragraph 5 of the judgment is carefully analysed. The material portion of paragraph 5 of the judgment runs as follows:

"Before we proceed to examine the contentions of the learned advocates advanced before us, it will be convenient to mention that it was not disputed by the learned advocates before us that 1941 Rules, 1960 Rules, 1963 Rules or for that matter 1970 Rules are in the nature of executive instructions and not the statutory rules or rules framed by the Governor in exercise of the powers under Article 309 of the Constitution. A faint attempt was made by Mr. Paranjpe, learned advocate for respondents Nos. 2 and 3 to suggest that 1960 Rules and 1970 Rules can be said to have been framed by the Governor under Article 309 of the Constitution. He relied on the recitals in both the rules at the fag-end of the text, indicating that the same have been issued by the order and in the name of the Governor of Maharashtra. The contention on the face of it is devoid of any substance inasmuch as all executive orders are required to be issued in that form in compliance with the Article 166 of the Constitution. We shall, therefore, have to proceed on the basis that all these rules are in the nature of mere executive instructions. It was also not disputed that while the conditions of service of the Government employees can be altered unilaterally retrospectively by competent legislative measures, the above Government Resolutions under consideration being merely executive instructions cannot have any retrospective effect whatsoever."

The aforesaid passage which occurs in para 5 of the judgment really brings out two or three aspects very clearly. In the first place, it will appear clear that before the Division Bench no serious dispute was raised by learned advocates who appeared before them that the 1941 Rules, the 1960 Rules, the 1963 Rules and for that matter the 1970 Rules should not be regarded as executive instructions but statutory rules framed by the Governor in exercise of the power conferred by Art. 309 of the Constitution and the Division Bench proceeded to consider the matter before it on the assumption that all these Rules were in the nature of mere executive instructions. Secondly there was a faint attempt made by Mr. Paranjpe, learned advocate who appeared for respondents Nos. 2 and 3 to suggest that 1960 Rules and 1970 Rules could be said to have been framed by the Governor under Art. 309 of the Con-

stitution, but the point does not seem to have been pressed before the Bench. Thirdly even this faint argument was sought to be canvassed on the mere aspect that these Resolutions contained statutory rules under Art. 309 because of the endorsements found at the foot of each of the Government Resolutions to the effect that each had been issued 'by order and in the name of the Governor of Maharashtra'. In our view, the argument was rightly rejected by the Division Bench, inasmuch as, the mere presence of such endorsement, as pointed out by us earlier, would be equivocal and of no consequence. It will thus appear clear that no other aspect was pressed into service and the question whether the several Rules viz. the 1940 Rules, the 1960 Rules, the 1963 Rules or the 1970 Rules had been really framed by the Governor under the proviso to Art. 309 of the Constitution or not was concluded by concession made by counsel for the parties and the entire matter was dealt with on the assumption that these were in the nature of executive instructions. Moreover, it is also clear from the entire judgment that none of the earlier Division Bench judgments was cited before that Bench. In any case so far as the 1963 Rules are concerned, which were issued under the Government Resolution dated 29-7-1963, we agree with the finding recorded by the Division Bench which disposed of Misc. Petn. No. 549 of 1969 (Bom) that these are the Rules framed under the proviso to Art. 309.

30. The only thing that remains is to deal with the observations of the Supreme Court in P. Y. Joshi's case. Strong reliance was placed by counsel for the petitioners on the observations made by the Court in para 12 of the judgment at page 144 of the report (1969 (3) SCC 134) which run as follows:

"We cannot, therefore, accept the contention of Shri Gupte that a promotee officiating Deputy Engineer Class II is not entitled to be considered for promotion under Rule 7 to the post of an officiating Executive Engineer unless he has put in 7 years of service from the date of confirmation. On the other hand, the subsequent resolution of the Government of 1963 makes it abundantly clear that the seniority of promotees should be considered as from the date of promotion to officiate continuously irrespective of whether the appointments are made in temporary or permanent vacan-

cies. It is no doubt submitted that this does not have the force of rules and cannot therefore have the effect of amending the Rules of 1960. As we have already held on an interpretation of the Rules of 1960 that they do not support the contention of the petitioners, the question whether the resolution has the force of rules may not be relevant in this context, but nonetheless in our view, there is force in the contention of Shri Kumaramangalam, learned Advocate for the respondents, that even the 1960 Rules have no statutory force and are no better than the executive instructions issued from time to time by means of resolutions. It may be observed that the rules referred to are part of the resolution of 1960. The resolution itself lays down the principles and in the end formulates those principles in terms of rules, which however are not purported to be made under any provision of law or even under Article 309. There also is nothing to indicate that the procedure and formalities required for making rules have been gone through."

We may point out that the aforesaid decision has been referred to by the Division Bench of this Court while disposing of Misc. Petn. No. 549 of 1969 (Bom) and with regard to those observations it has been pointed out by that Bench that "All that has been observed by their Lordships of the Supreme Court is that there is force in the contention that even the 1960 Rules have no statutory force and are no better than the executive instructions. This cannot be looked upon as a decision of the Supreme Court or even as obiter dicta of the Supreme Court" and that the same was regarded as merely a passing observation made in the context of contention that was urged by Shri Kumaramangalam, learned advocate for the respondents before the Supreme Court. The observations themselves clearly indicate that the Court had already held on an interpretation of the rules of 1960 that they did not support the contention of the petitioners and therefore the question whether the resolution had the force of rules was not relevant in that context. In that situation the observations will have to be regarded as casual or passing observations made by the Supreme Court.

31-32. Having regard to the above discussion, our answer to the first question referred to us would be as follows:

Circulars, Orders or Resolutions or parts thereof laying down the rules or principles of general application, which have to be observed in the recruitment or fixation of seniority of Government servants generally or a particular class of them, and which have been duly authenticated by a signature under the endorsement "By order and in the name of the Governor of Maharashtra" and intended to be applicable straightway can amount to rules framed in exercise of the powers conferred under the proviso to Art. 309 of the Constitution, although the said Circulars, Orders or Resolutions do not expressly state that the same are made or issued in exercise of the powers conferred under the proviso to Article 309 of the Constitution of India and are not published in the Government Gazette.

33. In view of the aforesaid answer to Question No. 1, in our view, questions Nos. 2 and 3 do not arise and accordingly they are not answered.

34. Costs to be costs in the petitions and would be dealt with by the Division Bench,

Order accordingly.

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DESHPANDE AND JOSHI, JJ.

S. R. B. Gaikwad, Petitioner v. The Union of India and others, Opponents.

Special Civil Appln. No. 218 of 1976, D/- 23-7-1976.*

Public Premises (Eviction of Unauthorised Occupants) Act (1971), S. 2 (e) — 'Public premises' — Lease in favour of Central Government determined and Central Government becoming statutory tenant under Bombay Rent Act, 1947 — Premises do not cease to be 'public premises'. (Houses and Rents — Bombay Rents, Hotel and Lodging House Rates Control Act (57 of 1947), S. 12).

Even where the lease in favour of the Central Government is determined and the Central Government becomes a statutory tenant under the Bombay Rent Act, 1947 the premises do not cease to be public premises within the meaning of S. 2 (e). The Act is not so much concerned with the title as with the possessory

*(To set aside order of Principal Judge, City Civil Court, Bombay in M. A. No. 73 of 1972).

rights vested in the Central Government, and S. 2 (e) only indicates the sources by which such right to possession can be acquired, one such being, the taking of the premises on lease from its owner. The definition thus is descriptive of the source or origin of the possessory rights acquired by the Central Government. It is the continuance of the vesting of this possessory right in Government and not so much the origin thereof, that makes any premises, a public premises under the Act. The contract of lease, no doubt, gives rise to the estate and interest of the lessee in the property, bare right to possession being only a part of such estate and interest. The determination of the lease, no doubt, puts an end to the contract and such interest and the estate. However, provisions of the Bombay Rent Act afford some protection to the tenants against eviction and prevents such determination of lease from having its full effect. In spite of the determination of the lease and incapacity of the tenant and the landlord to enforce the terms of the contract, the ex-tenant actually happens to enjoy still, what once was the fruit and the product of the same contractual lease. In other words, the entire interest covered by the possessory right created by the contract does not come to an end with the determination of the lease but part of it, at any rate, i.e., the bare right to remain in possession still survives and is protected by the Rent Act. The right to possession acquired by the Central Government under the lease on taking the same on lease, thus continues to exist and is protected, though the lease interest and the estate comes to an end. The premises do not cease to have been "taken on lease" as the phraseology is merely descriptive of how the possessory right originated. The loss of contractual security, and the substitution thereof by the cover of the protection under the Rent Act does not affect, at any rate, the kernel, i.e. the possessory right which also was the creature of the contractual lease. It is difficult to see how the premises cease to be public premises when in spite of the determination of the lease, possessory right created thereunder continues to be vested in the Government. AIR 1963 SC 120 and AIR 1965 SC 414 and AIR 1968 SC 471 and AIR 1961 SC 1067 and (1974) 76 Bom LR 218 and AIR 1967 SC 1853, Referred. (Paras 10, 11, 13)

Cases Referred: Chronological Paras
(1974) 76 Bom LR 218: 1974 Mah LJ 505

AIR 1968 SC 471: (1968) 2 SCR 20 16
AIR 1967 SC 1853: (1967) 3 SCR 343 20
AIR 1965 SC 414: (1964) 4 SCR 892 14,
16, 20
AIR 1963 SC 120: (1963) 3 SCR 312 12, 16
AIR 1961 SC 1067: (1961) 3 SCR 813 17,
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S. C. Chagla with M. N. Kothari, M. J. Bhatia and P. K. Pandit, for Petitioner; M. V. Paranjpe with L. J. Manjrekar and J. H. Parekh, for Opponents Nos. 1 & 2.

DESHPANDE, J.:— The building in which flat No. 8 is located and several other buildings once belonged to Messrs. Colaba Land and Mill Company Ltd. This flat and several other flats were obtained on lease by the Governor General in Council under a written agreement dated 21st June, 1944. The Garrison Engineer of the Defence Department is treated as the tenant on behalf of the Governor General. The Colaba Land and Mill Company Limited went into liquidation and the buildings were purchased in or about 1966 by a Housing Co-operative Society formed by the tenants of the flats therein under the name and style of Colaba Land Co-operative Housing Society Ltd., hereinafter referred to as 'the Society', from the Official Liquidator with the sanction of this Court. The Society had offered for sale all the flats to the Central Government held by it as tenant, in the same manner as were purchased by the other tenants by becoming a member of the Society and purchasing such shares as would justify member's occupation of the flats as such members. The Government, however, declined the offer, making it clear that sale of the building to the Society would be subject to the tenancy rights held by it. While sanctioning the sale, the High Court also confirmed the tenancy rights of the Government in all these flats.

2. The petitioner was serving in the Army and as such public servant, the flat No. 8 in dispute was allotted to him on 8-8-1966. The petitioner was due to retire on 17-4-1967. He was, however, re-employed on 18-4-1967 for a further period of three years. In the meanwhile, the petitioner and his wife made an application for membership of the Society by reference to this very flat of which he was in possession as the allottee from the Government, on 16-9-1966. Their membership was accepted on 1-7-1967 and this very flat was allotted by the Society to the petitioner and his wife on 21-7-1967 notwithstanding the purchase of the buildings by it being subject to the tenancy

rights of the Government in the flats held by it and the said flat was neither surrendered by the petitioner to the Government nor could it be surrendered by the Government to the Society. It is not in dispute that the rent of this flat along with the rent of several other flats continued to be sent by the Garrison Engineer to the Society every month and the Society is receiving the same subject to its objections made clear in the correspondence.

3. On 20-10-1967 the petitioner applied to the Army Head Quarters for de-hiring the flat, i.e. giving up its tenancy rights therein. On 12-7-1968 the petitioner was called upon in this connection to give a certificate that he would not ask for re-employment. This requisition seems to have been made in accordance with the then policy to consider de-hiring the flats, in cases of those who had retired and were not to be re-employed again. The petitioner furnished the said certificate on 17-7-1968. He also seems to have resigned earlier, which resignation became effective from 24-7-1968. It would have been necessary for him to vacate the flat on his resignation becoming so effective. The Army Head Quarters on 9-10-1968, however, directed staying of eviction proceedings pending disposal of his de-hiring application.

4. In the meanwhile, a policy decision seems to have been taken by the Army Head Quarters not to de-hire such flats in view of the deficiency in the accommodation for the service personnel. This policy decision was communicated to all employees concerned and given wide publicity by a Circular letter dated 31st October, 1969. By letter dated 14th January, 1970, allotment of the flat to the petitioner was cancelled with effect from 1st November, 1968, making specific reference to this Circular. The petitioner was called upon to vacate the accommodation forthwith. Presumably apprehending all this, a few days earlier, on 16-3-1970, the Society, as the owner of buildings and the petitioner and his wife issued a notice terminating the tenancy of respondent No. 1 in regard to the flat in dispute.

5. The Estate Officer seems to have been moved to issue a show cause notice dated 20th January, 1970 calling upon the petitioner why order of eviction should not be passed against him under the provisions of the Public Premises (Eviction of Unauthorised Occupants) Act of 1958, as it then stood. The petitioner seems to

have appeared before the Estate Officer on 10th June, 1970. According to him, the proceedings were adjourned sine die because of the pendency of his application for de-hiring.

6. In the meanwhile, the Public Premises (Eviction of Unauthorised Occupants) Act of 1971, hereinafter referred to as 'the Act', was enforced repealing the 1958 Act and another Estate Officer was appointed. On 2-1-1971, a fresh show cause notice was issued by the Estate Officer under the provisions of the Act. The petitioner appeared before him and showed the cause. The Estate Officer then passed an order of eviction on 1-3-1972. His appeal to the principal Judge of the City Civil Court was dismissed on 21-11-1975. The validity and legality of this order is assailed in this application under Art. 227 of the Constitution.

7. Mr. Chagla, the learned advocate appearing for the petitioner, contends that the eviction order is without any jurisdiction inasmuch as the premises in dispute ceased to be "public premises" since determination of the lease by notice dated 16th March, 1970. It was not disputed before us that on that date the Society, the petitioner and his wife, did terminate the lease of respondent No. 1 and the contents of the said notice did comply with the provisions of S. 106 of the T. P. Act. Even if the competency of the petitioner and his wife to terminate the lease is disputed, the competency of the Society to terminate the lease is beyond controversy inasmuch as the Society admittedly had purchased the property from the Official Liquidator after the original owner Company went into liquidation.

8. Mr. Paranjape, the learned advocate appearing for respondent No. 1, however, contended that under the terms of the lease dated 21st June, 1944, the landlord did not have any right to terminate the lease at all and in terms of Cl. 5 thereof the tenant alone is competent to so terminate the lease. It was not disputed before us that the said lease deed dated 21st June, 1944, is not a registered document. If the lease deed is construed as disabling the landlord and enabling the tenant alone to terminate the lease, the lease would turn out to be a lease for indefinite period. Such a lease deed is liable to be registered under S. 17 of the Registration Act. The lease deed then shall have to be adjudged as being inadmissible in evidence on this ground.

Once the lease deed is excluded from consideration, the tenancy shall be deemed to have been a month to month tenancy, liable to be determined by a notice as contemplated under S. 106 of the T. P. Act. That the Government was the tenant of the premises and was paying rent as such tenant till the tenancy was determined by the notice dated 16-3-1970 is not disputed before us. In view of this, Mr. Paranjape's contention is liable to be rejected. We shall, therefore, have to proceed on the basis that the tenancy of the Government has been validly terminated by the notice dated 16-3-1970. Even so, the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947, hereinafter referred to as 'the Rent Act,' protects the tenancy of the Government, as the application of this Act to the premises in dispute is not disputed before us.

9. Mr. Chagla, however, contends that the premises in dispute having been taken on lease by the Government, the premises cease to be such public premises with the determination of the contractual lease, within the meaning of S. 2 (e) of the Act. According to Mr. Chagla, if the premises cease to be public premises as defined under the Act, the Estate Officer can claim no authority to issue the show cause notice dated 2-1-1971 or pass the order dated 1-3-1972. The contention, no doubt, is attractive and apparently plausible.

10. Section 2 (e) of the Act, stripped of the unnecessary details is as follows:

" 'Public Premises' means any premises belonging to or taken on lease or requisitioned by, or on behalf of, the Central Government,

xx xx xx"

The enactment, as indicated in the preamble, is intended to provide for the eviction of unauthorised occupants from public premises and for certain incidental matters. The enactment is not so much concerned with the title as with the possessory rights vested in the Central Government, and S. 2 (e) only indicates the sources by which such right to possession can be acquired, one such being, the taking of the premises on lease from its owner. The definition thus is descriptive of the source or origin of the possessory rights acquired by the Central Government. It is the continuance of the vesting of this possessory right in Government and not so much more the origin thereof, that makes any premises, a public premises under the Act. The Act provides for a summary remedy against the

unauthorised occupants, to ensure unobstructed and undisturbed possession of the premises by the Government, for the purposes for which the possessory rights are acquired and through such persons whose possession is conducive to and in keeping with the object of such acquisition. The special summary procedure is justified by the 'public interest' involved therein. This summary remedy is integrally connected with the mode of enjoyment of such possessory rights by the Government and is indispensable part thereof. The enactment is thus aimed at ensuring the continuance of the possessory rights acquired through the modes indicated in the definition clause.

11. The contract of lease, no doubt, gives rise to the estate and interest of the lessee in the property, bare right to possession being only a part of such estate and interest. The determination of the lease, no doubt, puts an end to the contract and such interest and the estate. That must be the necessary consequence and effect of such notice under S. 106 read with S. 111 of the T. P. Act. However, provisions of the Rent Act afford some protection to the tenants against eviction and prevents such determination of lease from having its full effect. Reference in this context can conveniently be made to sub-s. (1) of S. 12 of the Rent Act.

"A landlord shall not be entitled to the recovery of possession of any premises so long as the tenant pays, or is ready and willing to pay, the amount of the standard rent and permitted increases, if any, and observes and performs the other conditions of the tenancy, in so far as they are consistent with the provisions of this Act."

12. Now, it is well settled that the provisions of this section come into operation as soon as the notice determining the contractual tenancy becomes effective and not till then. Even the liability of the tenant to eviction under the Act does not arise till such lease is terminated first and the statutory tenant does or omits to do something justifying eviction under the Rent Act. This is the ratio of the judgment of the Supreme Court in the case of Punjalal v. Bhagwatprasad, AIR 1963 SC 120 on which reliance was placed by Mr. Chagla. The section introduces certain fetters on the right of the landlord to recover possession and affords an immunity from eviction, to which the landlord otherwise gets entitled on determination of the contractual lease. This

immunity, however, is dependant (1) on the tenant being ready and willing to pay standard rent and permitted increases, and (2) on observance and performance of conditions of the tenancy, in so far as they are consistent with the provisions of the said Act. There cannot be any quarrel with the contention of Mr. Chagla that, with the determination of the original contractual lease, the status of irremovability of the tenant as also his obligation to comply with the terms of the lease is entirely the creature of the statute; and contract ceases to have any operation thereafter. It is in this sense that the tenant ceases to be a contractual tenant and assumes the character of what is in common parlance described as a statutory tenant.

13. Notwithstanding all this, what requires to be noticed is that, the protected possessory right or interest, was once the creature of the contractual lease. In spite of the determination of such lease and incapacity of the tenant and the landlord to enforce the terms of the contract, the ex-tenant actually happens to enjoy still, what once was the fruit and the product of the same contractual lease. In other words, the entire interest covered by the possessory right created by the contract does not come to an end with the determination of the lease but part of it, at any rate, i.e. the bare right to remain in possession still survives and is protected by the statute. The right to possession acquired by the Central Government under the lease on taking the same on lease, thus continues to exist and is protected, though his lease interest and the estate comes to an end. The premises do not cease to have been "taken on lease" as the phraseology is merely descriptive of how the possessory right originated. The loss of contractual security, and the substitution thereof by the cover of the statutory protection, does not affect, at any rate, the kernel, i.e. the possessory right which also was the creature of the contractual lease. It is difficult to see how the premises cease to be public premises when in spite of the determination of the lease, possessory right created thereunder continues to be vested in the Government. As discussed earlier, the Act deals with possessory rights of the Government. The Rent Act prevents divesting the Government of these rights even after the end of the contract. In essence and even in a literal sense the premises still continue to be 'public premises'. Determination of contractual lease

is one thing. Destruction of the entire interest created thereby is quite another thing. The determination of the lease ordinarily results in the end of all the interest and rights created by the lease. But continuance of the same or part thereof can be ensured by other modes also. In the present case, continuance of the possessory rights created by contract is ensured by the statute. This statutory protection may not cover the estate and entire extent of interest covered by the contractual lease. Surviving possessory rights, however, still happen to be the part and residue of the same interests. Notwithstanding the determination of the lease, possessory rights therein continue to be held by the tenant and protected by the statute. Holding of this possessory rights even in their limited extent by the Government, in our opinion, is enough to ensure the continuance of the premises as "public premises" within the meaning of S. 2 (e) of the Act.

14. Mr. Chagla strongly relied on the judgment of the Supreme Court in *Anand Nivas (P.) Ltd. v. Anandji*, AIR 1965 SC 414. Sometime after the expiration of the lease period of five years, the landlord instituted proceedings for possession under the Rent Act against the tenant Maneklal who had by that time become a statutory tenant, on expiry of the lease. A decree for possession was passed against him. During the pendency of the eviction proceedings Maneklal induced the appellant, Anand Nivas (Private) Limited, in a portion of the premises as his sub-tenant. The decree was executed against the portion occupied by the tenant. The appellant, however, resisted the execution of the decree in regard to the portion in its occupation by instituting a suit, claiming to be original sub-tenant and having become tenant on the determination of the tenancy of Maneklal. The controversy reached the Supreme Court at the interlocutory stage of interim relief for injunction. All the courts declined to grant injunction. The Supreme Court held (1) that even though the lease authorised the tenant Maneklal to sub-lease, the tenant ceased to have any such power to sub-let, after the contractual lease had expired, and (2) the Supreme Court also further held that even the amended S. 15 of the Rent Act cannot clothe such statutory tenant with right to sub-let as the word "tenant" in Ss. 14 and 15 is intended to cover contractual tenant as against its connotation in S. 12 dealing with statutory tenants and S. 13 (e) cannot have

the effect of altering the import of the said word in S. 14 or 15. The two English cases and one Calcutta case, on which reliance was placed, were distinguished on the basis of the wording of the concerned provisions which enabled even the statutory tenant to sub-lease.

15. We are not concerned in the present case with any such point and the case is clearly distinguishable. Strong reliance, however, was placed on the following extracts from para. 27 of the judgment in reference to S. 12 of the Rent Act:

(1) "A person remaining in occupation of the premises let to him after the determination of or expiry of the period of the tenancy is commonly though in law not accurately, called a statutory tenant. Such a person is not a tenant at all."

(2) "His right to remain in possession after the determination of the contractual tenancy is personal."

(3) "With the determination of the lease, unless the tenant acquires the right of a tenant holding over, by acceptance of rent or by assent to his continuing in possession by the landlord, the terms and conditions of the lease are extinguished, and the rights of such a person remaining in possession are governed by the statute alone."

(4) "Section 12 (1) of the Act 57 of 1947 merely recognises his right to remain in possession so long as he pays or is ready and willing to pay the standard rent and permitted increases and performs the other conditions of the tenancy, but not the right to enforce the terms and conditions of the original tenancy after it is determined."

16. Mr. Chagla also relied on the identical observations in Punjalal's case (AIR 1963 SC 120) (supra) and the judgment in the case of Calcutta Credit Corporation Ltd. v. Happy Homes (Pvt.) Ltd., AIR 1968 SC 471 in which the ratio of its judgment in Anand Nivas (P.) Ltd. case (AIR 1965 SC 414) was affirmed.

17. Mr. Chagla then relied on the judgment in the case of Ganga Dutt Murarka v. Kartik Chandra Das, AIR 1961 SC 1067 and of this Court reported in the case of Shrinivas Subyya Alwa v. Krishnavani Vasudeo Mudliyar, (1974) 76 Bom LR 218, in which the ratio of Ganga Dutt's case is followed. In both the cases, tenant challenged the eviction decrees passed under the respective Rent Acts on the ground that the landlord accepted rents after the expiry of the

lease, making him a 'tenant holding over' and eviction proceedings, without determination of such fresh lease created under S. 116 of the Transfer of Property Act, by notice, were not maintainable. It was held that in cases where, possession of the tenant is protected by the Rent Act, the landlord cannot be said to have created new lease or attracted the provisions of S. 116 of the Transfer of Property Act merely by acceptance of rent from the tenant after the expiry or determination of the lease. This ratio has no relevance, but following observations from the Supreme Court judgment at p. 1070 were relied on by Mr. Chagla:

(1) "Occupation of premises by a tenant whose tenancy is determined is by virtue of the protection granted by the statute and not because of any right arising from the contract which is determined. The statute protects his possession so long as the conditions which justify a lessor in obtaining an order of eviction against him do not exist."

The Court then observed:

(2) "Once the prohibition against the exercise of jurisdiction by the Court is removed, the right to obtain possession by the lessor under the ordinary law springs into action and the exercise of the lessor's right to evict the tenant will not, unless the statute provides otherwise, be conditioned."

18. In our opinion, neither the ratio of these cases, nor the observations relied on therefrom and extracted above, in any way run counter to our above view, even if the observations are read without reference to the context and the point arising therein. The observations that, on the determination of the contractual lease, ex-tenant ceases to be the tenant, or that right of possession thereafter becomes personal, or that acceptance of rent thereafter does not create fresh tenancy, go only to emphasise how contractual rights and obligations cease to be operative. The observations do not, expressly or impliedly suggest that surviving possessory rights cease to be the creature of the same contractual lease, as these once were, or any new rights come into existence on getting the support of the statute which were not in existence till then. The second passage from Ganga Dutt's case (AIR 1961 SC 1067) rather than militate, actually fortifies our view that even after the tenancy becoming statutory, contractual rights created do not come to an end. How else

the ordinary right to possession of the landlord could 'spring' on the removal of the statutory bar, as indicated therein?

19. The premises, in our opinion, do not go out of the purview of S. 2 (e) of the Act as long as, the interest, created by the contractual lease on taking the same on lease from its owner, continues to vest in the Central Government. That such interest stands reduced to the bare personal right of possession or that its continuance is propped up by the statute and not by the contract, are all besides the point. Personal right of possession in cases where tenancies are held by the corporate or inanimate bodies, such as the Government would be governed by the Constitution of which they are the creatures and the regulations which go to determine their mode of operation. Such possessory right is the residue of the estate and the interest which was created by the contract of the lease. This limited interest, which also was protected by the contract till the subsistence of the contractual lease is continued to be protected now by the statute. In spite of the respondent, ceasing to have an estate and interest of a lessee in the premises, after the determination of the lease, the bare possessory rights, as distinguished from other larger rights acquired under the descriptive definition of S. 2 (e) of the Act do not, in our opinion, undergo any material change whatsoever for the purposes of the Act.

20. It now remains to refer to the decision of the Supreme Court in yet another case of *Hiralal v. Kasturbhai*, AIR 1967 SC 1853, striking slightly a discordant note, to which our attention was drawn very fairly by Mr. Chagla himself. The suit of the landlord for eviction against his three tenants, partners in a firm, and fourth defendant alleging him to be an unlawful sub-tenant, was decreed by the High Court in revision, only against the fourth defendant on the basis that defendants 1 to 3 ceased to have any interest after the termination of the contractual tenancy and the fourth defendant actually in possession was liable to be evicted as a trespasser, on his failure to prove assignment of tenancy to him as claimed by him. Tenants were also found to have been in arrears of rent. On appeal by the fourth defendant, the Supreme Court found it difficult to support such a decree against a trespasser alone in a suit under

the Rent Act. The respondent-landlord tried, however, to support the decree saying that defendant No. 4 was a sub-tenant and had become a tenant under S. 14 of the Act on the 'determination' of the tenancy of defendants 1 to 3. Reliance was placed on a passage from *Anand Niwas* case (AIR 1965 SC 414) (supra). The Supreme Court rejected this contention even on the assumption that defendant No. 4 was a sub-tenant. The passage in *Anand Niwas* case was explained by reference to another passage therein and it was further observed that the interest of the contractual tenant does not come to an end till he gives up possession or decree for eviction is passed against him and a sub-tenant cannot claim to have become the tenant under S. 14 of the Rent Act merely on the termination of the contractual lease of the head-tenant. Mr. Chagla appears to be right in contending that, observations should be confined to the effect of S. 14 only. Mr. Chagla also is right in saying that interest of the contractual tenant on the determination of contractual lease, being protected by S. 12, the sub-tenant cannot claim direct tenancy till such 'interest' of the head-tenant also comes to an end. This only demonstrates how it is necessary not to read any observations in isolation.

21. Mr. Chagla then contends that the occupation of the petitioner under no circumstances can be said to be 'unauthorised' within the meaning of S. 2 (g) of the Act. Mr. Chagla relies on the membership of the Society and allotment of the flat to him by the Society. He contends that the petitioner is in possession of the flat, not so much as the allottee of the Central Government, but as a member and allottee of the said Society. We are unable to accept this contention. After the determination of the contractual tenancy, the statutory tenancy of the flat still vests in the Garrison Engineer. The petitioner entered the flat as his allottee and has not surrendered possession even after cancellation of the allotment. The Society may accept the petitioner as its member and also may allot the shares to him and even may allot the flat to the petitioner legally. As far as the possession is concerned, the Society is incompetent to deliver possession thereof to the petitioner in disregard of the statutory tenancy of respondent No. 1 and the right to possession vested in it thereby. Interference with the possession of the statutory tenant

even by the landlord is unlawful. Respondent No. 1 must be deemed to be in possession through its allottee the petitioner. The Society cannot claim to have delivered such possession to the petitioner nor recognised his possession otherwise in disregard of the statutory tenancy of respondent No. 1. The occupation of the petitioner after cancellation of allotment cannot but be unauthorised.

22. Mr. Chagla then contends that the conduct of the respondent operates as an estoppel. Now, what is relied on is the letter dated 12-7-1968 calling upon the petitioner to give a certificate that he would not seek any re-employment. The case of the petitioner is that such a certificate was given by him on 17-7-1968 in compliance with this letter. According to him, he had already resigned on account of this prematurely so as to make the resignation effective from 24-7-1968, though he could have remained in service for full three years from 18-4-1967 onwards. According to the petitioner, by calling upon the petitioner to undertake not to seek re-employment, respondent No. 1 represented to him that his application for de-hiring will be granted. We do not see any merit in this contention. Neither asking for such certificate can be treated as promise or representation, nor giving such certificate can be said to be acting to one's detriment. The petitioner has not stated on what date he actually submitted his resignation. On our query, Mr. Kothari, the learned advocate appearing for the petitioner today, informed us that the resignation application was made in the month of May, 1968, though the resignation was made effective from 24-7-1968. Apart from the fact that the letter dated 12-7-1968 does not constitute any representation or promise, application for resignation made in the month of May, 1968, cannot be said to have been made relying on any such representation. Secondly, all that the letter dated 12-7-1968 required of the petitioner is to furnish certificate. The affidavit sworn on behalf of respondent No. 1 indicates that, according to then instructions in force, applications for de-hiring could be considered only from those who had retired and were not going to be re-employed. There is no element of promise in the letter nor any representation. The certificate seems to have been demanded to facilitate the consideration of the application. In the meanwhile, the Army au-

thorities appear to have decided not to consider such applications at all. By a circular dated 21-10-1969, this decision of the Army Headquarters was conveyed to every one, including the petitioner. There is thus no promise, no representation, and no relying and acting by the petitioner to his detriment. He cannot be said to have resigned relying on any such promise or representation.

23. Mr. Kothari then contends that the disposal of the eviction proceedings by the Estate Officer without waiting for the result of his de-hiring application is not in accordance with law. The contention appears to us to be devoid of any substance. The proceedings were initiated when the show cause notice was given on 20-1-1970. This was after the allotment was cancelled by the letter dated 14-1-1970. This letter refers to the circular letters of the Army Headquarters dated 31-10-1969 indicating that de-hiring applications were not liable to be considered. It is true that on the earlier occasion on 9-10-1968 the Army Headquarters had directed the stay of eviction proceedings. But then the effect of that letter must be deemed to have been wiped out by the circular letter dated 31-10-1969, a copy of which is shown to have been sent to the petitioner along with the letter dated 14-1-1970 cancelling the allotment. In his petition the petitioner says that the Estate Officer had stayed the proceedings sine die till disposal of de-hiring application, when he appeared before him on 10-6-1970 in response to the notice dated 20-1-1970. This is denied by the deponent in the affidavit sworn on behalf of the respondent. No attempt is made to enforce the production of any such order. Mr. Paranjape, however, made it clear that the said proceedings were never revived as in the meanwhile the judgment of the Supreme Court had made the validity of the Act itself doubtful and proceedings were started afresh by a notice dated 2-1-1971, after the present enactment was enforced. It is clear to us that there is no room for assuming that any de-hiring application of the petitioner was pending consideration, after the decision of the Army Headquarters was made known to every one, including the petitioner, under its circular dated 31-10-1969. Instances of de-hiring cited in rejoinder by the petitioner do not indicate the dates thereof and cannot be relied on to suggest that such policy was liable to be relaxed. This apart, it is very difficult to hold that

eviction proceedings would become infructuous because the application for de-hiring was under consideration. It was the duty of the petitioner to move the authorities concerned to stay the proceedings, if at all the authorities were found responsive to his application. Mere pendency of any such application is irrelevant unless proceedings are shown to have been initiated or disposed of by any incompetent officer. We have no reason to assume any such incompetency. If the authority was competent to initiate the proceedings, his competency to so initiate or the jurisdiction of the Estate Officer to so adjudicate, cannot be affected merely because the application of the petitioner was pending at some quarters.

24. Mr. Kothari then contends that the notice dated 2-7-1970 is bad because it relies on the letter cancelling the allotment dated 14-1-1970, in which the allotment is sought to be retrospectively cancelled with effect from 1-11-1968. We do not think it desirable to decide in this case whether the allotment can be so retrospectively cancelled or made effective, or not. Even if it is held that the allotment cannot be so cancelled retrospectively, we are unable to see why the cancellation of allotment cannot be effective, at any rate, from the date when the cancellation was communicated to the petitioner. We are also unable to see why the notice dated 2-7-1970 becomes bad merely because it refers to the cancellation of allotment having become ineffective from 1-11-1968. The Estate Officer is competent to proceed with the eviction proceedings on his satisfaction that the petitioner's occupation of the premises in dispute was unauthorised. The possession becomes unauthorised as soon as the petitioner ceases to be in service or, at any rate, when the possession is demanded from him and consent is withheld by the competent authority to continue the allotment. These bare features are sufficient to make the cancellation of the allotment effective from the date it was communicated to the petitioner as also the notice dated 2-1-1971 initiating proceedings against the petitioner.

25. It was also faintly suggested that the eviction order is bad because it also relies on the ground of non-payment of rent which is not the ground mentioned in the show cause notice. There is hardly any substance in this contention. If the

order is read as a whole, it cannot be said that eviction order is passed due to failure of the petitioner to pay rent. Merely because reference is made to such failure, the order cannot be said to have been based on such failure.

26. There is thus no merit in the petition.

27. Rule is accordingly discharged.

28. There will be no order as to costs.

29. The order not to be given effect to up to 17th September, 1976, in view of the undertaking given by the petitioner to this Court.

30. Mr. Chagla applies for leave to appeal to the Supreme Court under Article 133 of the Constitution.

31. Leave refused.

Rule discharged.

AIR 1977 BOMBAY 228*

VAIDYA AND SHIMPI, JJ.

Kamarbai and others, Appellants v. Badrinarayan and another, Respondents.

First Appeal No. 478 of 1968, D/- 27-7-1976.**

T. P. Act (1882), S. 6 (h) (2) — Transfer for immoral purposes — Setting aside — Applicability of principles of *pari delicto* and *particeps criminis* — Transferor seeking to set aside transfer made to his mistress on ground that it was for future cohabitation — Whether entitled to relief. (Contract Act (1872), S. 23) — (Specific Relief Act (1963), Ss. 27, 28, 31, 34) — (Trusts Act (1882), S. 84).

When transfers are tainted by immorality, the Court has a discretion which must be exercised judiciously, having regard to all the facts and circumstances of the case, to decide whether the plaintiff is entitled to the relief by way of restitution of the proper transfer, even though such transfers may be void on the ground that its object or consideration is immoral or opposed to public policy. The Court should not readily infer the object as future illicit cohabitation easily alleged by one party and denied by the other without any regard for truth. (Para 99)

*(Only portions approved for reporting by High Court are reported here.)

** (Against order of M. S. Ajmere, Civil J. Sr. Divn., Aurangabad in Spl. Civil Suit No. 14 of 1966.)

Thus where a mature 40 year old, worldly wise, experienced married man with children, a Municipal Councillor and a local rich politician hired a woman whom he claimed to have treated as his mistress and was having sexual relations with her for about five years prior to the agreement and the sale deed and when soon thereafter the quarrels started between them he asked the court for the recovery of the property by falsely alleging that the sale deed was executed for unlawful and illegal object of future cohabitation and as such was unsustainable in law the only just and fair thing for the Court to tell him was "let the property lie where your sexual dalliance and immoral pleasures placed it. The Court will not assist you now to deprive further a fallen woman after you, perhaps with others like you, have robbed her of her youth, charms, all social virtues, her life, her light and her love. The Court will say: Let her enjoy in her old age darkness the fruits of her sins as you have enjoyed at least equally her sins." Case law discussed. (Para 118)

When a suit is filed, either for rescinding of a contract on the ground that it is void or cancellation of an instrument or for a declaration that the transfer is void, the Court should be guided in this country now by the provisions of the Chapters IV to VI of the Specific Relief Act, 1963. The provision of S. 27 is more or less statutory recognition of the well known equitable doctrine of *in pari delicto*. Section 28 lays down that equities should be done by the court between the parties where a decree for specific performance is to be set aside. Section 31 by which the present case is governed gives discretion to the Court. It is not as if in every case where the agreement is void, the Court is bound to set it aside. That discretion of the Court is not arbitrary but sound and reasonable, guided by judicial principles and capable of correction by a Court of appeal. It is in the exercise of the discretion that the Court may be asked to apply the well known equitable doctrine of *in pari delicto*. Again S. 34, in terms, lays down that the Court has a discretion in making the declaration. (Paras 93 to 96)

The statutory recognition of the principle in the maxim *'in pari delicto'* is also to be found in S. 84 of the Trusts Act, 1882. (Para 96)

A plaintiff, in cases like the present one, is denied assistance on the ground

that the Court would not assist him to benefit from his own immorality or fraud or illegality, either on the basis of the maxim 'he who seeks equity must do equity' or 'he who comes into equity must come with clean hands'; or on the basis of such doctrines like: (1) Courts do not aid a party to an illegal undertaking; or (2) that the law does not permit a party deliberately to put his property out of his control for an immoral purpose and then seek intervention of the Court to regain the same after the immoral purpose is executed or accomplished; or (3) where both parties are equally guilty law leaves the parties where it finds them and keeps itself comfortably aloof from the obligation to determine the rights as between the guilty parties; or (4) that a party who claims an equitable relief must come into court with clean hands; or (5) that the party could not be allowed to blow hot and cold; or (6) to let the mischief lie where it exists.

(Para 97)

Cases Referred: Chronological Paras

AIR 1968 SC 253:	(1968) 1 SCR 43	70, 107
AIR 1962 SC 370:	(1962) 3 SCR 739	103
AIR 1958 Cal 713:	63 Cal WN 258	68, 90
AIR 1951 SC 177:	1951 SCR 277	69
AIR 1947 Bom 198:	48 Bom LR 775: ILR (1947) Bom 206	67, 88, 93, 111
AIR 1941 Bom 274:	43 Bom LR 681 (FB)	103
AIR 1940 All 385:	ILR (1940) All 371	111
(1937) 2 KB 158:	106 LKKB 593	106
AIR 1933 Bom 209:	35 Bom LR 345	65, 80, 88, 92, 93
(1907) 9 Bom LR 542:	ILR 31 Bom 405	87, 102
(1901) 3 Bom LR 647:	ILR 26 Bom 163	100
(1873) 16 Eq Cas 275:	29 Lt 126	66, 71, 83, 85, 87, 88, 89, 92
(1850) 3 Mac & G 94:	42 ER 196	74
(1815) 3 M & S 463:	105 ER 684	100

M. G. Karmali, for Appellants; M. P. Kanade, for Respondent No. 1.

1 to 63. x x x x x

VAIDYA, J.:— 64. The important question to be decided in this appeal is whether the plaintiff could take an advantage of the immoral relations which he claimed to have established between himself and defendant No. 1, even according to his own story. Mr. Karmali, the learned counsel for the appellants, submitted that the learned Civil Judge has not applied his mind to the three

decisions which are referred to by him or to the law regarding the effect of immorality vitiating the agreements and transactions under S. 23 of the Indian Contract Act, read with S. 6, Cl. (h) of the Transfer of Property Act.

65. He argued that, instead of supporting the conclusions of the learned Judge, the decision of the Division Bench of this Court in *Sabava Yellappa v. Yamanappa Sabu*, 35 Bom LR 345: (AIR 1933 Bom 209), lays down that a suit for the recovery of possession of property transferred under a sale deed, the consideration or object of which was immoral, i.e. past or future cohabitation, though void under S. 23 of the Indian Contract Act, and S. 6 (h) of the Transfer of Property Act, the principle of equity contained in the maxim 'in pari delicto potior est conditio possidentis' i.e. where each party is in fault law favours him who is actually in possession must apply.

66. Mr. Karmali submitted that in that case it was laid down, categorically relying on the decision in *Ayerst v. Jenkins* (1873) 16 Eq Cas 275, that the Court in such a case was prevented from aiding a person who was guilty of immoral conduct, to recover property on the ground of public policy. In other words, Mr. Karmali submitted that as the plaintiff in this case sought to succeed only on the basis of the proof of the immoral relations between the plaintiff and defendant No. 1 prior to and subsequent to the sale-deed, his suit should be dismissed applying the said maxim of 'in pari delicto potior est conditio possidentis.'

67. Mr. Kanade, the learned counsel appearing for the plaintiff, tried to repel these arguments relying on the decision of another Division Bench of this Court in *Istak Kamu Musalman v. Ranchod Zipru Bhate*, AIR 1947 Bom 198, where it was laid down that where, a transaction though completed is intended to be for consideration, it can be impeached if the consideration is immoral, and it makes no difference whether the transaction is executory or executed.

68. He relied upon the decision of the Calcutta High Court in *Pranballay Saha v. Sm. Tulsi-bala Dassi*, AIR 1958 Cal 713, where a distinction was made between the English and the Indian Law which made an agreement or transfer whose consideration or object was unlawful, void; and it was held that in a suit where the owner of a house lets out the property

to the defendant for the immoral purpose of running a brothel, the executors and trustees of the will of the owner, who were not in *pari delicto* or in *particeps criminis* can sue to eject the defendant on the basis that the transfer is void and the court will accord relief to the claimants.

69. Mr. Kanade also referred to the decision of the Supreme Court in *Firm Srinivas Ram Kumar v. Mahabir Prasad*, AIR 1951 SC 177, and submitted that although the plaintiff had originally pleaded that the sale-deed was liable to be set aside on account of undue influence practised by defendant No. 1, it was open to the plaintiff to rely upon the finding of the lower Court that the object of the agreement of sale or of the sale-deed was future immoral cohabitation between the plaintiff and defendant No. 1.

70. He also relied on the decision in *Dwaramoudi Nagaratnamb v. Kunuku Ramayya*, AIR 1968 SC 253 and contended that only in certain cases where past consideration was the motive and not the consideration for the transfer, transfers were held to be by way of gift which were valid, and where, as in the present case, the object or consideration was for future cohabitation, original title of transferor remained unaffected by a sale-deed tainted with such immorality.

71. A discussion of these rival contentions must begin with the leading English case on the point in *Ayerst v. Jenkins*, (1873) 16 Eq Cas 275. In that case Mr. William Hardinge, a widower of mature age, having agreed with Isabella Buckton, the sister of his deceased wife, to cohabit with her under colour of a fictitious marriage (both parties must be taken to have known that a real marriage was impossible, under the English law at that time and there is no suggestion of fraud, deceit or mistake, on either side), transferred on the 16th of September, 1861, into the names of trustees named Buckton and Downes, certain shares belonging to him in the Alliance Marine Assurance Company and the London Chartered Bank of Australia, upon trusts declared by a contemporaneous deed, to which the settlor, the trustees, and the lady, were parties.

72. These trusts were in effect for the immediate, absolute, and unconditional benefit of the lady, without any power of revocation; the income being secured to her for her separate use, in the event of any future coverture; and no provision

being made, in that or any other event, for children. Two days after the date of the deed Mr. Hardinge and his sister-in-law went through the form of a marriage ceremony; and they lived together till his death, which happened four months afterwards. The lady has ever since enjoyed the full benefit of these trusts; and in April, 1870, she married a Mr. Jenkins without any settlement, doubtless relying on the provision so made for her. The plaintiff in that case had become the legal personal representative of Mr. Hardinge in 1886; and in January, 1872, he filed this bill in that character seeking to set aside the deed, as founded on an illegal consideration, and therefore, void, and asking for a re-transfer, 'if necessary', of the shares from the surviving trustee, Mr. Downes.

73. The question before the Court of Equity was whether the plaintiff was entitled to the relief, Lord Selborne, L. Ch. considered the older authorities and summarised at page 282 as follows:—

"Their results may be thus stated: 1. Bonds or covenants founded on past cohabitation, whether adulterous, incestuous, or simply immoral, are valid in law, and not liable (unless there are other elements in the case) to be set aside in equity. 2. Such bonds or covenants, if given in consideration of future cohabitation, are void in law, and therefore, of course, also void in equity. 3. Relief cannot be given against any such bonds or covenants in equity if the illegal consideration appears on the face of the instrument. 4. If an illegal consideration does not appear on the face of the instrument, the objection of *particeps criminis* will not prevail against a bill of discovery in equity in aid of the defence to an action at law. 5. Under some (but not under all) circumstances, when the consideration is unlawful, and does not appear on the face of the instrument, relief may be given to a *particeps criminis* in equity."

74. So far as the said case before him was concerned, the plaintiff was refused relief on equitable grounds observing as follows at page 283:

"In the present case relief is sought by the representative, not merely of a *particeps criminis*, but of a voluntary and sole donor, on the naked ground of the illegality of his 'intention and purposes; and that, not against a bond or covenant or other obligation resting in fieri, but against a completed transfer of

specific chattels, by which the legal estate in those chattels was absolutely vested in trustees, ten years before the bill was filed, for the sole benefit of the defendant. I know no doctrine of public policy which requires or authorises, a Court of Equity to give assistance to such a plaintiff under such circumstances. When the immediate and direct effect of an estoppel in equity against relief to a particular plaintiff might be to effectuate an unlawful object, or to defeat a legal prohibition, or to protect a fraud, such an estoppel may well be regarded as against public policy. But the voluntary gift of part of his own property by one *particeps criminis* to another, is in itself neither fraudulent nor prohibited by law; and the present is not the case of a man repenting of an immoral purpose before it is too late, and seeking to recall, while the object is yet unaccomplished, a gift intended as a bribe to inequity. If public policy is opposed (as it is) to vice and immorality, it is no less true, as was said by Lord Truro in *Benyon v. Nettlefold* in (1850) 3 Mac & G 94 (102) that the law, in sanctioning the defence of '*particeps criminis*', does so 'on the grounds of public policy, namely, that those who violate the law must not apply to the law for protection'. It is a maxim of law not opposed to any equity, that '*in pari delicto melior est conditio possidentis*'; and it is a principle of equity, that long delay in seeking to rescind a transaction originally voidable, on the faith of which other persons have irrevocably made their arrangements in life, may operate as a bar to relief."

Further an argument that even in respect of a completed transfer of property, where transfer was void, the property was to be retransferred, was rejected in that case after a full discussion of the cases cited in support of that proposition.

75. The law in England is succinctly stated in Halsbury's Laws of England, Fourth Edition, Volume 9, at page 300 as follows in paragraph 433:

"433. Introduction. One party to an illegal contract may have transferred property or paid money to the other in pursuance of the contract. The question then arises whether the money or property may be recovered. Generally, the position is governed by the maxim *in pari delicto potior est conditio defendentis*, so that where the parties are on an equal footing as regards the illegal contract neither can recover any property

or money transferred to the other in pursuance of the contract."

Again in paragraph on p. 301, it is stated:

"434. Transfer of ownership of goods or land. It now appears to be settled that where property has been transferred absolutely under an illegal contract such transfer is effective to pass title in the property to the transferee....."

2. The conclusion from these cases seems to be that, in relation to transfers of property, an illegal contract is not void, but merely unenforceable, for none of these cases could have been decided in the same way simply by reference to the maxim *in pari delicto potior est conditio defendentis*.....

3. Some cases assert a general principle that a party to an illegal contract may recover property which has been transferred under an illegal contract if he does not rely upon the illegal transaction; but this view is to some extent inconsistent with the doctrine that an illegal contract is not necessarily void and it is doubtful how far it is generally applicable. It may be that the principle is relevant only where the contract remains executory on the part of the transferee and the transferor seeks to rescind."

76. Again in Anson's Law of Contract, Twenty-third Edition, (1969), at page 329, the English law is stated as follows:—

"Although it has sometimes been said that contracts *contra bonos mores* are void, the only aspect of immorality with which Courts of Law have actually dealt is sexual immorality; and the law on this subject may be shortly stated.

A promise made in consideration of future illicit cohabitation is given upon an immoral consideration, and is unlawful whether made by parol or under seal. But a promise made in consideration of past illicit cohabitation is not made on an illegal consideration, but is a mere gratuitous promise, binding if made under seal, unenforceable if by parol."

77. In P. S. Atiyah's Law of Contract, at page 219, we find the following observations:—

"It must not be thought that illegality in the law of contract is coterminous with illegality in the criminal law, for a contract may be illegal without involving any breach of the criminal law at all. The most obvious illustration of this possibility is a contract involving sexual immorality. For instance, although

prostitution is not, as such, criminal, a prostitute cannot sue her clients in a Court of Law for remuneration for her professional services. Nor, indeed, can she be sued by a person who has supplied her with goods or premises which he knows are to be used by her for her professional purposes. In fact if he takes an inflated price, for example, by way of rent, he may even be prosecuted for living on the earnings of a prostitute.

Few people would quarrel with the law thus far. But changes in the moral values of our society make some older decisions look very unreasonable today. For example, in one case in 1911 it was held that a landlord who let a flat to a woman whom he knew to be the mistress of a certain man, from whom it was expected that the money for the rent would be forthcoming, could not sue the woman for the rent. The policy behind this decision seems highly questionable. Equally questionable seems the decisions holding that a promise by a married man to marry a woman after the death or divorce of his first wife was illegal because it might 'tend' to induce immoral relations between the parties. It seems too obvious for words that such a promise must be the result, and not the cause of the break down of a marriage. Since 1 January 1971 actions for breach of promise of marriage have anyhow been abolished; but the case law in this field is still of interest for the light it throws on the whole approach of the courts to questions of illegality. In this particular situation the use of the law of contract even as a deterrent was not likely to be of much value because it seems unlikely that the law was sufficiently well known to deter anyone. The rule might have had some social value if it discouraged third parties from acting in such a way as to lead to the breakdown of a marriage, but it seems very doubtful that it can have had any such effect.

In a more modern decision in 1937, the House of Lords showed a much greater appreciation of the problem by holding that a promise by a married man to remarry was not illegal or invalid, if given after a decree nisi had been obtained from or by his first wife. The argument that such a promise might tend to cause immoral relations between the parties was scouted by a majority of their Lordships, who pointed out that "to attack a contract" because of its evil tendencies was to get on very treacher-

ous ground. Tendencies of this kind rest on speculation rather than proof, and there are few contracts which do not provide motives or temptations for improper or illegal actions. As Lord Atkin said in this case, 'the doctrine (of public policy) should only be invoked in clear cases in which the harm to the public is substantially incontestable, and does not depend on the idiosyncratic inferences of a few judicial minds..... The contract should be given the benefit of the doubt'. This being the position in English law, we now turn to the Indian Law on the point.

78. There is no doubt that under Section 23 of the Indian Contract Act, every agreement of which the object or consideration is unlawful is void, and an agreement, consideration or object of which is immoral can be regarded by the Court as immoral and unlawful or opposed to public policy.

79. What applies to an agreement is also applied by S. 6 (h) of the Transfer of Property Act, to every transfer which includes the sale; and therefore, if the sale-deed is for an unlawful object or consideration within the meaning of S. 23 of the Indian Contract Act, 1872, the sale would be void.

80. The effect of these sections on transfers tainted by sexual immorality was considered by Patkar and Barlee JJ. in *Sabava Vellappa v. Yamanappa Sabu*, 35 Bom LR 345: (AIR 1933 Bom 209). That was the case where the plaintiff sued to recover possession of certain lands conveyed to defendant No. 1 by Sabu, the adoptive father of the plaintiff under a sale-deed dated September 21, 1903, and the other lands in suit conveyed by Sabu and his wife, defendant No. 6, the widow of Sabu who died in September 1917, by a gift-deed dated June 26, 1917. Out of the lands which were given in gift, one land was alienated by defendant No. 1 to defendant No. 5, her Mukhtyar, in 1918, who in his turn sold it to defendant No. 2 in May 1921. Another land was sold by defendant No. 1 to defendants Nos. 3 and 4 in Sept. 1918.

81. The case of the plaintiff was that the sale transaction of 1903 was illegal and void, because defendant No. 1 was the mistress of Sabu, and though the ostensible consideration was cash, the real consideration was illegal, that is, past and future cohabitation. As regards the deed of gift, it was alleged by the plaintiff that defendant No. 1 was in a

position to dominate the will of Sabu and that it was for the same unlawful object and consideration. The trial Court held that the sale-deed was passed not for cash as stated in the deed, but for past and future cohabitation, but held that the suit in respect of the property comprised in the sale-deed was barred by limitation as defendant No. 1 was in adverse possession for more than twelve years.

82. With regard to the deed of gift the learned Judges came to the conclusion that it was for past and future cohabitation and the deed of gift was void and the suit was within time; and, therefore, awarded the plaintiff possession of the lands comprised in the deed of gift, and ordered him to pay compensation to defendants Nos. 2, 3 and 4 for the improvements made by them in survey Nos. 181 and 336 comprised in the deed of gift.

83. This Court in the First Appeal from that judgment dismissed the appeal. With regard to the sale-deed, the learned Judges came to the conclusion that the ratio in *Ayerst v. Jenkins* (1873-16 Eq Cas 275) (supra) applied, observing as follows:—

"In the case of the sale-deed in the present case, which was for past and future cohabitation, Sabu could not have maintained a suit to recover back the property, as after the date of the sale-deed, there was illicit connection between Sabu and defendant No. 1 and the immoral object having been carried out, he would have been prevented from recovering back the property, and according to the decision in the case of *Ayerst v. Jenkins* his legal representatives would also be barred. It is somewhat difficult to hold that the plaintiff, the adopted son, is in *pari delicto* with defendant No. 1, the mistress of Sabu."

84. But this Court, as stated above, expressed a difficulty to hold that the plaintiff, the adopted son, was in *pari delicto* with defendant No. 1, the mistress of Sabu. The decision also rested on the finding that the sale-deed had become unimpeachable because of adverse possession.

85. So far as the gifts were concerned, this Court agreed with the view of the learned trial Judge. According to Patkar J. the plaintiff could have maintained a suit to recover property. Patkar J. gave the following reasons for his

conclusions at page 355 (of Bom LR) : (at pp. 214, 215 of AIR):

"Past cohabitation would be consideration for an agreement under S. 2 (d) of the Indian Contract Act but is not good consideration for a transfer of property. A gift does not require consideration. It is difficult to hold that past cohabitation can be an object of a gift. Future cohabitation can be considered to be an object of gift. So far as the object as regards the maintenance of future immoral relations was concerned, I think in the present case Sabu did not carry out the immoral object as "he was incapable of carrying it out owing to his illness and died soon afterwards. Sabu, therefore, could have maintained a suit to recover the properties comprised in the deed of gift. The deed of gift was invalid under S. 6 (h) of the Transfer of Property Act, and the principle of equity enunciated in the decision in the case of *Ayerst v. Jenkins* (1873-16 Eq Cas 275) would not have come in his way as the immoral object was not carried out. He could, therefore, have maintained a suit for recovery of the properties comprised in the deed of gift. If this view is correct, the plaintiff, as his adopted son, is entitled to recover the properties."

86. According to Barlee J., however, the parties were not contemplating future illicit intercourse when the gifts were made. Since Sabu was old or elderly and was ill, and Sabava was forty-seven years of age, the learned Judge observed:—

"I think they were making arrangements for the time when she would be left alone. That was not an unlawful object. I am, therefore, compelled to examine the evidence with a view to determine whether, as alleged by the plaintiff, past intercourse was the consideration of the agreement or merely the motive."

Then he considered the facts of the case and on the basis of the evidence he came to the conclusion that Sabu gave her a promise of the land, because she was his mistress and this promise being unenforceable conveyance in discharge of that agreement was void.

87. It may be noted that in that case despite the differences of opinion, the decision was based on the adverse possession by defendant No. 1 Sabava for more than 12 years of five properties comprised in the sale-deed. With respect, the discussion about *Ayerst v. Jenkins*

(1873-16 Eq Cas 275) is also inconclusive because after the doubt expressed in *Sidlingappa v. Hiras*, (1907) 9 Bom LR 542, the Court applied to the doctrine of *in pari delicto* for its alternative finding denying assistance to the plaintiff in respect of the five properties.

88. Mr. Karmali strongly relied on *Sabava v. Yamanappa* (AIR 1933 Bom 209) and contended that the facts of the present case are similar to the facts in that case, and the doctrine of *in pari delicto*, must apply. In *Istak Kamu Musalman v. Ranchod Zipru*, 48 Bom LR 775 : (AIR 1947 Bom 198) the heirs of the transferor had challenged the transfer as tainted by immorality, and therefore, void. With respect, after summarising the Indian and English law on the point, and pointing out that the ratio in *Ayerst's* case (1873-16 Eq Cas 275) will apply to a transfer void under S. 6 (h) of the Transfer of Property Act and also pointing out that the decision in *Sabava v. Yamanappa* (supra), *Divatia and Lokur JJ.* found that it was not necessary in that case to consider the contention that the Court of equity would not help the transferor to recover the property transferred on the ground that the transfer was void.

89. There again the judgment was based on adverse possession for more than twelve years in respect of certain transfers. Nevertheless, Mr. Kanade relied strongly on the judgment and contended that the decision helps him to argue that the principle laid down in *Ayerst v. Jenkins* (1873-16 Eq Cas 275), (supra) could not apply to avoid the agreement. They are transfers like the one in the present case for future cohabitation.

90. Mr. Kanade also strongly relied on the decision of P. B. Mukherji and R. S. Bachawat JJ. in *Pranballab Saha v. Sm. Tulsibala Dassi* (AIR 1958 Cal 713) (supra) where the learned Judges have delivered separate judgments discussing at length the English and the Indian Law and arrived at the conclusion that the executors and trustees in that case could maintain a suit for the recovery of possession of property let out by the testator for prostitution.

91. Bachawat J., as he then was, has discussed in detail all the relevant case law, the Specific Relief Act, and the Indian Trusts Act, holding that it was in the interest of justice or public interest and public welfare the premises should

cease to be a brothel; and the maxim *salus populi est suprema lex* should prevail over all other maxims of law. It is only necessary to refer to the 12 propositions of law which he has, with respect, very precisely stated in paragraph 114 of his judgment on pages 729 and 730, and in particular the (12th) proposition which is as follows:

"In general a plaintiff claiming title through a particeps criminis is denied relief if his case is such that the particeps criminis would not have got relief had he come to the Court as plaintiff with the same case."

92. Mr. Kanade, relied on the decision of P. B. Mukherji and Bachawat JJ. for the proposition that where the transaction is void, *Ayerst's case* (1873-16 Eq Cas 275) has no application. As already stated above, the question there was whether the executors and trustees were entitled to the relief and they appear to have dissented from the view taken in *Sabava's case* (AIR 1933 Bom 209) which, however, is binding on us.

93. Unfortunately, the attention of the Court was not drawn to the relevant provisions of the Specific Relief Act and the Indian Trusts Act in *Sabava's case* (AIR 1933 Bom 209) and *Istak Kamu's case* (AIR 1947 Bom 198). The real position appears to be that when a suit is filed, either for rescinding of a contract on the ground that it is void or cancellation of an instrument or for a declaration that the transfer is void, the Court should be guided in this country now by the provisions of the Chapters IV to VI of the Specific Relief Act, 1963.

94. Section 27 of that Act, lays down that any person interested in a contract may sue to have it rescinded, and such rescission may be adjudged by the court where the contract is unlawful for causes not apparent on its face and the defendant is more to blame than the plaintiff. It is patent that this provision is more or less statutory recognition of the well known equitable doctrine of *in pari delicto*. This is further reinforced by what is contained in sub-s. (2) of S. 27, which lays down that notwithstanding anything contained in sub-s. (1), the Court may refuse to rescind the contract— (a) where the plaintiff has expressly or impliedly ratified the contract; or (b) where, owing to the change of circumstances which has taken place since the making of the contract (not being due to any act of the defendant him-

self), the parties cannot be substantially restored to the position in which they stood when the contract was made; or (c) where third parties have, during the subsistence of the contract acquired rights in good faith without notice and for value; or (d) where only a part of the contract is sought to be rescinded and such part is not severable from the rest of the contract. Section 28 lays down that equities should be done by the Court between the parties where a decree for specific performance is to be set aside.

95. In our opinion, the present suit is governed by S. 31 as the plaintiff seeks to set aside the registered sale-deed. That section again lays down that that any person against whom a written instrument is void or voidable, and who has reasonable apprehension that such instrument, if left outstanding may cause him serious injury, may sue to have it adjudged void or voidable; and the court may, in its discretion, so adjudge it and order it to be delivered up and cancelled. It is not as if in every case where the agreement is void, the Court is bound to set it aside. It gives a discretion to the Court. That discretion of the Court is not arbitrary but sound and reasonable, guided by judicial principles and capable of correction by a Court of appeal. It is in the exercise of the discretion that the Court may be asked to apply the well-known equitable doctrine of '*in pari delicto*'.

96. Further S. 34, which is also a section applicable to the present case as declarations are sought again, in terms, lays down that the Court has a discretion in making the declaration. The Court must also bear in mind the principle laid down in S. 84 of the Indian Trusts Act, 1882, which runs as follows:—

"84. Where the owner of property transfers it to another for an illegal purpose and such purpose is not carried into execution, or the transferor is not as guilty as the transferee, or the effect of permitting the transferee to retain the property might be to defeat the provisions of any law, the transferee must hold the property for the benefit of the transferor."

This again is a statutory recognition of the principle in the maxim '*in pari delicto*'.

97. Apart from these statutory provisions, for more than two hundred years in this country the English equitable principles have been followed in cases like the present one. The plaintiff is

denied assistance of the Court on the ground that the Court would not assist the plaintiff to benefit from his own immorality or fraud or illegality, either on the basis of the maxim 'he who seeks equity must do equity' or 'he who comes into equity must come with clean hands; or on the basis of such doctrines like: (1) Courts do not aid a party to an illegal undertaking; or (2) that the law does not permit a party deliberately to put his property out of his control for an immoral purpose and then seek intervention of the Court to regain the same after the immoral purpose is executed or accomplished; or (3) where both parties are equally guilty law leaves the parties where it finds them and keeps itself comfortably aloof from the obligation to determine the rights as between the guilty parties; or (4) that a party who claims an equitable relief must come into court with clean hands; or (5) that the party could not be allowed to blow hot and cold; or (6) to let the mischief lie where it exists. Sometimes reference is also made to the legal maxim such as:— (1) *Ex dolo malo non oritur actio*; (2) *Ex turpis causa potior est conditio defendantis*; (3) *Nullus commodum capere potest de injuria sua propria*; and (4) *Allegans contraria non est audiendus*.

98. Shell's Principles of Equity, 26th Edition, page 34, when discussing the maxim "He who seeks equity must do equity," observed:

"To obtain equitable relief the plaintiff must be prepared to do 'equity', in its popular sense of what is right and fair to the defendant. This is a rule of 'unquestionable justice' which, however, decides nothing in itself; for you must first inquire what are the equities which the defendant must do, and what the plaintiff ought to have."

Again when discussing the maxim "he who comes into equity must come with clean hands" Shell states:

"This maxim, which seems not unrelated to the *ex turpi causa non oritur actio* of the common law, is very similar to the previous one; but it differs from it in looking to the past rather than the future. The plaintiff not only must be prepared now to do what is right and fair, but also must show that his past record in the transaction is clean; for 'he who has committed inequity.....shall not have Equity'."

At the same time, a caution is given at page 36 as follows:

"Maxim must not be taken too widely; Equity does not demand that its suitors shall have led blameless lives. What bars the claim is not a general depravity but one which has an immediate and necessary relation to the equity sued for."

99. We are, therefore, of the view that when transfers are tainted by immorality, the Court has a discretion which must be exercised judiciously, having regard to all the facts and circumstances of the case, to decide whether the plaintiff is entitled to the relief by way of restitution of the proper transfer, even though such transfers may be void on the ground that its object or consideration is immoral or opposed to public policy. The Court should not readily infer the object as future illicit cohabitation easily alleged by one party and denied by the other without any regard for truth as in the present case.

100. The position appears to have been considered and affirmed in several decisions of this Court. In *Ningaraddi v. Lakshmawa*, (1901) 3 Bom LR 647, where in joint Hindu family, the father alienates any portion of the family property by way of maintenance for his concubine in consideration of past cohabitation the liability which he legally incurs by virtue of such alienation does not create a debt which his son is bound to pay. Chandavarkar J. observed at p. 652 as follows:

"The debt, from that point of view, has its origin in an immoral purpose. But even if it is a debt contracted in the fulfilment of a moral obligation, and that as such not immoral, it is, at any rate, a debt in the nature of compensation made to the woman by way of maintenance for the injury done to her by the past illicit cohabitation. That is the real nature of the liability, according to *Gibson v. Dickie*, (1815) 3 M & S 463. If, then, it is a compensation for injury done to the woman, it is a debt which sounding in damages is in the nature of a fine or penalty, which according to the texts bearing on the subject, a Hindu son is not bound to pay."

101. In spite of this, however, he too agreed, having regard to the finding of the District Court that after the execution of the deed the defendant continued to be in the keeping of the plaintiff's father until his death and that as the connection then became permanent, it must be held that the defendant became entitled to maintenance after the

death of the plaintiff's father and she cannot be deprived of the property in dispute unless provision is made for her maintenance by the plaintiff.

102. Sir Lawrence Jenkins, C. J. in *Shidlingappa Ganeshappa v. Hirasa Tukasa*, (1907) 9 Bom LR 542, dealing with a suit brought by the plaintiff to recover possession of a house and land on the ground of his title and he and the defendant defrauding the creditors by the transactions in suit observed as follows on page 546:—

"It is well settled that when a fraud of this class has been carried into effect, a party to it cannot, as plaintiff, plead the fraud to vitiate the transaction."

At page 547, it is observed as follows:—

"Though we have dealt with the case as if both parties to this litigation had been equally culpable, it is to be noticed that it was the plaintiff's father and not the plaintiff, who joined the defendant in the fraud, and it is a question whether it can be said that the plaintiff and the defendant are in *pari delicto*."

He even went to the extent of holding that the defendant also could not plead fraud.

103. This view of his was overruled by the Full Bench of this Court in *Guddappa Chikkappa Kurbar v. Balaji Ramji Dange*, 43 Bom LR 681: (AIR 1941 Bom 274) (FB). It was also a case of fraud by *benami* transaction. After remarking that Beaumont C. J. would never differ from any decision of Sir Lawrence Jenkins without very great diffidence Beaumont C. J. stated that, in his opinion, his (Jenkins C. J.) decision in that case cannot be supported, and reiterated the principle that the Court "must never allow itself to be used to assist in the perpetration of fraud."

104. The doctrine 'in *pari delicto*' is also affirmed in several decisions of the Supreme Court. In *Immani Appa Rao v. Gollapalli Ramalingamurthi*, (1962) 3 SCR 739: (AIR 1962 SC 370) the conveyance in suit was the result of a collusive plan between respondent No. 1 and respondent No. 2 to defraud the latter's creditors. The agreement was that respondent 1 was to act as the *benamidar* for respondent 2 and his sons, the appellants. The fraud succeeded and the creditors of respondent 2 were in fact defrauded. Thereafter respondent No. 1 brought the suit for declaration of title and recovery of possession against respondent No. 2 and

the appellants on the basis of the conveyance. The latter resisted the suit on the ground that the conveyance was fraudulent, unsupported by consideration and passed no title.

105. The High Court in second appeal held that the appellants and respondent No. 2 were estopped from pleading fraud in the suit and decreed the same. The question was whether the view taken by the High Court was correct and the ostensible owner was entitled to a decree. It was held by the Supreme Court that there could be no question of estoppel in a case where both the parties were guilty of fraud.

106. Gajendragadkar J. speaking for the Court observed at p. 748 (of Bom LR): (at p. 375 of AIR):

"Reported decisions bearing on this question show that consideration of this problem often gives rise to what may be described as a battle of legal maxims. The appellants emphasised that the doctrine which is pre-eminently applicable to the present case is *ex dolo malo non oritur actio* or *ex turpi causa non oritur actio*. In other words, they contended that the right of action cannot arise out of fraud or out of transgression of law; and according to them it is necessary in such a case that possession should rest where it lies in *pari delicto potior est conditio possidentis*; where each party is equally in fraud the law favours him who is actually in possession or where both parties are equally guilty the estate will lie where it falls. On the other hand, respondent 1 argues that the proper maxim to apply is *nemo allegans suam turpitudinem audiendus est*, whoever has first to plead *turpitudinem* should fail; that party fails who first has to allege fraud in which he participated. In other words, the principles invoked by respondent 1 is that a man cannot plead his own fraud. In deciding the question as to which maxim should govern the present case it is necessary to recall what Lord Wright, M. R. observed about these maxims in *Berg v. Sadler and Moore* (1937) 2 KB 158, 162. Referring to the maxim *ex turpi causa non oritur actio* Lord Wright observed that "this maxim, though veiled in the dignity of learned language, is a statement of a principle of great importance; but like most maxims it is much too vague and much too general to admit of application without a careful consideration of the circumstances and of the

various definite rules which have been laid down by the authorities". Therefore, in deciding the question raised in the present appeal, "it would be necessary for us to consider carefully the true scope and effect of the maxims pressed into service by the rival parties and to enquire which of the maxims would be relevant and applicable in the circumstances of the case. It is common-ground that the approach of the Court in determining the present dispute must be conditioned solely by considerations of public policy. Which principle would be more conducive to, and more consistent with, public interest, that is the crux of the matter. To put it differently having regard to the fact that both the parties before the Court are confederates in the fraud, which approach would be less injurious to public interest. Whichever approach is adopted one party would succeed and the other would fail, and so it is necessary to enquire as to which party's success would be less injurious to public interest."

The Court then considered the facts and circumstances of the case in the context of the provisions of S. 84 of the Indian Trusts Act and set aside the decision of the High Court on the ground that the High Court was in error in not giving effect to the finding recorded by the trial Court that the fraud mutually agreed upon and contemplated by respondents 1 and 2 had been effectively carried out; and that in the carrying out of the fraud both the parties were equally guilty.

107. The position in law is discussed in *Dwarampudi Nagaratnamba v. Kunuku Ramayya*, AIR 1968 SC 253. In that case by two registered sale-deeds, Venkatacharyulu who was the Karta of his joint family consisting of himself and his four sons, transferred some family property under two purported sale-deeds dated April 15, 1946 to his permanent concubine Dwarampudi Nagaratnamba. In 1947, there was a disruption of the joint family and a severance of the joint status between Venkatacharyulu and his sons. In 1954, his widow and sons instituted a suit against the appellant Dwarampudi Nagaratnamba for recovery of possession of the properties alleging that the documents dated April 15, 1946, were executed without consideration or for immoral purposes, and were void. The appellant also filed a suit for damages and mesne profits for wrongful trespass on the properties.

108. The matter went to the High Court of Andhra Pradesh. The High Court found that the transfer under Ex. A-1 and Ex. A-2 were not supported by any consideration by way of cash or delivery of jewels, though they were described as sale-deed. The High Court further held that the transfers were made by Venkatacharyulu in favour of the appellant in view of past illicit cohabitation with her, such past cohabitation was the motive and not the consideration for the transfers and the two deeds though ostensibly sale-deeds, were in reality gift-deeds. It held that Venkatacharyulu had no power to make a gift of the joint family properties, the two deeds were invalid and the subsequent severance of joint status in 1947 could not validate them.

109. Before the Supreme Court it was common case that future illicit cohabitation was not the object or the consideration for the transfer under Ex. A-1 and Ex. A-2. The appellant Dwarampudi contended that Venkatacharyulu agreed to make the transfer in consideration of past cohabitation having regard to S. 2 (d) of the Indian Contract Act, 1872 her past service was a valuable consideration and Venkatacharyulu was competent to alienate for value his undivided interest in the coparcenary properties. On behalf of the respondent it was contended that the transfers were by way of gifts and not in consideration of the past cohabitation and Venkatacharyulu was not competent to make a gift of the coparcenary properties. In the alternative, they contended that assuming that the transfers were made in consideration of past cohabitation, they were hit by S. 6 (h) of the Transfer of Property Act, 1882.

110. The Supreme Court held that the transfers were without consideration and were by way of gifts. The gifts were not hit by S. 6 (h) of the Transfer of Property Act, by reason of the fact that they were motivated by a desire to compensate the concubine for her past services.

111. Bachawat J. speaking for the Court observed (at p. 254):—

"In *Balo v. Parbati*, ILR (1940) All 371: (AIR 1940 All 385) the Court held that the assignment of mortgagee's rights to a woman in consideration of past cohabitation was not hit by S. 6 (h) of the Transfer of Property Act and was valid. Properly speaking, the past cohabitation

was the motive and not the consideration for the assignment. The assignment was without consideration by way of gift and as such was not hit by S. 6 (h). In *Istak Kamu v. Ranchhod Zipru*, ILR (1947) Bom 206 at p. 217 : (AIR 1947 Bom 198 at p. 202) the Court rightly held that past cohabitation was the motive for the gift under Exhibit 186, and the gift was valid but in holding that the promises to make the gifts under other exhibits were made in consideration of past illicit cohabitation and consequently those gifts were invalid, the Court seems to have too readily assumed that past cohabitation was the consideration for the subsequent promises."

"Venkatacharyulu was free to make a gift of his own property to his concubine. The gifts under Exs. A-1 and A-2 were not hit by S. 6 (h) of the Transfer of Property Act. But the properties gifted under Exs. A-1 and A-2 were coparcenary properties. Under the Madras School of Mitakshara law by which Venkatacharyulu was governed, he had no power to make a gift of even his undivided interest in the coparcenary properties to his concubine. The gifts were therefore, invalid."

112. The Supreme Court, therefore, refused to interfere with the decision of the High Court in the circumstances of the case, though it pointed out that past illicit cohabitation could be a motive for gift-deed which was called to be a sale-deed.

113. Mr. Kanade, the learned counsel for the plaintiff contended that the said decision of the Supreme Court supports his argument that where the sale-deed is invalid, the property sold is liable to be restored. However, the facts of that case are distinguishable, firstly, because the suit there was by the widow and sons and not by the transferor himself, and secondly, the property which was gifted was the coparcenary property, and that is not the case here. The case only illustrates how the doctrine in *pari delicto* though not specifically referred to in the judgment guides the Court when a transfer is tainted with immorality.

114. In view of these principles we have no hesitation in setting aside the decree passed by the lower Court as the plaintiff was as much responsible for the immorality which tainted the suit sale-deed as the defendant. As already stated his case of undue influence having been given up in the lower Court at the hear-

ing, was not and could not be pressed before us. In paragraph 8 of the plaint, it is alleged that the sale-deed was executed for unlawful and illegal object for future cohabitation, and as such it was against public policy and unsustainable in law, the consideration being immoral. There is nothing on the record except the interested and unreliable testimony of the plaintiff to show that the object of/or consideration for the agreement was future cohabitation. The case of the plaintiff himself in the witness-box was that he was having sexual relations with the defendant from 1959, i.e. for above five years prior to the agreement and the sale-deed.

115. It is his case that seen after the sale-deed, quarrels started between them though he had romantic interludes during which he posed with her before the camera like a couple in different costumes and at different places, including Jinna cap and Arab dress for the plaintiff. That by itself is not enough to show that the agreement and the sale-deed were executed for future cohabitation or that the object and consideration for the agreement and the sale-deed were future cohabitation.

116. It may be that future cohabitation was incidental and consequential to the intimate relations which were established between the plaintiff and the defendants which may be described as past love and affection on account of the memories of pleasures which they must have had between them since 1959 as stated by the plaintiff. On his own story, therefore, it is difficult to hold that the agreement and the sale-deed have as their object or consideration future cohabitation. Even assuming that what he says is true and they were executed for future cohabitation, he was as much a party to the immoral considerations and object as the defendant.

117. The Court will not promote immorality by enforcing or nullifying such immoral agreements, except under special circumstances where it would be unconscionable to refuse the relief for instance where inexperienced and sexually infatuated Romeos and Juliets in teenage or weak minds are involved. The Court is bound to hold the transfer for immoral purposes void, where the object or consideration is void on account of immorality. This Court will not, however, assist a person responsible for the immorality to get back what he or she has done in

practising and enjoying that immorality. If the Court acts otherwise, it will be heaping inequity on the immoralities indulged in by the parties for their pleasures and profits.

118. If a mature 40 year old, worldly wise, experienced married man with children, a Municipal Councillor and a local rich politician, like the plaintiff hires a woman whom he claimed to have treated as his mistress (whom he now calls a prostitute) by transferring his property as in the present case, enjoys her company for some years, as can be seen from his aforesaid admissions, the romantic letters, which the plaintiff himself has produced, as having been written to him, and the photographs produced by him; and thereafter quarrels with her and asks the Court for the recovery of the property, the only just and fair thing for the Court to tell him, ordinarily, would be. "Let the property lie where your sexual dalliance and immoral pleasures placed it. The Court will not assist you now to deprive further a fallen woman after you, perhaps with others like you, have robbed her of her youth, charms, all social virtues, her life, her light and her love. The Court will say: Let her enjoy in her old age darkness the fruits of her sins as you have enjoyed at least equally her sins."

119. This must be the practical result of the application of the doctrine 'in pari delicto, potior est conditio defendentis' to the facts of the present case. We, therefore hold in the exercise of the discretion which is vested in the Court, in all the facts and circumstances of the case, that the plaintiff is not entitled to any assistance to recover the property which he had conveyed to the defendants and hence the suit is liable to be dismissed.

120. However, having regard to the previous intimate relations which appeared to have existed between the parties for some years, before the suit and all other facts and circumstances of the case, the proper order regarding costs of this case will be to order both parties to bear their own costs throughout.

121. In the result, the appeal is allowed. The judgment and decree passed by the learned Civil Judge (Senior Division) Aurangabad, on April 24, 1968, are set aside; and the plaintiff's suit is dismissed.

122. Parties to bear their own costs throughout.

Appeal allowed.

AIR 1977 BOMBAY 240
(AT NAGPUR)

DESHPANDE AND GINWALA, JJ.

Kaniram Jagannath Lokhande and another, Petitioners v. The State of Maharashtra and others, Respondents.

Special Civil Appln. No. 287 of 1976, D/- 28-9-1976.

(A) Maharashtra Restoration of Lands to Scheduled Tribes Act (1974) (14 of 1975), Ss. 3 and 10 — Act is not incomplete or defective piece of legislation — Amount payable to non-tribal transferee under S. 3 (1) (ii) read with S. 3 (4) (b) is also covered by S. 3 (4) (g).

The Act is not an incomplete and defective piece of Legislation. It is not correct to contend that, though the restoration of land to the tribal is intended to be accompanied by refund of the purchase price and value of the improvements made, by him to the non-tribal, the Act not only does not provide any machinery for the enforcement of the recovery thereof, but on the contrary precludes even the Civil Court from doing it. (Para 3)

The amount made recoverable by collector as arrears of land revenue under S. 3 (4) (g) covers the amount payable under S. 3 (1) (i) read with sub-s. (4) (a) (c) (d) as well as under S. 3 (1) (ii) read with S. 3 (4) (b) of the Act. There is absolutely no warrant to restrict the connotation of the words "in lump sum" only to the dues made payable so expressly in lump sum and assume legislative intent not to include amounts payable so in lump sum impliedly. Thus by implication the amount payable under S. 3 (1) (ii) or S. 3 (4) (b) must be deemed to have been payable in lump sum and it must be deemed to have been covered under S. 3 (4) (g) of the Act. (Para 11)

The amount payable to the non-tribal-transferee under S. 3 (1) (ii) read with S. 3 (4) (b) is clearly covered by S. 3 (4) (g) of the Act without regard to whether the amount is refundable towards the consideration paid or towards value of improvements or encumbrances by such tribal-transferor to the non-tribal-trans-

feree, and question of considering the effect of S. 10 does not arise. (Para 12)

(B) Maharashtra Restoration of Lands to Scheduled Tribes Act (1974) (14 of 1975), Ss. 3 and 4 — Scope of the Act — Drastic power conferred on Collector — Duty of Collector to scrupulously follow the procedure.

The enactment confers drastic power on the Collector. Citizens are contemplated to be deprived of their right in, and possession of, the lands purchased by them bona fide by this summary procedure. The only safeguard against such drastic action lies in ensuring scrupulous adherence to the procedure required to be followed by the Collector so that the affected citizens get enough opportunity, to have their say in the matter and, defence properly adjudicated, before their title to the property is destroyed and they are finally deprived of the possession of the same. (Para 13)

A. P. Deshpande, for Petitioners; R. W. Adik, Advocate General, M. M. Qazi, Addl. Govt. Pleader and V. V. Naik, Hon. Asstt. to A.G.P., for Respondents Nos. 1 and 2.

DESHPANDE, J.:— The petitioners purchased the lands in dispute from respondent No. 3 for a sum of Rs. 1,800 on 17-4-1963. A few days before they filed an application in this Court under Articles 226 and 227 of Constitution on 5-1-1976, they received a notice from the Sub-Divisional Officer, Umrer calling upon them to appear before him on 28th of August 1975 to show cause why the lands Khasra Nos. 7 and 8 should not be restored to the tribal, respondent No. 3, under the provisions of the Maharashtra Restoration of Lands to Scheduled Tribes Act, 1974 (hereinafter referred to as 'the Act'). Subsequent to the service of the first notice, the Government of Maharashtra framed rules on 1st of November 1975 under the Act prescribing the forms in which the notices were to be served for initiating the proceedings for restoration of lands to the tribals. Another notice, therefore, was also served in form No. II requiring the petitioner to appear on 28th of December 1975. The petitioners challenge the validity of the Act as also the legality of these notices in this Special Civil Application.

2. Rule and interim stay was granted by this Court on 7th of January 1976 as in many other cases challenging the validity of the Act. After this rule was granted, the Act itself has now been included

in the Ninth Schedule under the 40th Constitution Amendment Act of 1976. The effect of the inclusion of this enactment in the Ninth Schedule is to immunise it from any attack on its validity by reference to any provision in Part III of the Constitution, including Arts. 14, 15, 19 and 31.

3. Mr. A. P. Deshpande, learned Advocate appearing for the petitioners, therefore, could not press his contention based on these constitutional provisions. He, however, raised two points for our consideration. He firstly contends that the Act is an incomplete and defective piece of legislation in that, though the restoration of land to the tribal is intended to be accompanied by refund of the purchase price and value of the improvements made, by him to the non-tribal, the Act not only does not provide any machinery for the enforcement of the recovery thereof but on the contrary precludes even the Civil Court from doing it. He secondly challenges the legality of the notices as being not in conformity with requirement of the Act.

4. Now, as indicated in the preamble itself, the Act is intended to restore the lands to the persons belonging to the Scheduled Tribes referred to in the Act as 'tribals' which were duly transferred by them to other persons. This Act has been enacted on the recommendations of a Committee appointed to find out how far the Maharashtra Land Revenue Code of 1966 (hereinafter referred to as 'the Code'), and the relevant Tenancy Laws have been effective in extending the intended protection to the tribals. Lands, sold by the tribals during the period from 1-4-1957, i.e. Tillers day, so notified under the Bombay Tenancy and Agricultural Lands Act of 1948 to 6-7-74 when Ordinance No. 13 of 1974 amending the Code was enforced to non-tribals alone are covered by the definition of 'transfer' which includes all transfers by act of parties including exchange made inter vivos, or made under the order or decree of the Court and also statutory sales but excludes transfers covered by S. 36 (1) and (3) of the Code. Section 3 of the Act deals with the restoration of lands transferred inter vivos by the act of the parties while S. 4 deals with statutory sales. Lands put to non-agricultural use before 6-7-1974 are excluded and restoration of the land is made conditional on tribal's undertaking to cultivate the land personally and refund of such amount to the non-tribal as

the Collector would determine under sub-s. (4) of S. 3. The relevant portion of S. 3 (1) authorises the Collector to restore the land free from encumbrances from the non-tribal to the tribal, notwithstanding any law or decree, etc. to the contrary, sold by the tribal to the non-tribal. It is as follows:

"3. (1) Where due to transfer—

(a) the land of a Tribal-transferor is held by a non-Tribal-transferee, or

.....

.....

.....

(ii) the land transferred otherwise than by exchange be taken from the possession of the non-Tribal-transferee, and restored to the Tribal-transferor, free from all encumbrances, and the Tribal-transferor shall pay such transferee and other persons claiming encumbrances the amount determined under Cl. (b) of sub-s. (4)."

5. It is unnecessary to dilate in details, as to how Collector includes some other officers under S. 2 (b) or on sub-s. (2) and (3) of this Section for disposal of the point raised.

6. Sub-section (4) of S. 3 deals with the determination of the amounts payable by the tribal or the non-tribal, for the value of improvements and encumbrances and consequential refund of consideration. This sub-s. (4) consist of Cls. (a) to (g). Clause (a) of sub-s. (4) authorises the Collector to determine the value of improvements made by the tribal or the non-tribal on the exchanged lands during the period of their occupation. Clause (d) enables the Collector to determine the amount of encumbrances created on the exchanged lands and Cls. (c) and (d) leave it to the discretion of the Collector to require such payments towards the value of improvements and encumbrances either in lump sum or in annual instalment of not exceeding 12, with 4½% interest thereon. In cases of other transfers by the tribal-transferor to the non-tribal transferee, the Collector has to determine the amount of the refundable consideration not exceeding 48 times of the Land Revenue, as also the value of improvements made on the land by the non-tribal during the period of his occupation of the land. The Cl. (b) deals with this power of the Collector. But Cl. (b) does not invest the Collector with any discretion to permit payment in instalments, as under Cls. (c) and (d) for the amount determined under S. 3 (4) (a) and (d). Implicit in this absence of any such discretion is the liability to pay

in lump sum. Clause (e) deals with the apportionment of the encumbrances between the transferee and other charge holders while Cl. (f) deals with suspension of rent, with which we are not concerned in this case. Then follows Cl. (g) on the language of which the contention of Mr. Deshpande is founded.

7. Clause (g) is to the following effect:

"If the Tribal-transferor or as the case may be, non-tribal-transferee fails to pay the amount in lump sum or remains in arrears of two or more instalments, the amount so remaining unpaid (with interest thereon at 4½ per cent. per annum) shall be recoverable by the Collector as an arrear of land revenue. The amount so recovered shall be paid by the Collector to the non-tribal-transferee and persons claiming encumbrances, if any, or as the case may be, the tribal-transferor."

8. Mr. Deshpande contends that under S. 3 (4) (g) only the value of improvements made and the value of encumbrances created on the exchanged land during the period when the tribal or non-tribal-transferee happens to be in possession, is made recoverable as arrears of land revenue by the Collector. This Cl. (g) of sub-s. (4), contends Mr. Deshpande, does not cover the liability of the payment created by S. 3 (1) (ii) and determinable by the Collector under sub-s. (4) (b). This contention, no doubt, is rendered attractively plausible because of the preceding expressions "fails to pay the amount in lump sum" or "remains in arrears of two or more instalments" before the enforceability portion in the above Cl. (g), making it appear as if the amount made expressly so payable under Cls. (c) and (d) alone is enforceable as arrear of land revenue under the clause.

9. The learned Advocate General appearing for the State on the other hand contends that every amount made payable under the Act, as under any other enactment, is ordinarily payable in lump sum unless it is expressly made payable in instalments. The expression "fails to pay the amount in lump sum" covers every amount so payable without regard whether it is made expressly payable in lump sum or is payable in lump sum impliedly. He also further contends that, even if such amount is found not to be recoverable under S. 3 (4) (g), that itself will be the good reason why S. 10 of the

Act ousting the jurisdiction of the Civil Court should not be attracted.

10. It is true that the phraseology quoted above from CL. (g) only occurs in Cls. (c) and (d) of sub-s. (4) and is not to be found either in CL. (b) of sub-s. (4) or S. 3 (1) (ii) of the Act which gives rise to the liability of the tribal-transferor to pay. In other words, S. 3 (4) (g) gives an impression as though what can be recovered as arrears of land revenue by the Collector under this Clause is the amount determinable under S. 3 (4) (a) and made expressly payable in lump sum under Cls. (c) and (d) alone and not the one made payable under CL. (b) of sub-s. (4). This contention, however, assumes that no amount becomes payable in lump sum unless the law expressly says so. Any such contention, in our opinion, is wholly misconceived. Close examination of sub-cl. (c) and (d) of sub-s. (4) of S. 3 would show that use of the expression 'lump sum' was necessitated by the contemplated concession of instalments to be extended in the discretion of the Collector, for payment of value of improvements and encumbrances in regard to the exchanged lands. The Legislature in its wisdom has thought it necessary to treat the dues under exchange transactions on different footing from the dues arising out of other transfers. Discretion vested in the Collector to permit payment in instalment in contradistinction of payment in lump sum, could hardly have been emphasized otherwise. The use of expression 'in lump sum' would have been otherwise wholly unnecessary. The sub-cl. (g) had to import the phraseology of the cls. (c) and (d) by way of abundant precaution to ensure the recoverability as arrear of land revenue of such dues also.

11. The liability to pay, whether under exchange or other transfer, is the creature of Ss. 3 (1) (i) and 3 (1) (ii). Clauses (a) and (b) of sub-s. (4) deal with the mode of determination of such dues. Clauses (c) and (d) of sub-s. (4) deal with the mode of payment of the dues determinable under CL. (a) of sub-s. (4). It is the liability that is created under S. 3 (1) (i), (ii) and determined under Cls. (a) and (b) of sub-s. (4) against tribal-transferor and non-tribal transferee, that is made enforceable under CL. (g). Mere absence of the words 'in lump sum' in S. 3 (1) (ii) or 3 (4) (b) cannot make the payment in any manner but in lump sum. There is nothing to in-

dicade that CL. (g) is restricted to the dues shown to be payable under CL. (a) read with Cls. (c) and (d) of S. 3 (4) only which only determines the mode of discharging liability created under S. 3 (1) and determined under S. 3 (4). In the absence of any indication of concession of payment by instalment payment in lump sum is implicit in the very scheme of these two provisions. The amount made recoverable by Collector as arrear of land revenue under S. 3 (4) (g) thus covers the amount payable under S. 3 (1) (i) read with sub-s. (4) (a) (c) (d) as well as under S. 3 (1) (ii) read with S. 3 (4) (b) of the Act. There is absolutely no warrant to restrict the connotation of the words 'in lump sum' only to the dues made payable so expressly in lump sum and assume legislative intent not to include amounts payable so in lump sum impliedly. Thus by implication the amount payable under S. 3 (1) (ii) or Section 3 (4) (b) must be deemed to have been payable in lump sum and it must be deemed to have been covered under S. 3 (4) (g) of the Act.

12. There is not much substance in the contention of Mr. Deshpande that S. 10 of the Act ousts the Civil Court's jurisdiction for enforcement of the recovery of such amount even when recovery thereof is not covered by S. 3 (4) (g). In the event of the amount payable under S. 3 (1) (ii) read with S. 3 (4) (b) being excluded from the purview of Section 3 (4) (g), there would be no reason why the bar of jurisdiction of the Civil Court created under S. 10 of the Act should operate. What is excluded from the jurisdiction of the Civil Court under S. 10 is only that which is required to be settled, decided or dealt with under the provisions of this Act. If the amount due under S. 3 (1) (ii) read with S. 3 (4) (b) is excluded from the purview of S. 3 (4) (g), the amount cannot be said to have been liable to be settled, decided or dealt with under any of the provisions of the Act and the exclusion contemplated under S. 10 of the Act cannot cover such contingency. We are, however, firmly of the opinion, that the amount payable to the non-tribal-transferee under S. 3 (1) (ii) read with S. 3 (4) (b) is clearly covered by S. 3 (4) (g) of the Act without regard to whether the amount is refundable towards the consideration paid or towards the value of improvements or encumbrances by such tribal-transferor to the non-tribal-transferee, and question of considering the effect of S. 10 does not arise.

The first contention of Mr. Deshpande is liable to be rejected.

13. The second contention of Mr. Deshpande is not without some force. The enactment confers drastic power on the Collector. Citizens are contemplated to be deprived of their right in, and possession of, the lands purchased by them bona fide by this summary procedure. The only safeguard against such drastic action lies in ensuring scrupulous adherence to the procedure required to be followed by the Collector so that the affected citizens get enough opportunity, to have their say in the matter and, defence properly adjudicated, before their title to the property is destroyed and they are finally deprived of the possession of the same. The first notice appears to have been issued long before the Rules were framed in this behalf. The notice speaks of the petitioner having 'violated the provisions of Restoration of Lands to Scheduled Tribes Act of 1974', without indicating in which manner the provisions have been so violated. Even the name of the enactment under which the proceedings were initiated is not correctly given in the notice. Though the section speaks of the day of appearance being required to be mentioned in the notice, the notice does not so mention it. The second notice betrays the total lack of application of mind by the officer who has issued the same. The officer has not taken care even to strike off the passages which were irrelevant. The notice does not indicate the time at which the petitioner was required to appear in his Court. It is true that the addressee could have with a little more enquiry found out from the office as to what precisely was intended in the said notice and what the officer was intending to do against him. But then when the enactment itself requires some notice to be issued in the prescribed form and intimation of certain facts to be given to the addressee in advance by way of safeguard against the danger implicit in such summary procedure, there is no reason why the same should not have been complied with and scrupulously followed by the officers who are charged with the duty of enforcing the same. We were informed at the Bar that in all these cases very little time is given to the notices and requests for adjournment are not entertained with any favour. This may be in an anxiety to give effect to the enactment to promote the cause of those for whose benefit the legislature has enacted the law. But then

the responsibility of those who are charged with administering the law in regard to scrupulously following the legislative dictates, is all the more greater, so that the aggrieved parties' grievances do not remain unheard. It is impossible to proceed on the hypothesis that what is assured by the officer or alleged by the tribal is all true and there could be no defences and no serious enquiry is required in such cases. Any such approach would make mockery of the intended 'summary enquiry'. It is, however, not necessary for the purpose of this case to consider the nature of irregularities and if these in fact vitiate the proceedings or not. Proceedings in either case shall have to be revived. In view of the same having been stayed issuing of fresh notices is indispensable.

14. We accordingly quash the two notices and make the rule absolute. It will be open for the officer concerned to initiate the proceedings afresh after serving the notice in accordance with the Act and the rules. Rule is made absolute. There will be no order as to costs.

Rule made absolute.

AIR 1977 BOMBAY 244

(AT NAGPUR)

DHARMADHIKARI AND GINWALA, JJ.

The Municipal Council, Malkapur and another, Petitioners v. The State of Maharashtra and another, Respondents.

Special Civil Appns. Nos. 610 of 1972 and 1691 of 1973, D/- 9/10-9-1976.

(A) Maharashtra Municipalities Act (1965), S. 313 — Action of appointment of administrator — Observance of principles of natural justice — Necessity of.

Section 313 contemplates passing of a speaking order by the State Government. From the bare reading of these provisions it is further clear that an opinion cannot be formed by the State Government unless there is material before it. Reasons for making an order cannot be recorded in the order itself unless those reasons exist. Further the section contemplates publication of the order in the official Gazette. Unless these formalities are followed, the order passed under S. 313 cannot be said to be valid and a legal order nor it can come into operation. Administrator can be appointed only by an order which is published in the Official

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Gazette. This in itself is one of the ingredients of the principles of natural justice. (Para 3)

Having regard to the scheme of S. 313 and the consequences of the action which are drastic even if there is no express provision in S. 313 that an opportunity should be given to the Municipal Council to show cause against the proposed action, the principles of natural justice require that a reasonable opportunity should be given to the council to explain the charges and to put forward its case before an action is taken against it under S. 313. (Para 5)

Though from the prima facie reading of the section it does appear that it contemplates an administrative action, in so far as the actual order of appointment of Administrator is concerned, it is quite obvious that the said order must be founded on a judicial appraisal of the facts and circumstances on the basis of which Government comes to the conclusion that a given Municipal Council is incompetent to perform or has persistently made defaults in performance of duties imposed on it by law etc. The section casts a duty on the State Government to act in accordance with the principles of natural justice while coming to an objective finding on the basis of relevant material placed before it. Therefore, in any case the action which could be taken by the State Government in pursuance of the power conferred under Section 313 is quasi-judicial in character, which requires observance of the rules of natural justice. Case law discussed.

(Para 5)

The principles of natural justice require that if any additional material or charge is intended to be used against the Municipal Council, they should be given a reasonable opportunity to submit their explanation or to put forward their case in reply to the same. (Para 12)

(B) Constitution of India, Art. 166 — Mah. Govt. Rules of Business framed under, R. 14 — Observance of Rules — Duty of the Secretary of the concerned Dept.

Rule 14 of the Rules makes the Secretary of the department concerned responsible for the careful observance of the rules and when he considers that there has been any material departure from them, it is his duty to personally bring the matter to the notice of the minister-in-charge and the Chief Secretary. (Para 6)

(C) Mah. Municipalities Act (1965), S. 313 — Action under — Considerations — Acts, defaults etc. of the authority other than Municipal Council — If relevant.

The acts, defaults, competency or incompetency, excess or abuses etc. which can be taken into consideration by the Government while taking action under S. 313 of the Act should be the defaults, excess, etc. of the Council and not merely of the President or the Chief Executive Officer or the Standing Committee itself, who, for certain purposes, can exercise their powers within the framework of this Act independently. In a given case it could be shown that though the action is that of an individual authority, namely, the President or the Standing Committee, etc., the Council as a whole is responsible for the said act or omission. (Para 7)

(D) Mah. Municipalities Act (1965), S. 313 (1) (b) — Scope — Singular default — If sufficient.

The words used in Cl. (b) sub-s. (1) of S. 313 are 'persistently makes default in the performance of such duties, or in complying with the lawful directions and orders issued by the authorities'. It does not deal with mere defaults, but the expression used is persistent defaults. Therefore, prima facie it implies the conduct of the Municipal Council to continue firmly some state of affair or course of action which they have adopted in spite of the warning, notice or protest, etc. In a given case a singular default which is of a serious nature might indicate persistent attitude of the Municipal Council. The very words contemplate the default which is persistent one and that too in the performance of duties or in complying with the lawful directions of the authorities. (Para 7)

Where in its wisdom as elected representative of the people with an intention to avoid the monopoly in the trade, rightly or wrongly, decision was taken by the Municipal Council which was not found to be correct by the Collector and, therefore, he suspended the resolution and it was not shown that this resolution was passed by the Municipal Council mala fide or the decision in that behalf was not honestly taken, it was held that only because the said resolution was suspended and for the reasons disclosed in the explanation ultimately the auction was to be held through a revenue officer,

it could not be said that there was a persistent default on the part of the Municipal Council or they had disobeyed to carry out the directions or orders issued by higher authorities.

(Para 7)

(E) Mah. Municipalities Act (1965), S. 313 — Explanation in reply to show cause notice — Consideration of.

If an authority is called upon to submit explanation in reply to a show-cause notice issued to it, it is normally expected that the said explanation will be duly considered by the competent authority and at least the files will disclose as to why the said explanation is not accepted or is not acceptable.

(Para 11)

(F) Mah. Municipalities Act (1965), S. 313 — Action under — Exclusion of additional or non-existing ground — Effect — Order of supersession, held not sustainable.

Where from the tenor of the order passed by the Minister for State it was not possible to separate one charge from another nor it was possible to speculate that the Government was satisfied that any one of the charges levelled against the Municipal Council was serious enough to warrant action under Section it was held, in view of the various circumstances, that the authority concerned would not have passed the order on the basis of the other relevant or existing grounds alone. It could not be said that the exclusion of additional or non-existing grounds would not have affected the ultimate opinion or decision. The order of supersession was not sustainable in the circumstances. AIR 1967 SC 1353, Distinguished.

(Para 13)

(G) Mah. Municipal Councils and Municipal Corporations (Postponement of Elections during the Emergency) Act (1975), S. 3 (1) (c) — Petition challenging action of appointment of administrator under S. 313 of Mah. Municipalities Act (1965) — Effect of subsequent Postponement Act — Petition, held, had not become infructuous merely because fresh elections could not be held. (Para 14) Cases Referred: Chronological Paras

1974 All LJ 58	3, 5, 11
AIR 1973 SC 2758: 1973 Lab IC 1613	3
AIR 1970 SC 150	5
AIR 1970 Madh Pra 154	5
AIR 1968 Delhi 30 (FB)	4, 5
AIR 1967 SC 1353: 1967 Mah LJ 317	13
1967 All LJ 1043	3
AIR 1967 Punj 430	4, 5

AIR 1958 Madh Pra 323 (FB) 5

AIR 1958 Madh Pra 397 5

AIR 1951 SC 467: 1952 Cri LJ 54 3

Spl. Civil Appln. No. 610 of 1972:—

C. G. Madkholkar, for Petitioner; V. P. Salve, Asstt. Govt. Pleader, for Respondents.

Spl. Civil Appln. No. 1691 of 1973:—

C. G. Madkholkar, for Petitioner; V. P. Salve, Asstt. Govt. Pleader, for Respondents Nos. 1 to 3.

DHARMADHIKARI, J.:— General elections for electing the Councillors to the Municipal Council, Malkapur were held in June 1967. Thereafter, the first meeting of the Municipal Council for electing the President was held in July 1967 and it appears that one Shri J. N. Jadhao, who is respondent No. 4 before us, was elected as the President of the Municipal Council. The term of the elected Councillors in the normal course would have expired in July 1972. But it appears that it was extended from time to time. Initially as there was an acute scarcity in the majority of the districts of Maharashtra in the year 1972, the State Government decided to extend the term of the Municipal Council upto 31st of December 1972. Then came the Maharashtra Municipal Council (Postponement of Elections due to Scarcity Conditions in the State) Act, 1972. By virtue of this enactment the elections were postponed. It appears from the record that in the meantime on 22nd May 1972 Shri Vallabhdas Jagannath Purohit was elected as the President of the Municipal Council. It is the case of the petitioners that after this election of Shri Purohit as a President, the opposite group in the Municipal Council started making false complaints against him and the Municipal Council as a result of which initially a notice under S. 42 of the Maharashtra Municipalities Act, 1965 (hereinafter referred to as 'the Act') was issued to Shri Purohit who was then the President of the Municipal Council, asking him to show cause as to why he should not be removed from the Municipal Council itself. An explanation to this show-cause notice was given by him. He had also raised an objection that an action proposed to be taken under S. 42 was wholly uncalled for. Thereafter, according to the petitioners, the Director of Municipal Administration ordered an inquiry against the President Shri Purohit under S. 311 of the Act. Shri Purohit and the Municipal Council challenged the said order before this Court by filing a

writ petition being Special Civil Appln. No. 610 of 1972 and it appears from the record that the said writ petition was duly admitted by this Court and an interim stay of further enquiry was also granted. From the record of the Special Civil Application No. 610 of 1972 it also appears that the State Government then filed an application for vacation of stay. After hearing the parties this Court modified the stay order in the following term on 15th of January 1973:

"The interim stay granted on 4-5-1972 is modified in that the enquiry will proceed and the enquiry report will also be submitted but further action on the report be stayed."

2. In spite of this order it appears that instead of proceeding further with the enquiry the State Government cancelled the whole proceeding by order dated 22nd of March 1973 and instead passed an order issuing a show-cause notice dated 19-4-1973. By this order the Municipal Council was directed to show cause within 20 days from the date of its receipt as to why action under S. 313 of the Act should not be taken by the Government. The grounds on which the said action was proposed to be taken read as under:

"It has been reported to Government that Malkapur Municipal Council in Buldana District,

(1) is not competent to perform duties imposed upon it by or under the Maharashtra Municipalities Act, 1965, or any other law for the time being in force, as mentioned in Annexure I.

(2) persistently makes default in the performance of such duties or in complying with the lawful directions and orders issued by the authorities empowered under the law to issue such directions or orders to the Council as mentioned in Annexure II.

(3) has exceeded and abused the powers as mentioned in Annexure III and that

(4) the financial position and the credit of the Municipal Council is seriously threatened as mentioned in Annexure IV."

To this show-cause notice in all four schedules were attached, giving various instances. We will refer to these schedules and instances enumerated therein in detail in due course. However, from these schedules it appears that in all 22 charges were levelled against the Municipal Council. After receipt of this show-

cause notice a detailed explanation was submitted by the Municipal Council with necessary annexures incorporating the information relevant for deciding the controversy involved in the said show-cause notice. It seems that the matter was also heard by the Minister for State on various dates. Ultimately by an order dated 1st of December 1973, which is incorporated in Annexure 'F' to the petition, the Government of Maharashtra directed the appointment of one, Shri V. W. Deshmukh, Tahsildar, Malkapur as an Administrator of the Municipal Council in addition to his own duties for a period till new body after general elections takes over. The said final order reads as under:

"MAHARASHTRA GOVERNMENT
GAZETTE, Extraordinary

Saturday, December 1st, 1973/Agrahayan 10, Saka 1895. Part I-A-Nagpur Division Supplement. Urban Development, Public Health & Housing Department, Sachivalaya, Bombay-32 BR, dated 1st Dec. 1973.

O R D E R

No. MUV-1372/24940/N. whereas it has been reported to Government that the Malkapur Municipal Council in Buldhana district hereinafter referred to as "the said Municipal Council" constituted under the Maharashtra Municipalities Act, 1965 (Maharashtra Act No. XL of 1965) (hereinafter referred to as 'the said Act.')

(a) is not competent to perform duties imposed upon it by or under the said Act or any other law for the time being in force as mentioned in Annexure I.

(b) persistently makes default in the performance of such duties, or in complying with the lawful direction and orders issued by the Collector, the Director, the State Government or any other authority empowered under law to issue such directions or orders to the Council as mentioned in Annexure II.

(c) has exceeded and abused the power as mentioned in Annexure III.

(d) The financial position and the credit of the Municipal Council is seriously threatened as mentioned in Annexure IV. And whereas, the allegations aforesaid on verification have been found to be true and severally and jointly appear serious enough to warrant action against the said Municipal Council, under S. 313 of the said Act. Now, therefore, in exercise of the powers vested in it under Section 313 (1) of the said Act and of all other power enabling it in this behalf

the Government of Maharashtra for the reasons specified aforesaid is hereby pleased to appoint Shri V. W. Deshmukh, Tahsildar, Malkapur, as the administrator of the Malkapur Municipal Council in addition to his own duties for a period till a new body after general elections takes over with immediate effect.

ANNEXURE I.

The instances showing that the Council is incompetent to perform duties imposed upon it by or under the Maharashtra Municipalities Act or any other law for the time being in force:—

(1) Ordinary meetings are not held according to the provisions of S. 81 of the Maharashtra Municipalities Act.

(2) Quarterly accounts are not prepared and note to that effect is not published according to provisions of S. 103 of the Maharashtra Municipalities Act.

(3) The Salary Reserve Fund is not constituted as provided by S. 91. Further the amount withdrawn from the said fund has not been recouped.

(4) The Council failed to pay loan instalment and interest thereon payable to L.I.C. which were due on 29th March, 1972. The Collector Buldhana had, therefore to recover the same by making necessary adjustment while releasing D. A. grant in June, 1972.

(5) Abnormal deduction is made in the assessment list without recording reasons. Some properties have not been assessed for years together.

(6) Education Cess recovered is not credited into Government Treasury in time.

(7) Building permissions are not given within the prescribed time and the permissions were not made available for inspections.

(8) 60 Audit paras are still outstanding, oldest being for the year 1957-58.

ANNEXURE II.

The instances of making persistent default in performance of duties or in complying with the lawful directions and orders issued by the Collector, the Director and the State Government:—

(1) Arrears of Badkas Commission pay scales to the tune of Rs. 4,00,000 have not been paid.

(2) Auction sale of beef market stalls were not held in spite of instructions from the Collector and the Director of Municipal Administration, Bombay.

(3) Arrears of Property Tax of Rupees 3,234 and other were outstanding against the father of the President Shri V. J.

Purohit. The said taxes have been paid by him on 3rd November, 1972.

ANNEXURE III.

The instances in which the Municipal Council has exceeded and abused its powers:—

(1) The percentage of expenditure over all Municipal staff is 77 per cent. There is surplus staff, particularly in Octroi Department.

(2) There are 12 posts created without obtaining prior sanction from the competent authority. The posts of court clerk and the number taker in dispensary are continued, even though the Director of Municipal Administrations has rejected the proposals.

(3) Illegal termination of service of Sarvashri Paranjape, Typist and Satpute Naka Mohrir.

ANNEXURE IV.

The instances showing that the financial position and the credit of the Council is seriously threatened:—

(1) The Liabilities (Rs. 12,17,946-54) exceeded the assets (Rs. 8,86,103) on 5th November, 1973.

(2) The percentage of recovery of consolidated property tax, namely, 51 per cent is not satisfactory. There are heavy arrears amounting to Rs. 1,42,190 on 31st December, 1972 as against normal yearly demand of Rs. 1,32,000. The arrears of all taxes as on 31st December, 1972 were Rs. 4,14,000 as against the demand of Rs. 6,93,842. This has been reduced to Rs. 3,13,936 on 27th March, 1973.

(3) The special sanitary service and the water supply scheme are not self-supporting.

(4) The income from Octroi has shown a reduction from Rs. 6,86,000 to Rupees 3,86,560 within a period of two years ending March, 1972. The percentage of expenditure on Octroi staff is high, namely, 44 per cent as against the prescribed percentage of 20.

By order and in the name of
the Governor of Maharashtra,
Sd/- A. R. Shaikh,

Deputy Secretary to Government."

A dispute is raised in the petition that in fact such an order was not passed by the State Government on 1-12-1973 nor was it published in the Maharashtra Government Gazette on the same day. In this behalf specific allegations have been made by the petitioner in paragraphs 27, 28, 29, 30 and 31-A of the petition. According to the petitioner, the order passed by the State of Maharashtra under S. 313 of the Act is wholly illegal as it

is in contravention of the well established principles of natural justice. It is further contended on behalf of the petitioners that there was no material before the State Government on the basis of which an opinion could have been formed by the State Government that the Municipal Council was not competent to perform the duties or has persistently made defaults in performance of the duties or either had exceeded or abused its power or its financial position and the credit was seriously threatened. It is also contended by the petitioners that an Administrator could be appointed by the State Government only by publishing an order in official gazette. In the present case, the publication in the gazette is not only tainted but is also a manipulated one and; therefore, there is no publication of the order in official gazette as contemplated by S. 313 of the Act. A contention is also raised in the petition that these proceedings have been instituted against the Municipal Council in colourable exercise of the power and respondent No. 2, Deputy Secretary to the Government of Maharashtra, Shri A. R. Shaikh, had taken a special interest in the whole affair and had gone out of his way in preparing the order and serving it on the Municipal Council. According to the respondent State itself, Shri Shaikh has acted as per the directions of the State Government. Therefore, according to the petitioners, the conduct of the State in this behalf is not above-board. In support of this contention the learned counsel for the petitioners has relied upon the additional return filed on behalf of the respondent-State and particularly on paragraph 5 thereof. According to the learned counsel for the petitioners, if Shri Shaikh had acted as per directions of the Government, then obviously the exercise of power by the State which is reflected in the order and the official gazette is nothing but a fraud on the statute. It is further contended on behalf of the petitioners that some of the grounds on which the order of appointment of an Administrator is based are irrelevant and non-existent. Some more grounds were added at the time of passing the final order regarding which the Municipal Council was not given any opportunity of being heard or to put forward its case. So far as the other grounds referred to in the supersession order are concerned, they are also non-existent and are irrelevant to the inquiry under S. 313 of the Act. The learned counsel for the

petitioners, Shri Madkholkar, further contended before us that the order passed by the State Government superseding the Municipal Council and appointing the Administrator is based on the cumulative effect of totality of the grounds stated in the order as published in the official gazette and as some of them were vague, non-existent or newly added, regarding which the Municipal Council had no opportunity to show cause or put forward its case, the whole order is vitiated as it is not possible to speculate as to which of the grounds or reasons stated therein had weighed with the State Government while forming its opinion, which has resulted in the appointment of the Administrator. He further contended that all the grounds in show cause notice were duly explained by the Municipal Council but said explanation was not considered at all by the State Government.

In reply to the various contentions raised in the petition in the return it is contended on behalf of the respondents that after giving an opportunity to show cause and after giving personal hearing to the petitioner Council the State Government had come to the conclusion that it is necessary to appoint the Administrator under S. 313 (1) read with sub-cl. (a), (b), (c) and (e) of the Act. So far as the grounds which were newly added in the final order and were not the subject-matter of the show-cause notice are concerned, in the return it was contended on behalf of the State that the provisions of S. 313 of the Act do not contemplate that a show-cause notice must be given before taking action under that section. According to the respondents, it is the discretion of the Government either to give a show-cause notice or not to give it. An additional return on behalf of respondent No. 1 was also filed duly supported by a solemn affirmation. The said additional return, which is dated 13th of August 1975, was solemnly affirmed by Shri A. R. Shaikh, Deputy Secretary to the Government of Maharashtra, Urban Development Department. In this additional return the respondents have denied the allegations made in paragraphs 28, 29, 30 and 31-A of the petition so far as respondent No. 2, A. R. Shaikh, was concerned. Thereafter on 17th of July 1976, an additional affidavit was also filed on behalf of the respondents duly sworn in by the officiating administrator of the Municipal Council. By this affidavit it was contended on behalf of

the respondents that initially the Administrator was appointed on 13-12-1973 and thereafter by virtue of Ordinance No. 14 of 1973 promulgated on 16th October 1973 general elections to the Municipal Council were postponed upto 31st of March 1974 or such other earlier date to be notified by the State Government. The term of the existing Administrator was thereafter extended from time to time, initially up to 31st of March 1974 and thereafter also. According to the respondents, under sub-s. (1) of S. 315 of the Act, quarterly report was submitted by the Administrator to the Director of Municipal Administration, Bombay and in view of this report, under sub-s. (2) of S. 315 of the Act the term of the Administrator was continued up to 31st of March 1976. In the meantime came the Ordinance postponing the general elections during the Emergency. This ordinance was later converted into an Act known as the Maharashtra Municipal Councils and Municipal Corporations (Postponement of Elections During the Emergency) Act, 1976 and this Act is to remain in force during the period of Emergency and 6 months thereafter if no earlier date is notified by the Government. Therefore, according to the respondents, in view of the provisions of S. 3 (1) (c) of this Postponement Act, the term of the Administrator stands extended during the aforesaid period. A contention was also raised on behalf of the respondents before us that in view of these subsequent enactments the petition does not survive and is liable to be dismissed with costs. Therefore, in substance it is the contention of the respondents that the formation of the opinion by the State Government under S. 313 of the Act is based on the subjective satisfaction of the State Government and, therefore, it cannot be objectively tested.

It is also their contention that in fact it is neither necessary nor is it obligatory on the part of the State Government to give any show-cause notice to the Municipal Council before an action under S. 313 is taken. According to Shri Salve, learned Assistant Government pleader appearing on behalf of the respondents 1 to 3, in view of the fact that normally in such matters principles of natural justice should be followed, the State Government had given a show-cause notice by way of abundant caution to the Municipal Council. Their reply to the said show-cause notice was duly considered. Even a personal hearing was

given to the Municipal Council through their counsel and after considering the explanation given by the Municipal Council and taking into consideration the material placed on record the State Government came to the conclusion that it was necessary to appoint the Administrator under S. 313 (1) of the Act. Thus in substance it is contended by Shri Salve that the order passed by the Government appointing the Administrator is perfectly legal and valid and is not liable to be interfered with in the extraordinary jurisdiction of this Court under Arts. 226 and 227 of the Constitution of India.

3. For properly understanding the controversy raised before us, it will be necessary to refer to certain important provisions of the Act. Chap. II of the Maharashtra Municipalities Act deals with the Municipal Councils, their area and classification. It further deals with composition of Municipal Councils and elections of the councillors. Section 40, then lays down that the Councillors elected at the general election shall hold office for a term of five years which may be extended by the State Government. Then it deals with the elections of the office-bearers including the President and the Vice-President. Chapter III of the Act deals with the duties and functions of the Municipal Council and Municipal Executive including the obligatory duties and discretionary functions of the Municipal Council. Chapter VII then deals with Municipal Property, Funds, Contracts and Liabilities etc. Chapter XXIII, in which S. 313 appears, then deals with Control over the Municipal Council constitution under the Act. Section 306 of the Act empowers the Director or the Collector or any officer of the Government authorised by the State Government in that behalf to inspect and supervise the affairs of the Municipal Council. Director or Collector has power to call for a return or reports. Power is also conferred upon the Collector to suspend execution of the orders and resolutions of the Council on certain grounds. Extraordinary powers also are given to the Collector in the matter of execution of certain works in case of emergency. The Director is also empowered to prevent extravagance in the employment of establishment. Under S. 311 of the Act, the State Government has a power to order an inquiry to be held by any officer appointed by it in this behalf into any matters concerning the municipal administration of any

Council or the matters connected therewith. Under S. 312 of the Act, power has been conferred upon the Director to issue directions in the matter to enforce performance of the duties, and then comes S. 313 of the Act, with which we are concerned in the present writ petition. Section 313 reads as under:—

"313. (1) If, in the opinion of the State Government—

(a) a Council is not competent to perform duties imposed upon it by or under this Act or any other law for the time being in force, or

(b) persistently makes default in the performance of such duties, or in complying with the lawful directions and orders issued by the Collector, the Director, the State Government or any other authority empowered under law to issue such directions or orders to a Council, or

(c) exceeds or abuses its powers, or

(d) a situation has arisen in which the administration of the Council cannot be carried out in accordance with the provisions of this Act, or

(e) the financial position and the credit of the Council is seriously threatened, the State Government may, by an order published in the Official Gazette, appoint a Government Officer as the Administrator of the Council for a period not exceeding three years. The order shall state the reasons for making the order.

(2) If the term of office of an Administrator so appointed is less than three years, the State Government may extend it from time to time, subject to the limitation of the total period of three years." Then S. 314 of the Act deals with the powers of Administrator. It also deals with the consequences of appointment of an Administrator under S. 313 of the Act. As soon as the Administrator is appointed, all the powers and functions, vesting in or exercisable by the Council, the President, the Vice-President, the various committees, the Councillors and the Chief Officer under the Act or any other law for the time being in force vest in and are exercisable by the Administrator, to the exclusion of their exercise and performance by the authorities referred to above. Under S. 315 of the Act review of the Administrative work is contemplated. Under sub-s. (3) of S. 315, if, in the opinion of the State Government, even after the period of three years of administration by the Ad-

ministrator the grounds on which the Administrator was appointed still exist, the State Government may by an order published in the Official Gazette dissolve the Council. If such a Council is dissolved, then the subsequent provisions prescribe the procedure for re-establishment of the Council, after such a dissolution. From the bare reading of these relevant provisions of the Act it is quite obvious that once the power is exercised by the State Government under S. 313 of the Act, practically the local government elected by the electorate ceases to function. Though under S. 40 of the Act the Councillors have a right to continue in office for a term of five years, they cease to function as such as soon as Administrator is appointed under S. 313 of the Act. To some extent if an order is passed under S. 313 (1) of the Act, it results in casting a stigma upon the Municipal Council and the elected Councillors.

This whole thing is popularly known as supersession of Municipal Council. Therefore, the nature of the inquiry and the procedure which the State Government should follow before passing an order under S. 313 (1) of the Act will have to be viewed and understood having regard to serious consequences. It is no doubt true that in terms S. 313 does not lay down that before an action is taken against the Municipal Council under S. 313 of the Act, a show-cause notice should be issued. But S. 313 contemplates formation of an opinion by the State Government regarding the grounds and the matters enumerated in Cls. (a) to (e). Then obligation is cast upon the State Government to pass an order in that behalf which should be published in the Official Gazette. It further enjoins a duty upon the State Government to state the reasons for making the order. Therefore obviously S. 313 contemplates passing of a speaking order by the State Government. From the bare reading of these provisions it is further clear that an opinion cannot be formed by the State Government unless there is material before it. Reasons for making an order cannot be recorded in the order itself unless those reasons exist. Further the section contemplates publication of the order in the Official Gazette. Unless these formalities are followed, the order passed under S. 313 of the Act cannot be said to be a valid and legal order nor it can come into operation. Administrator can be appointed only by an order which is published in the Official Gazette. This

in itself is one of the ingredients of the principles of natural justice. The Supreme Court had an occasion to consider this aspect of the matter in *Harla v. The State of Rajasthan* (AIR 1951 SC 467). In the said case the Supreme Court observed as under:—

"We are of opinion that it would be against the principles of natural justice to permit the subjects of a State to be punished or penalised by laws of which they had no knowledge and of which they could not even with the exercise of reasonable diligence have acquired any knowledge. Natural justice requires that before a law can become operative it must be promulgated or published. It must be broadcast in some recognisable way so that all men may know what it is; or, at the very least, there must be some special rule or regulation or customary channel by or through which such knowledge can be acquired with the exercise of due and reasonable diligence. The thought that a decision reached in the secret recesses of a chamber to which the public have no access and to which even their accredited representatives have no access and of which they can normally know nothing, can nevertheless affect their lives, liberty and property by the mere passing of a resolution without anything more is abhorrent to civilised man. It shocks his conscience. In the absence therefore of any law, rule, regulation or custom, we hold that a law cannot come into being in this way. Promulgation or publication of some reasonable sort is essential."

It appears that the publication of an order or law in the Official Gazette is treated to be sufficient notice to everybody. The publication of the order in Official Gazette passed under S. 313 (1) of the Act is not only meant for the Municipal Council or its Councillors alone but the citizens as well as the electorate are also entitled to know the reasons for which they are deprived of their elected local self-government. This aspect of the matter came for consideration before the Division Bench of the Allahabad High Court in *State of Uttar Pradesh v. K. C. Gupta* (1974 All LJ 58). That was also a case of supersession of a Municipal Council. In this context the Division Bench made a reference to the earlier decision of a Single Judge in *I. P. Kapoor v. State of U. P.* (1967 All LJ 1043) and particularly to the following observations therein:

"It is apparent that the requirement that reasons for the order shall be published in the Official Gazette is to provide a safeguard against arbitrary action on the one hand and to convince the citizen and the members of the Board, of the ground on which the State Government reached the requisite satisfaction to deprive them of their right to local self-government. The purpose of the requirement that reasons shall be stated is to ensure that the reasons which have impelled the action are germane and relevant to the content and scope of the power vested in the State Government."

The provision for stating the reasons for making the order has been made for obvious reasons. The giving of reasons in support of their conclusions is essential for various purposes. First, it is calculated to prevent unconscious unfairness or arbitrariness in reaching the conclusions. The very search for reasons will put the authority on the alert and minimise the chances of unconscious infiltration of personal bias or unfairness in the conclusion. The authority will adduce reasons which will be regarded as fair and legitimate by a reasonable man and will discard irrelevant or extraneous considerations. Second, it is a well-known principle that justice should not only be done but should also appear to be done. Unreasoned conclusions may be just but they may not appear to be just to those who read them. Reasoned conclusions, on the other hand, will have also the appearance of justice. Third, it should be remembered that sometimes these orders of the Government are challenged before this Court under Articles 226 and 227 of the Constitution of India and in case no reasons are given, the Court will have to wade through the entire record and find for itself whether the decision is right or wrong. In many cases this investment of time and industry will be saved if reasons are given in support of the conclusion (see *M/s. Woolcombers of India Ltd. v. Woolcombers Workers' Union*, AIR 1973 SC 2758).

4. In this context reference could usefully be made to a decision of the Punjab High Court in the *Municipal Committee Kharar, District Ambala v. The State of Punjab* (AIR 1967 Punj 430). While dealing with the aspect of the matter *Narula J.* in paragraph 41 observed as under:—

"In the instant case the State Government, which is entrusted with vast power and extensive authority to supersede a

"The reasons required as a condition precedent by S. 238 to be stated in a valid notification superseding a Committee, in my view, are those necessary facts which may have weighed with the State Government in arriving at the conclusion that the Committee is incompetent to perform and has persistently made defaults in the performance of statutory duties. The notification in order to be valid must accordingly set out all the necessary facts precisely so that all those who read the notification may be able to know what those facts are on which the above conclusion has been founded. The object and purpose of this requirement appears to me to be traceable to a desire on the part of the Legislature to guarantee that the State Government does not act arbitrarily and does not abuse or misuse the drastic power conferred on it by the Statute. This desire has apparently roots in the conscious realisation that the exercise of power, if it is to be something better than infliction of wanton injustice, must be

For my part, I consider this right to be basic in a set-up like ours where a citizen has been assured equal justice according to law and where the courts are not ordinarily deprived of their jurisdiction to adjudicate on citizens' rights even against the State. In any event, the right to know the reasons indisputably tends to promote in the minds of the citizens a feeling of democratic satisfaction with the legal character of our State: a satisfaction on which alone can be founded a stable and healthy democratic set-up. If I may so put it, it is because of this law that a citizen primarily feels content with a truly democratic State and it is this contentment alone which basically sustains such a State. The impugned notification is accordingly invalid as it does not contain reasons for the super-session.

It is true that the statute does not in terms provide that the State Government has to perform a duty of a judicial character while dealing with the question of supersession, but that alone cannot be conclusive, because the judicial character of a duty may be inferred from the nature of the statutory duty itself, examined in the light of the character of the right affected and the consequences that flow from the exercise of such duty. Where power is conferred on an authority to determine questions prejudicially affecting rights of citizens, in view of what I have said above, a duty may, justifiably be implied that such powers would be exercised in conformity with the principles of natural justice applicable to a judicial approach. These limits seem to inhere in the very nature of the power. The omission of the Legislature to insert positive words imposing an obligation of a judicial approach appears to be supplied by the plainest principles of justice on which our Constitution is

founded. The duty imposed on the State Government, when exercising the power conferred by S. 238, requires the determination of the question whether the Committee concerned is incompetent to perform or persistently makes default in the performance of the duties imposed on it. This duty necessarily involves consideration of factual material and formation of opinion on its evaluation leading to the final conclusion. This seems to me to require an objective approach closely resembling that of a judicial mind adjudicating upon a controversy, and is not a mere matter of administrative or executive policy, expediency or discretion. And if I am right in taking this view then this duty may well be considered to partake of a quasi-judicial character attracting the observance of the rules of natural justice.

The order of supersession, it may be remembered, very seriously affects the members of the Committee concerned and incidentally also the electorates who have duly elected the municipal Councillors. I am not unmindful of the fact that the Punjab Municipal Act was enacted apparently in pursuance of the policy of developing local self governing institutions as a part of the larger policy of establishing in this country democratic Government by elected representatives and training the people in the art of local self-Government. An effective and close supervision and control over the working of local bodies like the Municipal Committee was thus considered necessary to a considerable extent. But this aspect induces me further to hold that the power conferred by S. 238 which entails drastic consequences of superseding a self-governing elected body calls, in its exercise, proper observance of the rules of natural justice so that the other side of the picture is adequately presented before the State Government by the party affected. This seems to me to be essential if local self-Government is to develop on healthy lines and our democratic set-up is to have strong and deep roots in the community at large."

The law laid down in this decision was subsequently approved by the Full Bench of Delhi High Court in *Suraj Prakash v. State of Punjab* (AIR 1968 Delhi 30). Therefore, the scope of S. 313 of the Act will have to be understood in this context.

5. From the bare reading of the provisions of S. 313 of the Act it is quite ob-

vious that formation of an opinion is condition precedent for taking an action under S. 313 of the Act. Before the power can be exercised under this section, there must exist the circumstances on the basis of which an opinion could be reasonably formed or from which an inference could be reasonably drawn regarding the factors enumerated in Cls. (a) to (e) of sub-s. (1) of S. 313 of the Act. The power to appoint Administrator is conferred on the State Government and that too in certain circumstances only. It is not an unbridled or arbitrary power. Further the order appointing an Administrator is to be passed on certain grounds or reasons and those should be specifically stated in the order. The order must be made public by publishing in the Official Gazette. The recording of the reasons ensure that opinion is formed according to law and is not a result of caprice and whim or fancy and is not reached on the grounds of policy or expediency. Further the Municipal Council, Councillors and the citizens are entitled to know the reasons or grounds for taking action. Therefore, having regard to the scheme of S. 313 and the consequences of the action which are drastic, in our opinion, even if there is no express provision in S. 313 of the Act that an opportunity should be given to the Municipal Council to show cause against the proposed action, the principles of natural justice require that a reasonable opportunity should be given to the council to explain the charges and to put forward its case before an action is taken against it under S. 313 of the Act. It is not necessary for us to go into the question as to whether the power given under S. 313 is a quasi-judicial power or an administrative power. As observed by the Supreme Court in *A. K. Kraipak v. Union of India* (AIR 1970 SC 150), the dividing line between an administrative power and a quasi-judicial power is quite thin and is being gradually obliterated. It is further laid down therein that the principles of natural justice and fair play apply to the exercise of administrative power also. It is equally well settled that these principles are not embodied rules nor they can be imprisoned within a strait-jacket or rigid formula. As to whether in a given case these principles of natural justice are followed or not must obviously depend on the facts and circumstances of each case. To us it appears that this position is by now well settled. A reference in this behalf could usefully be made to

the following decisions: *Municipal Committee, Kareli v. State of Madhya Pradesh* (AIR 1958 Madh Pra 323) (FB), *Maurinha v. State of Madhya Pradesh* (AIR 1958 Madh Pra 397), *Suresh Seth v. The State* (AIR 1970 Madh Pra 154), *Municipal Committee Kharar v. The State of Punjab* (AIR 1967 Punj 430), *Suraj Prakash v. State of Punjab* (AIR 1968 Delhi 30) (FB) and *State of U. P. v. Krishna Chandra Gupta* (1974 All LJ 58). Further it is not now necessary for us to deal with this aspect of the matter any further as Shri Salve, learned Assistant Government Pleader, has conceded this position and, in our opinion, rightly. Even according to Shri Salve, as S. 313 of the Act confers a power upon the State Government to take action, which has drastic effect or consequences, the power which is conferred upon it, though prima facie appears to be an administrative one, is in substance a quasi-judicial. In our opinion, by now this position appears to be well settled. Though from the prima facie reading of the section it does appear that it contemplates an administrative action, in so far as the actual order of appointment of Administrator is concerned, it is quite obvious that the said order must be founded on a judicial appraisal of the facts and circumstances on the basis of which Government comes to the conclusion that a given Municipal Council is incompetent to perform or has persistently made defaults in performance of duties imposed on it by law etc. The section casts a duty on the State Government to act in accordance with the principles of natural justice while coming to an objective finding on the basis of relevant material placed before it. Therefore, in our opinion, in any case the action which could be taken by the State Government in pursuance of the power conferred under S. 313 of the Act is quasi-judicial in character, which requires observance of the rules of natural justice. Therefore, the action taken by the Government in the instant case superseding the petitioner Municipal Council will have to be tested in this background.

6. Initially a complaint is made by Shri Madkholkar before us that the order of supersession passed by the State Government is wholly illegal as it was not published in the Official Gazette as contemplated by S. 313 of the Act. In paragraphs 27 to 30 the petitioners have made specific allegations that the document, namely, the gazette produced be-

fore the Court is a fabricated document and cannot be equated with an order passed by the State Government and published in the Official Gazette as contemplated by S. 313 of Act. In these paragraphs of the petition the petitioners had made a specific allegation that respondent No. 2 Shri A. R. Shaikh, who is Deputy Secretary of the Urban Development Department to the Government of Maharashtra, had acted high-handedly with gross illegality on his part. It is further stated in the petition that Shri Shaikh had made reservation on 29th of November 1973 itself for going to Malkapur. This reservation was cancelled and on 30-11-1973 he made another First Class reservation from Bombay to Malkapur by 29 Down Bombay-Howrah Express. According to the petitioners, he travelled in a First Class coach and the petitioners have given the ticket number as well as the reservation ticket number also. He did not get down at Malkapur. on 1-12-1973 but extended his ticket up to Shegaon. According to the petitioners, this 29 Down Bombay-Howrah Express reaches Malkapur at 7-30 a.m. and at Shegaon at 8-20 a.m. After getting down at Shegaon Shri Shaikh proceeded to Buldana and contacted the Collector. He secured a jeep of Zilla Parishad at about 11 a.m. Then he started with one Kharche, resident Deputy Collector at Buldana for Malkapur and then with the aid of the Sub-Divisional Officer he forcibly took charge of the office of the Municipal Council, Malkapur and handed it over to Shri Deshmukh Tahsildar, who was appointed as an Administrator. These facts are not disputed by the respondents. On the basis of these admitted facts a further contention is raised by the petitioners that a gazette notification purporting to be published on 1-12-73 was available to Shri Shaikh in the published form on 30th of November 1973 itself, even before he left Bombay on that date. Therefore, according to the petitioners, the gazette which is purported to be published on 1-12-1973 or the Government resolution which is purported to be signed on 1-12-1973 was already prepared and got printed on 30th November 1973 itself and was deliberately post-dated. The petitioners further contended that in this case an extraordinary method was followed for serving the order on the Municipal Council. The petitioners further contend in the petition that this undue enthusiasm was shown by Shri Shaikh as per directions of the Govern-

ment for the obvious reasons. One of such reasons, according to the petitioners, is that this ingenuous method was followed by respondent No. 2 in this behalf with the sole intention that the petitioners should not get any time to approach any higher authorities or even the Court of law for getting redress. Another reason is given by the petitioners in their reply to the show-cause notice itself. According to them, this order of supersession was politically motivated as Shri Jadhao, who was Vice-President of the District Congress Committee, was defeated in the Presidential election. Therefore, in substance it is the contention of the petitioners that the whole conduct of respondent No. 2 and the Government is mala fide or at least the order as well as the gazette notification was issued in a colourable exercise of power. When the matter was heard last time, i.e., on 2nd of September 1976 by this Bench, the Assistant Government Pleader took time to produce the whole record before us as it was noticed that the return filed was a cryptic one and did not deal with all the allegations made in the petition. The whole record of the case is now, made available to us. As a matter of fact, during the course of arguments Shri Salve, learned Assistant Government Pleader relied upon this record and files in support of his contentions. With the help of the learned Assistant Government Pleader we have gone through the whole record and file which is produced before us and to say the least, in our opinion, so far as the question of publication of the gazette is concerned, it discloses a very sorry state of affairs. Obviously our observations in this behalf are based on prima facie perusal of the record. It appears from the file produced before us that after the matter was heard by the Minister for State, a decision regarding the supersession of the Municipal Council was taken on 26th November 1973 itself. From the record produced before us and particularly from the letter dated 28th November 1973 addressed to the Collector, Buldana and signed by Shri A. R. Shaikh, respondent No. 2, and a letter addressed to the Manager of Government Central Press, Bombay, dated 29-11-1973 which is also signed by respondent No. 2 Shri Shaikh, it appears that the Government Central Press was directed to print copies of Extraordinary Gazette to be dated 15th December 1973 and supply in all 30 copies of it to respondent No. 2 by 12

noon on 30th November 1973 itself. Therefore, it is quite obvious that even before the Government Resolution was prepared, signed and dated, the gazette notification was got printed on 30th November 1973 itself by putting up the date as 1st December 1973. In the file we find that there is a Government Resolution bearing No. MUV-1372/24940/N 6 dated 1st December 1973 and is signed by Shri A. R. Shaikh, respondent No. 2, the Deputy Secretary to the Government. From the endorsement on the file as well as the date put on the Government Resolution it is quite obvious that Government Resolution was issued on 1st of December 1973 and not earlier. That is the date we find even in the Extraordinary Gazette. If this is so, one fails to understand how the Government Resolution which is issued on 1st of December 1973 and was also to be published on the 1st of December 1973 in the Extraordinary Gazette, could have been printed on 30th of November 1973. It is also difficult to understand how respondent No. 2 Shri A. R. Shaikh could have obtained the copies of this Extraordinary Gazette, which is dated 1st of December 1973, even before he left Bombay for Malkapur on 30th November. If, therefore, the endorsements on the file are read with the allegations made in the petition, prima facie it appears that there is much substance in the contention raised on behalf of the petitioners in this behalf. The record produced before us discloses various circumstances which raise a doubt about the whole affair and, therefore, calls for an inquiry. It is well settled that a condition is implied in all instruments which creates power, that power shall be used bona fide and for the purposes for which it is conferred. In the present petition a contention is raised by the petitioners that the order issued by the government as well as published in the Official Gazette is nothing but a fraud on the statute. The petitioners have adversely commented upon the whole conduct of respondent No. 2 Shri A. R. Shaikh. In the return itself a statement is made on behalf of the State that Shri Shaikh has acted according to the directions of the Government. However, it is not necessary for us to probe into this question any further in this writ petition. However we want to draw the attention of respondent No. 1 towards the Maharashtra Government Rules of Business framed under Art. 166 of the Constitution of India and particularly towards R. 14

of the said Rules. It is pertinent to note that the State of Maharashtra is joined as respondent No. 1 to this petition through the Secretary of Urban Development Department of the Government of Maharashtra. Rule 14 of the said Rules makes the Secretary of the department concerned responsible for the careful observance of the rules and when he considers that there has been any material departure from them, it is his duty to personally bring the matter to the notice of the Minister-in-charge and the Chief Secretary. Therefore, having regard to the material placed before us and the allegations made in the petition we find that there is material departure from the procedure normally followed in this behalf and, therefore, we hereby direct the Secretary of the department concerned to bring this matter to the notice of the Minister-in-charge as well as the Chief Secretary. Under Art. 166 of the Constitution of India, the executive action of the Government of a State is required to be expressed in the name of the Governor. Orders and other instruments made and executed in the name of the Governor or to be authenticated in such manner as may be specified in the business rules. Article 166 (2) further lays down that the validity of an order or instrument which is so authenticated shall not be called in question on the ground that it is not an order or instrument made or executed by the Governor. Therefore, it is obvious that a sanctity and authenticity is attached to such an order or instrument which is issued in the name of the Governor. If the allegation made in the petition in this behalf are true which in our opinion, have much substance, then the very purpose of Article 166 will be frustrated. The very authenticity or sanctity to be attached to such documents will lose its force. This is likely to affect the confidence the public has in such instruments or orders. Therefore, in our opinion this is a fit case where this matter should be brought to the notice of the Head of the State, viz., the Governor also in whose name and order is issued and published in the Official Gazette. We, therefore, direct respondent No. 1 the State of Maharashtra, to place this matter also before the Governor of Maharashtra.

7. So far as the contentions raised on the merits of the matter are concerned, they will have to be decided having regard to the provisions of S. 313 of the Act and the material and circumstances

placed on record. As already observed, initially certain action was proposed to be taken against the President of the Municipal Council. Thereafter an inquiry was instituted under S. 311 of the Act. The institution of that inquiry was challenged before this court by the petitioners by filing a writ petition bearing Special Civil Application No. 610 of 1972. As already observed, this petition was admitted by this Court and initially an interim stay of inquiry was also granted. On an application being made by the State the said interim stay was modified and permission was granted to the State Government to proceed with the inquiry up to the stage of submission of report. However, further action on the basis of the report was stayed. In spite of this modification of the order, which was at the instance of the State Government, it appears that the State Government did not proceed with the inquiry but cancelled its earlier order of instituting the inquiry itself. The fact of cancellation of the inquiry was not brought to the notice of this Court. The said petition is still pending and is being disposed of today as it has become infructuous. According to the petitioners, when the respondent State found that even if inquiry is held and report is submitted as in view of the stay order granted by this Court further action cannot be taken the inquiry was dropped and then recourse was taken to the provisions of S. 313 of the Act in colourable exercise of the power. Under S. 313, an action to appoint an Administrator could be taken if in the opinion of the State Government,

(a) the Council is not competent to perform duties imposed upon it by or under this Act or any other law for the time being in force, or

(b) it persistently makes default in the performance of such duties, or in complying with the lawful directions and orders issued by the Collector, the Director, the State Govt. or any other authority empowered under law to issue such direction or orders to a Council, or

(c) exceeds or abuses its power, or

(d) a situation has arisen in which the administration of the Council cannot be carried out in accordance with the provisions of this Act, or

(e) the financial position and the credit of the Council is seriously threatened. In the case before us, show cause notice was founded on the ground connected with Cls. (a), (b), (c) and (e) of this

section. Section 7 of the Act indicates the Municipal Authorities charged with carrying out the provisions of the Act, namely,

- (a) the Council;
- (b) the President;
- (c) the Standing Committee;
- (d) the Subjects Committees, if any; and
- (e) the Chief Officer.

Then by S. 8, incorporation of the Council is provided which further lays down that it will have a perpetual succession. Therefore, obviously the Act creates specific municipal authorities which are charged with the execution of the provisions of the Act. As already observed, Chapter XXIII provides for the control over the administration and working of the Municipal Council, S. 313 deals with the competency or incompetency acts or omission of the Municipal Council as such. It, therefore, appears from the scheme of the Act that the acts, defaults, competency or incompetency, excess or abuses etc. which can be taken into consideration by the Government while taking action under S. 313 of the Act should be the defaults, excess etc. of the Council and not merely of the President or the Chief Executive Officer or the Standing Committee itself, who, for certain purposes, can exercise their powers within the frame work of this Act independently. In a given case it could be shown that though the action is that of an individual authority, namely, the President or the Standing Committee, etc., the Council as a whole is responsible for the said act or omission. Therefore, in the present case it will have to be seen as to whether there was a material before the Government on the basis of which reasonably an opinion could have been formed that council was either incompetent to perform its duties or has made persistent defaults in performance of its duties, or had exceeded or abused its power or the financial position and the credit of the Council was seriously threatened. The words used in Cl. (b) sub-s. (1) of the S. 313 are "persistently makes default in the performance of such duties, or in complying with the lawful directions and orders issued by the authorities." It does not deal with mere defaults, but the expression used is persistent defaults. Therefore, prima facie it implies the conduct of the Municipal Council to continue firmly some state of affair or course of action which they have adopted in spite of the warn-

ing, notice or protest, etc. In a given case a singular default which is of a serious nature might indicate persistent attitude of the Municipal Council. The very words contemplate the default which is persistent one and that too in the performance of duties or in complying with the lawful directions of the authorities.

The duty imposed upon the Municipal Council could be an expressed duty as imposed by the provisions of the Act or any other law for the time being in force or could be an implied one. Having regard to the position the Council occupies in the democratic set up and the obligations and duties imposed upon it by the Act or any other law for the time being in force, an obligation is cast upon them to do something which they should do as a public body or as a result of an obligation it owes to the citizens in general. So far as abuse or excess of power is concerned, abuse of power could be inferred from want of good faith or bona fides or if the action is arbitrary, fanciful or unreasonable. However, no general rule or principle can be laid down in this behalf and ordinarily it must depend on the facts and circumstance of each case. In the present case, so far as the competency of the Council is concerned, in the show cause notice the sub-cl. (a) of S. 313 is reproduced. Then in Schedule 'I' the instances are given which, according to the State Government, show that the Council is incompetent to perform its duties imposed upon it by or under the Maharashtra Municipalities Act or any other law for the time being in force. The instances given are as under:

"(1) Ordinary meetings are not held according to the provisions of S. 81 of the Maharashtra Municipalities Act.

(2) Quarterly accounts are not prepared and note to that effect is not published according to provisions of S. 103 of the Maharashtra Municipalities Act.

(4) The Salary Reserve Fund is not constituted provided by S. 91. Further the amount withdrawn from the said fund has not been recouped.

(4) The Council failed to pay loan instalment and interest thereon payable to Life Insurance Corporation which were due on 29-3-72. The Collector, Buldana had, therefore, to recover the same by making necessary adjustment while releasing D. A. grant in June 1972.

(5) Abnormal deduction is made in the assessment list without recording rea-

sons. Some properties have not been assessed for years together.

(6) Education cess recovered is not credited into Government Treasury in time.

(7) Building permissions are not given within the prescribed time and the permissions were not made available for inspection.

(8) The work of removing encroachments is neglected.

(9) Basic amenities such as public latrines, Urinals, dust-bins have not been adequately provided.

(10) The Council has carried out public works costing Rs. 1,56,293 but the stock account of building road materials are not maintained properly.

(11) Tenders at higher rate have been accepted after negotiations. Only certain contractors being called for negotiations therefor and not all who tendered.

(12) No technical sanctions are obtained from competent authority in case of works costing Rs. 10,000 and above, as required by S. 72 of the Act."

It is an admitted position that so far as the instances given in items Nos. 8 and 12 are concerned, they were not relieved upon by the State Government while passing the final order. Therefore, these instances do not find place in the final order passed on 1-12-1973. So far as the failure of holding ordinary meetings is concerned, the Municipal Council had given a detailed explanation. As to during what period ordinary meetings were not held is not enumerated in the show cause notice. But it appears from the material placed on record that in all seven ordinary meetings were held during the period from 11th June 1971 to 7th May 1973 and about 18 special meetings were taken during that period. Under S. 81 of the Act a duty is cast upon the Chairman to convene meetings. Sub-section (1) of S. 81 then lays down that there shall be held six ordinary meetings in each year for the disposal of general business, in every alternate month commencing from the month in which the first meeting of the Council under S. 51 is held, and such other ordinary meetings as the President may find necessary. The said provision lays down a duty upon the President to fix the dates for all ordinary meetings and to call such meetings. The whole period from the commencement of the month in which the first meeting of the Council was held under

S. 51 of the Act upto the date of issuing of the show cause notice has not been taken into consideration by the State. Further it appears that in the special meetings the business of the Council was transacted. It is not the case of the State Government at any stage that because these general meetings were not held as per schedule, business of the Council has been prejudicially affected. An action initially was taken against the President and inquiry was also instituted in this behalf under S. 311 of the Act but the State Government has chosen not to proceed with it. Therefore, from the material placed on record it appears that there is technical breach in this behalf which has been explained by the Municipal Council. Unfortunately even from the final order, which is incorporated in the Government Resolution, we do not find any reference to the explanation given by the Council at all. We do not find any recital in the final order which could indicate that the explanation given by the Council to the show cause notices was considered by the State Government. The phraseology used in the final order only indicates that the facts stated in the show cause notice were only verified. We still assume for a moment that the President was not justified in not calling the meetings as per provisions of the Act and has committed a technical breach of Section 81 of the Act. But then what will justify an action under S. 313 of the Act is the incompetency of the Municipal Council and not wrongful act of the President. It has not been alleged that the Municipal Council as a whole was a party to this alleged wrongful Act of the President. Therefore, in our opinion, the State was in error in relying upon this instance. So far as preparation and publication of quarterly accounts are concerned, it appears from the record that such accounts were prepared but were not published according to the provisions of S. 103 of the Act. Section 103 of the Act requires the Municipal Council to publish a statement in this behalf in the local newspapers. However, in the explanation given by the Municipal Council it was clarified that in the town of Malkapur there is no daily newspaper and there is only one weekly paper which has insignificant circulation. Therefore, the Council thought that by publishing this notice in the weekly newspaper no tangible result would be assumed and, therefore, a statement in that behalf was put on the notice-board

of the Municipal Council. It is an admitted position before us that in the Municipal town of Malkapur there are no daily newspapers. As per provisions of S. 58 of the Act it is the duty of the President to perform the executive functions and exercise supervision and control over the acts and proceeding of the officers etc. The duty to publish the matter in the local newspaper could be termed to be an executive function. It should have been done by the President or the Chief Officer. Here again we will assume for a moment that they were not justified in not publishing quarterly or annual accounts in the weekly newspaper. But as already observed, we are not concerned with the wrongful acts of the President or other servants of the Municipal Council. Here also it is not shown that the Municipal Council as a whole was a party to this wrongful act. So far as the Salary Reserve Fund is concerned, it appears that this is partly done by the Municipal Council and so far as question of recoupment is concerned, the Municipal Council had explained the whole position by stating, that because of the obstacles created in releasing the grant in time it was not possible for them to recoup the funds within time, which was ultimately done by the Collector himself from the grants which are payable to the Municipal Council. Similar, is the position with payment of loan instalments. This amount was also recoverable by the Collector from the grants payable to the Municipal Council. So far as the allegation regarding the abnormal deduction made in the assessment list is concerned, it is obvious from the bare reading of this charge that it is too vague. It was pointed out by the Municipal Council in its explanation that the charge does not disclose the details of entries in the assessment list nor it discloses the property to which it relates. So far as the charge regarding credit of education cess in Government Treasury in time is concerned, in the charge it is not stated as to what was the time specified for payment of this Education Cess. Similar is the position with the charge No. 7 in Annexure I, which relates to building permission. This charge is also vague. A specific complaint in this behalf was made by the Municipal Council in its explanation and in spite of this, no further details or particulars were ever given by the State Government. From the copy of the Inspection note which was given to the Municipal Council also these details are not available. In

this behalf it is pertinent to note that granting of building permission is not the function of the Municipal Council as a whole. Under S. 190 of the Act, it is the power of the Chief Officer. In this case also it is neither alleged nor shown that the Municipal Council as a whole was a party to this inaction on the part of the Chief Officer. In this behalf reference could usefully be made to S. 77 of the Act which deals with the powers and duties of the Chief Officer. In these circumstances, it cannot be said that there was no substance in the grievance made and explanation given to the individual charges by the Municipal Council in its explanation. As already observed, charges Nos. 8 to 12 were already deleted and were not relied upon when the final order was passed. Instead, one more charge was added to this Annexure 'I' in the final order, which reads as under:

"60 Audit paras are still outstanding, oldest being for the year 1957-58." It is an admitted position that this charge was not the subject-matter of the show cause notice nor was it ever brought to the notice of the Municipal Council at any time. It is not necessary to deal with this additional charge in detail as a statement has been made before us by Shri Salve, learned Assistant Government Pleader, that he is not relying upon any of the newly added charges for supporting the order passed by the State Government. Schedule II deals with the instances of making persistent defaults in performance of the duties or in compliance with the lawful direction or orders issued by the Collector or the Director and of the State Government. Though this is, in our opinion, a verbatim reproduction of Cl. (b) of sub-s. (1) of S. 313 of the Act, no details have been given as to what were the direction or orders issued by the Collector, the Director or the State Government, which were not carried out by the Municipal Council. It is also not specified as to what was the duty of the Municipal Council to which the defaults relate. Charge No. 1 deals with payment of arrears of Badkas Commission pay-scales which is to the tune of four lakhs, in reply to this allegation it was clarified by the Municipal Council that Badkas Award was made applicable with retrospective effect from 1966 and by issuing a circular by the State Government. It is no doubt true that an option in this behalf was given to the Municipal Council. Initially the Muni-

pal Council decided to make the said Award applicable from 1-3-1970. But then there was an agitation by the employees and, therefore, the decision taken by the Municipal Council could not be transacted into practice and ultimately it was forced to accept the recommendation of the Badkas Commission and make the Award applicable with effect from 1-4-1966. According to the Municipal Council having regard to the obligatory duties it was not possible for them to arrange for making of payment of these four lakhs of rupees in a lump sum. Such a plea has also been taken by them in paragraph 14 of the petition. Therefore, obviously it could be said that the Municipal Council has not paid these arrears till the show cause notice was issued. But it is difficult to hold that this amounted to a persistent default for performance of duties. No specific order or direction has been placed on record to indicate that the Municipal Council was directed to pay this amount by a specific date. It is no doubt true that it could be assumed that once by a resolution the responsibility regarding payment of arrears of Badkas Award is accepted by the Municipal Council, it is duty-bound to pay it. But if the Award is made applicable retrospectively from the year 1966, then it can very well be visualised that it may not be possible for a local body to pay the whole amount in a lump sum in one year. The Budget estimates and recovery were already completed and even the accounts for the said period were duly audited and closed. Payments of arrears could be made only from the prospective recoveries. It is obviously not an obligatory duty. If, therefore, in this background incapacity to pay the whole amount in lump sum is duly explained by the Municipal Council and that too reasonably, in our opinion, it cannot be said that they had committed any persistent default in this behalf. So far as the charge No. 2 regarding beef-market stalls is concerned, it appears that there was difference of opinion between the authorities concerned and Municipal Council. It involves a question of policy and principles. It appears that there was a difference of opinion regarding the policy to be adopted in this behalf. According to the Municipal Council initially the Municipal Council had issued notice of auction sale on 6-2-1970 intimating that the auction sale will be held on 23rd of November 1970. However, that was postponed. Then only one

person came forward and filled the tender. According to the Municipal Council there were complaints against him and it was alleged by others that he wants to create a monopoly. Therefore, in its wisdom the Council resolved to give these shops on fixed annual rent. This resolution was then suspended by the Collector. In the meantime the President and the Vice-President were ousted by passing a vote of no-confidence and ultimately the Collector's nominees held the auction. If the explanation given by the Municipal Council is true, then it cannot be said that here also there was any persistent default in performance of duties. In its wisdom as elected representative of the people with an intention to avoid the monopoly in the trade, rightly or wrongly, decision was taken by the Municipal Council which was not found to be correct by the Collector and, therefore, he suspended the resolution. It is not shown that this resolution was passed by the Municipal Council mala fide or the decision in that behalf was not honestly taken. Therefore, only because the said resolution was suspended and for the reasons disclosed in the explanation ultimately the auction was to be held through a revenue officer, it cannot be said that there was a persistent default on the part of the Municipal Council or they had disobeyed to carry out the directions or orders issued by higher authorities. From the final order it appears that to this Annexure also a charge was added which reads as under:

"Arrears of property tax of Rs. 3,234 and other were outstanding against the father of the President Shri V. J. Purohit. The said taxes have been paid by him on 3rd November, 1972."

It is an admitted position that this was also not the subject-matter of the show cause notice. It is not necessary to deal with this additional charge also in view of the statement made by the learned Assistant Govt. Pleader before us that he is not relying upon it for supporting the order passed by the Government. Annexure III then deals with instances in which the Municipal Council had exceeded and abused its powers. Out of three charges enumerated therein, charge No. 3 relating to water connection does not find place in the final order. Charge No. 1 deals with percentage of expenditure over the Municipal staff which, according to the State, was 77 per cent and this was particularly so in the Octroi

department. According to Municipal Council, it had submitted statement showing the Schedule of expenditure and according to it, it came to 42 per cent only. In paragraph 17 of the petition a specific averment is made that this statement was admitted at the time of hearing on 23rd August 1973. So far as surplus staff in the Octroi department is concerned the Municipal Council has clarified the position that Octroi department is governed by the Industrial Law and the department is required to work for 24 hours. As a result of this the staff which is required to be engaged is practically three-fold in number and this fact was also brought to the notice of the Minister for State at the time of hearing. The reply given by the Government in the return to this allegation is most cryptic. It is not denied in specific words that these facts were brought to the notice of the Minister for State and the statements made in this behalf were admitted at the time of hearing. Even in the additional affidavit we do not find anything regarding these allegations. So far as the charge regarding creation of 12 posts is concerned according to the Municipal Council, they were required to appoint 10 teachers in view of the ratio fixed by the Director of Education under the provisions of the School Code. The ratio fixed by the Director of Education is that there should be one teacher for every 40 students. In view of this direction issued by the Director of Education, teachers were appointed. According to the Municipal Council, this position was also explained to the Minister at the time of hearing and the Minister also accepted the same. It was also pointed out that so far as the other two posts are concerned, one was a part-time employee and the other post was abolished. In reply to these averments made in the petition in the Return it was not disputed by the State Government that in view of the norms prescribed by the Deputy Director of Education 10 teachers were required to be appointed. However, according to the State Government, the prior sanction of the Director of Municipal Administration was necessary for this. So far as the averments made in the petition that these facts were admitted by the Minister at the time of hearing are concerned nothing has been stated in the return. It further appears to us that if the averment made in the explanation to show cause notice and the petition are correct

that in view of the norms prescribed by the Director of Education the Municipal Council was required to appoint the teachers, then it can hardly be said that the Municipal Council had either exceeded or abused its powers. The ten posts out of 12 referred to in this charge related to the posts of teachers. So far as prior sanction for creation of the posts from competent authority is concerned, it is quite obvious that under S. 337 of the Act it is open for the authority to accord ex-post facto sanction if it is satisfied that such action was bona fide and has not caused or it not likely to cause injury to any person or that the action taken was in the public interest. Under S. 49 of the Act it is one of the obligatory duties of the Municipal Council to establish and maintain primary schools. Out of these 12 posts, some posts were of primary teachers and were created to meet educational needs in the primary schools due to increase of students and this was done with the sanction of Deputy Director of Education, Amraoti. Further it appears that the Mpl. Council was getting a matching grant from the Education Department in this behalf. So far as other posts of teachers are concerned, they were created for the Higher Secondary School maintained by the Municipal Council to meet the educational needs in the town. The grant on the salary expenditure of these teachers was also sanctioned by the Government through Educational Officer, Zilla Parishad, Buldana. So far as appointments of two other posts are concerned, the explanation in that behalf was also given by the Municipal Council. To this schedule also in the final order we find that an additional charge is added, which is:

"Illegal termination of services of Sarvashri Paranjape, Typist and Satpute, Naka Mohrir". It is an admitted position that this charge was also not the subject-matter of the show cause notice. It is also not necessary for us to deal with this charge any further in view of the statement made by the learned Asstt. Govt. Pleader.

8. In Annexure IV, four instances showing that the financial position and the credit of the Council is seriously threatened, are given. Before dealing with this schedule, it will be worthwhile to refer to the actual order passed in this behalf by the State Government. It appears from the record that so far as the State Government is concerned,

the matter in this behalf was heard by the Minister for the State and it is he who has taken the final decision. After hearing the Municipal Council as well as the complainants viz., Sarvashri J. N. Jadhao, Sk. Mohammad Jamadar, who are also respondents before us, the Minister passed the following order on 26-11-1973:

"The case of the Municipal Council, Malkapur, was heard by me on the 15th and 23rd October, 1973. The Council was represented by Advocate Mr. C. G. Madkholkar. The Chief Officer Shri M. S. Dawale, Shri M. Z. Aziz, Municipal Councillor were present on 15th instant. On the same day, complainants Sarvashri J. M. Jadav and Shri Shaikh Mohamad Jamadar were also present. On the second day of it i.e. 23rd October, 1973 besides the Advocate and the Chief Officer and Councillor Shri Aziz, the President of the Municipal Council Shri V. J. Purohit were present for the Municipal Council; complainants as stated above were also present. Out of 22 charges levelled against the Municipal Council, 17 charges have been proved against the Municipal Council. Besides following additional charges were made by the complainants during the hearing.

(i) Illegal termination of services of Sarvashri Paranjape. Typist and Satpute, Naka Moharir.

(ii) 60 Audit Paras. are still outstanding, oldest being for the year 1957.58.

(iii) Arrears of property tax of Rupees 3,234 and other taxes are still outstanding against the father of the President Shri V. J. Purohit.

All the above charges stand proved. In fact the arrears of taxes have been recovered from Shri J. B. Purohit, the father of the President of the Municipal Council on 3rd November, 1973 i.e. after I had directed the President to do so at the time of hearing on 23rd October, 1973. The Municipal Council has also admitted all the above 3 charges.

In view of the above position I am convinced that the affairs of the Municipal Council are not carried out according to the provisions of the law and that this is a fit case for appointing an Administrator under S. 313 of Maharashtra Municipalities Act, 1965. I, therefore, order that Administrator be appointed over the Municipal Council under S. 313 (1) (a) (b) (c) and (d) of the Act."

9. In the return filed before us it is admitted that the decision to supersede

the Municipal Council was taken by the Government on 26-11-1973, obviously in view of this order passed by the Minister for State. Shri Salve Assistant Government Pleader is strongly relying upon this order. On the other hand, it is contended by the learned counsel for the petitioners, Shri Madkholkar, that he was present at the time of hearing even before the Minister for State and the statement made in the order that Municipal Council had admitted these additional charges is wholly incorrect. According to him, as the petitioners were not aware of this order passed by the Minister for State, they could not make any statement in that behalf in the petition. He further stated that they are coming to know about this order passed by the Minister for State for the first time. It is not necessary to deal with this aspect of the matter in detail because of the statement already made by the Assistant Government Pleader before us that he is not relying upon any of these additional charges for supporting the order passed by the Government superseding the Municipal Council.

10. From the bare reading of this order it is quite clear that the Minister found that out of 22 charges levelled against the Municipal Council, 17 charges have been proved. It was fairly conceded by Shri Salve before us that this figure given in this order is arithmetically wrong. Out of 22 charges initially levelled against the Council, it is admitted position that some of them were deleted and were not relied upon when the final order was passed. At the most even after including the charges which were vague in nature it could be said that 15 charges could be found to be proved by the Government, because excluding the newly added charges only 15 of them find place in the final order. Further it is clear from this order that some additional charges were made by the so-called complainants during the hearing and those charges were also found to be proved and were relied upon by the Minister for passing the order. After taking into consideration those charges the Minister formed an opinion and came to the conclusion that,

"affairs of the Municipal Council are not carried out according to the provisions of law and, therefore, this is a fit case for appointing an Administrator under S. 313 of the Maharashtra Municipalities Act, 1965."

This part of his reasoning or order is covered by sub-cl. (d) of sub-s. (1) of S. 313 of the Act. Therefore, ultimately the Minister for State directed that Administrator should be appointed over the Municipal Council under S. 313 (1) (a), (b), (c) and (d) of the Act. So far as sub-cl. (e) of sub-s. (1) of S. 313 of the Act is concerned, in this final order passed by the Minister for State no reference is made to it. On the contrary, the Minister has only relied upon sub-cl. (d) of sub-s. (1) of S. 313 of the Act which was never the subject-matter of the show cause notice. Though the Minister directed appointment of an Administrator under sub-cl. (a), (b), (c) and (d) of the Act, in the final order we find that cl. (d) sub-s. (1) of S. 313 of the Act is not relied upon neither referred to. Further in this order we do not find anywhere that the Minister, who formed the opinion on behalf of the State, ever thought that any of the grounds or charges levelled against the Council were severally or jointly serious enough to warrant action against the Municipal Council. On the contrary, it is quite obvious from the bare reading of this order that after taking into consideration the cumulative effect of all these 17 charges which, according to the Minister, were found to be proved, plus three more newly added charges, he came to the conclusion that situation has arisen in which administration of the Council cannot be carried out in accordance with the provision of the Act. What does it mean is difficult to understand. Therefore, it is obvious that the opinion was formed by the Minister for State on the basis of cumulative effect of all the charges, which according to him, were proved. Therefore, this is not a case where an opinion has been formed by the competent authority that the charges which were levelled against the Council were severally serious enough to warrant action under S. 313 of the Act. The recitals to that effect in the Government Resolution have no effect because it is not in conformity with the decision taken by the Minister for State. It is an admitted position even from the return that the decision to supersede the Municipal Council was taken on 26-11-1973. Before us Shri Salve has relied upon this decision dated 26-11-1973 which was taken by the Minister for State on behalf of the State Government. From the files produced before us it appears that the decision in this behalf was taken by the Minister for State.

Therefore, it is obvious from the order of the Minister for the State that he has not formed an opinion that financial position and the credit of the Council was seriously threatened. To us it appears that it is the order passed by the Minister for State which is decisive of the matter because it was he who heard and decided the matter as a representative of the State Government. Therefore, in our opinion, strictly speaking the charges made in Annexure IV are not germane for deciding the question involved in this writ petition. Even otherwise, if the said charges levelled against the Municipal Council are read in its context as referred to in Annexure IV, they are as under:

"(1) The liabilities (Rs. 13,28,508) exceed the asset (Rs. 8,86,103) on 31-12-1972. (2) The average deficit of the Municipal Council was Rs. 4,640. There was always minus real cash balance with the Municipal Council (3) Percentage of recovery of Consolidated Property Tax, namely, 51 per cent is not satisfactory. There are heavy arrears amounting to Rs. 1,42,190 on 31-12-1972 as against, normal yearly demand of Rs. 1,32,000. The arrears of all taxes as on 31-12-1972 were Rs. 4,14,000 as against the demand of Rs. 6,93,842. This has been reduced to Rs. 3,12,936 on 26-3-73. (4) The special sanitary service and the Water Supply Scheme are not self supporting. (5) The income from Octroi has shown a reduction from Rs. 6,86,000 to Rs. 3,86,560 within a period of two years ending March 1972. The percentage of expenditure on Octroi staff is high, namely 44% as against the prescribed percentage of 20."

So far as charge No. 2 is concerned, it is an admitted position that it was not relied upon when the final order was passed. So far as charge No. 1 is concerned, in the show cause notice the liabilities referred were up to 31-12-72 whereas in the final order the liabilities were taken into consideration as on 5th November 1973. Obviously, therefore, the Municipal Council had no notice that their financial position relating to the liabilities and assets up to 5th of November 1973 will be taken into consideration or will form part and parcel of the charge. So far as charge No. 3 relating to the percentage of recovery of Consolidated Property Tax is concerned; we find on page 91 of the petition that a statement showing the position of recovery and arrears of various municipal taxes from

1-4-1972 to 31st March 1973 was produced before the State Government. From this statement it appears that recovery was 67 per cent and not 51 per cent, as shown in the show-cause notice or in the final order. About this charge in paragraph 21 of the petition explanation has been given by the Municipal Council. The said explanation was also given before the Minister for State. A positive statement is made in the petition that this position was explained in detail and was admitted to be correct by the Minister for State on 23-10-1973. It is no doubt true that this statement is disputed in the return. However, it is quite obvious that in spite of the schedule submitted by the Municipal Council explaining the whole position which is at page 91 of the petition, mechanically the whole thing is reproduced from the original charge-sheet even in the final order without considering the explanation or the schedule of recovery submitted by the Municipal Council. This clearly indicates non-application of mind. So far as charge No. 4 relating to Special Sanitary Service and the Water Supply Scheme being not self-supporting are concerned, the Municipal Council had given a cogent and convincing explanation in that behalf also. According to the Municipal Council, the proposal for additional water pipe line was submitted to the Urban Development Department which was promptly rejected by it. Therefore, there are a very few water lines in the town and revenue from this water connection cannot be sufficient to make the scheme self-supporting. It was further clarified that so far as this position is concerned, similar is the position in other Municipal Councils in the whole of the State of Maharashtra whether it is being run by the elected Councillors or by the Administrator appointed by the Government. So far as the charge relating to the income from octroi tax and the expenditure on the staff is concerned, the Municipal Council in its explanation had contended that in view of the fact that more than 8 hours duty cannot be assigned to any employee, they were required to engage more staff. It was also explained that Buldana district was declared a scarcity district in the years 1970-71, 1971-72 and 1972-73 and, therefore, trade was seriously affected. The Cotton Procurement Scheme was also introduced by the Government. It has also adversely affected the trade of the town. A further Scheme of Procurement of

Jowar and Wheat was also introduced by the Government and this has affected the revenue on that count. Therefore, according to the Municipal Council because of the acute scarcity conditions and introduction of this monopoly scheme the trade of the town had suffered and hence there was a reduction in the revenue. However, they further explained that this was beyond their control and they were taking necessary steps in that behalf. In paragraph 23 of the petition it was stated on behalf of the petitioners that this position was also discussed at length with the Minister for State at the time of hearing. In the petition it was also contended on behalf of the petitioners that the position or circumstances on the basis of which various charges were framed by the State Government for superseding the petitioner Municipal Councils were practically prevalent in all the Municipal Councils throughout the State of Maharashtra. Therefore, it was contended on behalf of the petitioners before us that only the petitioner-Council is chosen for such an action and that too for extraneous reasons. The contentions raised in the petition that similar position is prevalent in other Municipal Councils in the State of Maharashtra is not specifically denied in the return. No doubt, it is true that only because such a situation is existing in other Councils, it is not open for the petitioners to contend that they have a right to continue such circumstances or commit such defaults. However, when allegations of mala fides and discriminations are made in the petition, it was expected of the respondents that they would clarify the whole position in the return. Unfortunately this has not been done.

11. Further it is an admitted position that initially a show-cause notice was given to the Municipal Council. The Municipal Council had given a detailed explanation relating to each and every charge. In spite of this fact in the final Government Resolution issued on 1st December 1973 superseding the Municipal Council and appointing the Administrator, no reference is made to the show cause notice. Even in the speaking order passed by the Minister for State we do not find any consideration of this explanation submitted by the Municipal Council. If an authority is called upon to submit explanation in reply to a show-cause notice issued to it, it is nor-

inally expected that the said explanation will be duly considered by the competent authority and at least the files will disclose as to why the said explanation is not accepted or is not acceptable. In this context a reference could be made to a decision of Allahabad High Court in State of Uttar Pradesh v. K. C. Gupta (1974 All LJ 58) as well as to a decision of Madhya Pradesh High Court in Suresh v. State referred to hereinbefore. While considering the similar position under S. 422 of the Madhya Pradesh Municipal Corporation Act the Madhya Pradesh High Court observed:

"In this context, the further requirement that the reasons for making the order shall be stated, must be understood to mean that reason for rejection of the explanation of the Corporation must also be stated. The statutory requirement of stating the reasons is not satisfied simply by narrating the charges and the opinion of the Government that the explanation of the Corporation has failed to meet the charges; in our view it is also necessary that reasons for that opinion should be stated."

In the present case apart from the fact that it is not stated in the order passed by the Minister for State as to the explanation given by the Municipal Council is not acceptable; we do not find even a bare reference to the said explanation in the order. As already observed, even the factual position stated in the order is incorrect. During the course of hearing certain grave and serious new charges have been added and from the tenor of the order passed by the Minister for State it appears that it is these charges which have weighed with him for forming the opinion.

12. This is not all. From the file produced before us an impression is created that even before the matter was heard, a decision was already taken for superseding the Municipal Council. In the reply to the show-cause notice the Municipal Council had stated that there is an opposition group in the Municipal Council which is headed by Shri J. N. Jadhao. It was also stated that Shri J. N. Jadhao was President of the Municipal Council for last 12 years and that it was for the first time that he was defeated. A further allegation was also made that as Shri Jadhao was defeated, he got frustrated and, therefore, with a mala fide intention and jealousy he started making complaints against the Municipal

Council. A specific allegation was made that he was creating troubles and impediments with the sole motive of getting the Municipal Council superseded because he was defeated in the presidential election. A further allegation was also made that he held an influential office in the political party in the district. He was Vice-President of the District Congress Committee and by utilizing his position in the party he was making false complaints against the Municipal Council with an intention to achieve his political end. From the files produced before us we find that there are several letters written by Shri Jadhao to the Chief Minister as well as Minister for State. On one such letter he had made a reference to the visit of the Minister for State to Malkapur and it is further stated therein that in visit the Minister had told them that show-cause notice was already issued to the Municipal Council and as soon as reply was received orders regarding supersession of the Municipal Council would be passed. This position may be true or may not be true. It may be that he carried such an impression. But from the final order passed by the Minister for State it is quite obvious that it was on the complaint by these persons that the action was taken. They were also present at the time of hearing. In the order passed by the Minister they are described as complaints. From the letter-head on which such letter is written it appears that Shri Jadhao was member of Maharashtra Pradesh Congress Committee and was also a President of the Nagar Congress Committee. If this is so, then it cannot be said that the apprehension in the mind of the petitioners in this behalf was wholly unwarranted. However, a contention was raised before us by the learned Assistant Government Pleader that no specific allegations in this behalf have been made in the petition and, therefore, the State Government was not bound to give any answer in this respect. In our opinion, the State Government is not justified in taking shelter behind this technical objection. In the petition a specific reference is made to the explanation given by the Municipal Council in reply to the show-cause notice. The same is appended to the petition as annexure. Summary of the explanation has been given in the petition and we think rightly. Otherwise the petition would have become cumbersome if each and every thing

from the explanation was produced in the petition itself. Sufficient reference has been made to the annexures in the petition itself and a summary thereof is given. Further so-called complainant, including Shri Jadhao were joined as parties to the petition. In spite of notice they have chosen to remain *ex parte*. Therefore in a cumulative effect of all the circumstances disclosed on record is taken i.e. starting from the institution of the action against the President, then institution of an inquiry under S. 311 of the Act and its dropping down in view of the stay order issued by this court, coupled with the circumstances in which gazette was got printed, order was prepared, dated and served, we are satisfied that the whole inquiry in this behalf has not been conducted fairly and properly or in any case in consonance with the principle of natural justice. The principle of natural justice is minimum required that if any additional material or charge was intended to be used against the Municipal Council, they should have been given a reasonable opportunity to submit their explanation or to put forward their case in reply to the same. That too was not given. It is no doubt true that from the material placed on record it could be said that some of the charges levelled against the Municipal Council were either admitted or were proved, though they were explained by the Municipal Council. But as already observed the order passed by the Minister for State is based on the cumulative effect of all the charges and we are satisfied that but for the charges which were newly added or were either vague or non-existent, the present order would not have been passed by the State Government.

13. However, an argument was advanced by Shri Salve that in the present case even if the newly added charges or the charges which are either non-existent or vague are excluded, from the consideration, still there are some charges which are proved and they are of serious nature for which the State Government could have legally taken the same action. In support of this contention Mr. Salve has relied upon a decision of the Supreme Court in the State of Maharashtra v. B. K. Takkamore 1967 Mah LJ 317: (AIR 1967 SC 1353) and particularly upon the following observations on page 325:

"The principle underlying these decisions appears to be this. An administra-

tive or quasi-judicial order based on several grounds, all taken together, cannot be sustained if it be found that some of the grounds are non-existent or irrelevant and there is nothing to show that the authority would have passed the order on the basis of the other relevant and existing grounds. On the other hand, an order based on several grounds some of which are found to be non-existent or irrelevant, can be sustained if the Court is satisfied that the authority would have passed the order on the basis of the other relevant and existing grounds, and the exclusion of the irrelevant or non-existent grounds could not have affected the ultimate opinion or decision."

In our opinion, the law laid down by the Supreme Court in State of Maharashtra v. B. K. Takkamore's case has no application to the facts and circumstances of the present case. In that case in the show-cause notice itself a specific reference was made by the State Government that in its opinion the second ground alone was serious enough to warrant an action of supersession. We do not find such an averment in the show-cause notice issued in the present case, or in the speaking order passed by the Minister for State. For the first time in the Government Resolution which is purported to be published in the Extraordinary Gazette on 1st December 1973 a reference is made that the allegations made on verification have been found to be true and severally and jointly appear serious enough to warrant action against the Municipal Council under Section 313 of the Act. As already observed by us, this is not the opinion of the State Government. In this case the decision in this behalf was taken by the Minister for State. It is the Minister for State who had formed an opinion on behalf of the State Government and his opinion or decision is not reflected in this Government Resolution and that too for the obvious reasons to which we have already made a reference. Further the said Government Resolution as well as the publication of the Official Gazette is itself clouded by various circumstances referred to hereinbefore. Further this is a case where certain other grounds were added to the charges already levelled in the show-cause notice. The order passed by the Government superseding the Municipal Council is based on a cumulative effect of all the charges levelled against the Municipal Council which are referred to in the final

order. From the tenor of the order passed by the Minister for State it is not possible to separate one charge from another nor it is possible to speculate that the Government was satisfied that any one of the charges levelled against the Municipal Council were serious enough to warrant action under S. 313 of the Act. In view of the various circumstances referred to hereinbefore, we are satisfied that in the present case the authority concerned would not have passed the order on the basis of the other relevant or existing grounds alone nor we are satisfied that the exclusion of additional or non-existing grounds would not have affected the ultimate opinion or decision. In the present case the Minister for State had expressly recorded his opinion. From the words used in his order there is no doubt in our mind that it was the cumulative effect of all the charges and the grounds referred to therein that has resulted in passing the present order. It appears that the Minister for State has attached more weight and importance to the newly added grounds. The charges, cumulative effect of which was the opinion formed by the Minister for State, included the charges which were non-existent as well as newly added charges. The numerical mistake in the order clearly indicates non-application of mind. Further the Minister for State has not made any reference to Cl. (e) of S. 313 but has relied upon Cl. (d) of the said sub-section. Further we do not find that the explanation given by the Municipal Council was ever considered by the Minister for State on its own merits. On the contrary, the initial charges levelled in the show-cause notice were mechanically reproduced in the Government Resolution without even taking into consideration the relevant date placed before the Minister for State by the Municipal Council. This also indicates non-application of mind. Further the extraordinary way and method in which the Government Resolution was issued and published it in the Official Gazette has not been duly explained by the State Government. It is not clear from the return as to why Government thought it necessary to follow such an extraordinary method in this case alone. In a democratic society it is of the essence that democratic institutions which are part and parcel of the scheme of decentralisation of power are allowed to function and not superseded on

charges inadequately brought home or unreasonably accepted. In this view of the matter, it is not possible for us to sustain the order of supersession passed by the State Government.

14. Before we part with the judgment, we must take a note of an objection raised on behalf of the State that the petition itself has become infructuous in view of the subsequent enactments and events referred to in the additional affidavit filed by Shri Waghmare, officiating Administrator of the Municipal Council, Malkapur. In this additional affidavit filed on behalf of the State it was contended that the term of the present Municipal Council had already come to an end and was merely extended because of the postponement of general elections. Further the term of the existing Administrator was also extended in view of the subsequent enactments. Reliance was also placed on the latest Ordinance and the Act known as the Maharashtra Municipal Councils and Municipal Corporations (Postponement of Elections During the Emergency) Act 1975. According to the learned Assistant Government Pleader, the term of the Administrator of the Municipal Council stands extended during the aforesaid period in view of S. 3 (1) (c) of the said Act. It is not possible for us to accept the contention that in view of the subsequent enactment the petition has become infructuous. In the present case the action was taken under S. 313 of the Act for appointment of an Administrator. It is an admitted position that no order has been passed by the State Government under S. 315 (3) of the Act dissolving the Council. This is not a case where a Council is dissolved. In view of the provisions of the Maharashtra Municipalities Act, the Council has a perpetual succession and it is still subsisting. Only in place of elected Councillors the powers of the Municipal Council and other authorities are being exercised by the Administrator. It is also not disputed before us that if Administrator was not appointed and the elected Councillors had continued in office and for one reason or other elections were not held then the old body would have continued. If this is so, in our opinion only because the elections are being postponed or fresh elections could not be held in view of the postponement enactment, it cannot be said that the petition itself has become infructuous. The order of supersession of the Council and appointment

of an Administrator to some extent is penal in nature and casts a stigma on the Councillors as well as the Municipal Council. In these circumstances, it is difficult to say that only because general elections are postponed the petitioners have no right to challenge the order of supersession itself at this stage. The grievance made in the petition still survives. It is not controverted before us that normal term of the Councillors under S. 40 of the Act is five years, which may be extended by the State Government under exceptional circumstances. The term of the office of the Councillor commences on the date of meeting held after the general election to elect President. Under sub-s. (3) of S. 40, notwithstanding the provisions of sub-ss. (1) and (2) of the said section, the term of office of the outgoing Councillor is deemed to be extended to and expired with the day immediately preceding the date of such meeting. Apparently, therefore, existing Councillors are entitled to continue in office under Statute till the new Councillors are elected. Though, therefore, the initial term of the Councillors had expired, they are entitled to continue in office. Further having found that the impugned order is tainted with vice and violation of rules of natural justice and was issued in colourable exercise of power and under the existing law the Councillors of the Committee are entitled to retain their office till fresh elections are held, it seems to us that in the facts and circumstances of the case it will be a sound exercise of judicial power to set aside and quash the impugned illegal order rather than to allow it to stand. If the said order is permitted to stand it would only mean replacement of a popularly elected Municipal Council by an official Administrator and that too when his appointment is held to be illegal. Therefore, considering the entire case in the light of the peculiar facts and circumstances placed before us, we are constrained to allow the writ petition and to quash the impugned order.

15. In the view, therefore, we have taken, the petition is allowed. The order passed by the State Government dated 1-12-1973 under S. 313 of the Maharashtra Municipalities Act, 1965 and published in Extraordinary Gazette dated 1st of December 1973 and incorporated in Annexure F to the petition is, therefore, quashed and set aside. The petitioners

will be entitled to their costs from respondent No. 1.

16. At this stage the oral request for leave to file an appeal to the Supreme Court of India is made by the Assistant Government Pleader on behalf of respondent No. 1. In the present case we have only applied the well-established principles of law as laid down by the Supreme Court to the facts and circumstances of the present case. In this view of the matter, we do not feel that this is a fit case where such a leave should be granted. The prayer made in this behalf is, therefore, rejected.

Petition allowed.

AIR 1977 BOMBAY 269

DESHMUKH AND AGGARWAL, JJ.

Ganesh Shankar Kulkarni, Appellant v. Janakibai Krishnaji Kulkarni and others, Respondents.

Second Appeal No. 954 of 1967 with Civil Appeal No. 3140 of 1975, D/- 1-9-1976.*

Limitation Act (1908), S. 4 — Exclusion of vacation period — It is only when plaintiff initially brings suit in proper court that he can take benefit of S. 4.

If a suit is brought in a proper court which has pecuniary and territorial jurisdiction to entertain and try the suit, then the advantage offered by S. 4 can be availed of.

In the present case, the suit was originally filed in the Court of the Civil Judge, Senior Division on 4-6-1958 i.e. on the reopening of the Court. The period prescribed for institution of the suit was over on 3-5-1958. The Court was closed for the summer vacation from 3-5-1958 to 4-6-1958. The suit originally valued at Rs. 15,000 for the purpose of jurisdiction was revalued at Rs. 1,875. The plaint was ordered to be returned for presentation to the proper court and it was filed in the court of the Civil Judge, Junior Division on 17-8-1959. In the circumstances, the plaintiff was not entitled to claim the exclusion of the vacation period from 3-5-1958 to 4-6-1958 as he had approached the wrong court. AIR 1953 Bom 353 and AIR 1935 PC 85 and AIR 1973 SC 313, Relied on.

(Para 19)

*(Against order of R. K. Joshi, Dist. J., Kolhapur in C. A. No. 254 of 1965.)

Cases Referred: Chronological Paras

AIR 1973 SC 313: (1973) 2 SCR 684 13,
18

AIR 1953 Bom 353: 55 Bom LR 119 13,
17, 19

AIR 1935 PC 85: 37 Bom LR 533 13,
16, 18

K. J. Abhyankar with N. D. Hombalkar, for Appellant; V. V. Albal; M. L. Pendse, H. D. Gole, for Respondents.

AGGARWAL, J.:— This second appeal against the decision of the learned District Judge, Kolhapur, has been referred to Division Bench by a learned Single Judge as, in his opinion, it involves important questions, particularly as regards the joinder of proper parties and limitation under Ss. 4 and 14 of the Limitation Act, 1908. Principally, this appeal involves the point of limitation and in order to appreciate the same, it is necessary to trace the history of the litigation.

2. It is common ground that the land in suit bearing Regular Survey No. 386 admeasuring 22 acres and 39 gunthas originally belonged to Shri Swami Jagatguru Matha Karvir and Sankeshwar. By a Sanad of Margashirsha Vad 3, Shake 1756, His Holiness granted it in Inam to Hari Ballal. Hari Ballal had two sons named Bhavanrao and Antaji. Bhavanrao died before 1892 leaving behind his widow Ramabai. Antaji had two sons named Hari and Krishnaji. Hari had a son named Shankar and wife named Radha. Hari died in 1927. In 1892 Shankar was taken in adoption by Ramabai widow of Bhavanrao. Antaji's other son named Krishnaji died in 1955 leaving behind Jankibai, original defendant No. 1, who died in 1961. The said land which was originally Inam land was converted into Rayatava in Fasli 1356.

3. On 3rd May, 1888, Bhavanrao created a mortgage in respect of the said Survey No. 386 by a registered deed, Ex. 95. The entire property was mortgaged to Shivram Pujari for Rs. 750. The period stipulated was 10 years. The mortgage-deed provided that the mortgagee was to pay Rs. 156 per annum out of the usufruct to the mortgagor and to appropriate the balance towards the claim of interest on the mortgage amount of Rs. 750. The mortgagee was to redeem the property at any time after 10 years by paying Rs. 750/-. The mortgagee was put in possession immediately. The mortgagee Shivaram Pujari, however, assigned his right, title and interest to Krishnaji Tankasale and his son Vasu-

deo by two different deeds dated 8th June 1894 and 7th September 1898, being Exs. 96 and 97 respectively, for a consideration of Rs. 500 and Rs. 250 respectively. Shivaram Pujari parted with possession and Krishnaji Tankasale and his son Vasudeo entered into possession and undertook to abide by the old terms and in particular to pay Rs. 156 to Bhavanrao, the mortgagor.

4. Thereafter, Krishnaji Antaji filed Civil Suit No. 402 of 1939 in the Court of the Subordinate Judge at Shirol against Shivaram Pujari and Krishnaji Tankasale and his son Vasudeo for redemption and possession of the said property. On 25th February 1943, he obtained a decree and the mortgagees were directed to pay Rs. 101 and to surrender possession. The mortgagees preferred an appeal to the District Court, Kolhapur, and that Court confirmed the said decree on 31st January 1945. Against that decree, the mortgagees preferred Second Appeal No. 27 of 1946 in the Joint High Court for Kolhapur and Deccan States. The High Court modified the decree by relieving the mortgagees of their liability to pay Rs. 101 to the mortgagors. Krishnaji Antaji thereafter executed the decree by filing a Darkhast and obtained possession on 22nd April 1946.

5. Krishnaji Antaji, however, proceeded to alienate the said property. He sold half of the property to defendant No. 2 and his brothers under a registered sale-deed dated 18th September 1946 (vide Ex. 122). Defendant No. 2 sold 3 acres out of their portion to Nayaku Gavade on 16th March 1955 under a registered sale-deed, Ex. 160. There were further alienations in favour of defendants Nos. 5 to 8 (vide Exs. 140 to 144) during the period 1949 to 1952.

6. The original plaintiff Shankar claiming to be an adopted son of Bhavanrao, the original mortgagor, instituted the present suit on 4th June 1958 for redemption, partition and possession of his half share. This suit was originally instituted in the Court of the Civil Judge, Senior Division, Kolhapur, being Special Suit No. 38 of 1958, on the re-opening of the Courts, although the period prescribed for institution of such a suit was over on 3rd May²³ 1958. The suit was valued at Rs. 15,000 for the purpose of jurisdiction on the basis of the market value of the property at Rupees 12,000. However, on 10th August 1959, the original plaintiff Shankar applied for

amendment of the plaint reducing the value of the suit to Rs. 1,875. This application was allowed on 14th August 1959 and the plaint was ordered to be returned for presentation to the proper Court. According to the plaintiff, the plaint was handed over at 6 p.m. on 14th August 1959. 15th and 16th August 1959 were holidays. On 17th August 1959, Shankar presented the plaint to the Court of the learned Civil Judge, Junior Division, Jayasingpur, and the suit was numbered as Regular Civil Suit No. 126 of 1959. Original defendant No. 1 Janakibai wife of Krishnaji had died in 1961 and, therefore, her heirs were brought on record as defendants Nos. 1-a to 1-c. Defendants Nos. 2 to 8 are the various purchasers and defendant No. 9 is one of the tenants on the suit property.

7. Defendants Nos. 2 to 8 and the legal representatives of defendant No. 1 resisted the claim mainly on the grounds that the plaintiff had no right to sue, his adoption was not admitted by them and even otherwise, in the family partition, the suit land was allotted to the share of the other branch of Bhavanrao's brother Antaji. These defendants also set up the plea of adverse possession. Defendants Nos. 2 to 8 claimed protection of S. 41 of the Transfer of Property Act on the ground that they were bona fide purchasers for value without notice. They pleaded that the suit was barred by the law of limitation.

8. The learned Civil Judge, Junior Division, Jayasingpur, by his judgment and order dated 30th April 1965, dismissed the suit with costs, holding that the plaintiff had failed to prove that the suit property was kept joint at the time of the partition between Bhavanrao and Antaji and that the defendants proved that they had become owners of the suit land by adverse possession and that they were bona fide transferees for value without notice.

9. It may be noted that during the pendency of the said suit, the suit came to be dismissed for default on 7th June 1961. The original plaintiff Shankar made an application on 5th July 1961 for restoration. Shankar, however, died on 22nd August 1961. On 1st September 1961, his son Ganesh and his mother Parvatibai made an application for bringing their names on record as the heirs of Shankar. On 6th June 1963, they made an application, whereby they wanted to bring the names of the other two heirs Sitaram and Narsinha, the sons of

the daughter of Shankar, on record. This application was granted on 3rd June 1964.

10. Being aggrieved of the said judgment and decree, Ganesh filed Civil Appeal No. 254 of 1965 in the Court of the learned District Judge, Kolhapur, and in the memo of appeal he stated that the heirs Nos. 1 (b), 1 (c) and 1 (d) of the deceased plaintiff Shankar had not been impleaded as their names had already been deleted in the trial Court. 1 (b) was Parvatibai, 1 (c) is Sitaram and 1 (d) is Narsinha. The learned District Judge, by his judgment dated 15th December 1966, dismissed the appeal with costs, holding that the plaintiff proved his right to redeem the suit property and that the defendants failed to prove that they had become owners by adverse possession and that defendants Nos. 2 to 8 were bona fide purchasers for value without notice. The learned District Judge also held that the suit was barred by the law of limitation.

11. In the present appeal, Mr. Pendse, the learned counsel appearing for defendants Nos. 2 and 3 (a) to 3 (d), has raised two preliminary objections. Firstly, Shankar having died on 22nd August 1961, all the four legal representatives made an application for being brought on record and that application was granted on 3rd June 1964, and they went for a trial of the suit and the suit is now dismissed against all the four. The three legal representatives, namely, Parvatibai, Sitaram and Narsinha, not having filed the appeal, the decree has become final against them. They were not joined as respondents in the District Appellate Court and the same position has continued in the present second appeal. According to Mr. Pendse, having regard to the provisions of O. 34, R. 1, C.P.C., all persons having an interest either in the mortgage security or in the right of redemption are required to be joined as parties to any suit relating to the mortgage, and since this rule is not complied, the suit must fail. Mr. Pendse further pointed out that the present Civil Application No. 3140 of 1975 filed by the present appellant for bringing the names of Sitaram and Narsinha on record cannot be allowed as they were not parties before the District Appellate Court. The appellant has deliberately made an incorrect statement in the memo of appeal that their names had been deleted in the trial Court, as there is nothing on record to support that statement. Secondly, res-

pondent No. 5-E Sidubai wife of Sidu Dhangar had been brought on record along with respondents Nos. 5-A to 5-D by order dated 7th April 1975 passed in Civil Application No. 2748 of 1974. As against her, the appeal stands dismissed for want of prosecution pursuant to the order of the learned Registrar dated 25th February 1975 and, therefore, there is a decree in favour of respondent No. 5-E. In these circumstances, having regard to the provisions of O. 34, R. 4, C.P.C. there would be a conflicting decree if the appellant's case is accepted.

12. On the other hand, Mr. Abhyankar, learned counsel for the appellant, sought to repel these preliminary objections on the ground that by virtue of a registered deed of partition dated 16th November 1961, the suit land had fallen to the share of the appellant along with other land, and in these circumstances, Parvatibai, Sitaram and Narsinha were not interested in the present litigation. Thereafter, an application for deleting their names on the ground that they had no interest in the property was prepared and as far as the appellant recollected, it was presented to the Court, and subsequently the names of Parvatibai, Sitaram and Narsinha were deleted. But unfortunately the order is not traceable on the record. Mr. Abhyankar submitted that Parvatibai died in the meantime and Sitaram and Narsinha had no interest in the property under redemption and, therefore, O. 34, R. 1, C.P.C. is not attracted. As regards the second objection, he submitted that the estate would be represented by the remaining respondents Nos. 5-A, 5-B, 5-C and 5-D, even though the appeal as against respondent No. 5-E is dismissed for want of prosecution. The learned counsel pointed out that respondent No. 5-E could not be served as the report of the Bailiff dated 22nd November 1974 showed that respondent No. 5-E had died 3 to 4 months prior to 22nd November 1974. The application for bringing the heirs of respondent No. 5 was decided on 7th April 1975 and, therefore, respondent No. 5-E had died prior to the said application.

13. In our opinion, it is not necessary to decide these preliminary objections in view of the fact that the appeal can be disposed of on the pure question of law — whether the suit is barred by law of limitation or not. We have noticed that the date of the mortgage is 3rd May 1888. The period stipulated in the mortgage-deed was 10 years and, therefore,

the last date for redemption was 3rd May 1958. On 3rd May 1958, the summer vacation had commenced and the Court reopened on 4th June 1958. The original plaintiff filed the plaint on 4th June 1958. The plaint was ordered to be returned on 14th August 1959 for presentation to the proper Court. 15th and 16th August 1959 were holidays and, therefore, the plaint was presented in the proper Court on 17th August 1959. The question, therefore, is whether the appellant could be entitled to the benefit of S. 4 of the Limitation Act, 1908, as well as to the benefit of S. 14. The legal position is well settled in view of the decision of the Privy Council reported in *Maqbul Ahmad v. Onkar Pratap Narain Singh*, 37 Bom LR 533: (AIR 1935 PC 85), and a decision of this Court reported in *Karim Ismail v. Abdul Rehiman*, 55 Bom LR 119: (AIR 1953 Bom 353). This view has also been confirmed by the Supreme Court in *Amar Chand v. Union of India*, AIR 1973 SC 313.

14. Counsel for the appellant contends that in the first place, the period during which the suit was pending in the Court of the Civil Judge, Senior Division, Kolhapur, should be excluded. Secondly, the vacation period from 3rd May 1958 to 4th June 1958 should be excluded, and thirdly, the two holidays falling on 15th and 16th August 1959 are to be excluded. According to the appellant's counsel, the relevant sections permitting the exclusion of these periods are S. 4 and S. 14 (2) of the Indian Limitation Act, 1908. Section 4 provides: —

"Where the period of limitation prescribed for any suit, appeal or application expires on a day when the Court is closed, the suit, appeal or application may be instituted, preferred or made on the day that the Court reopens."

Section 14 (2) provides:—

"In computing the period of limitation prescribed for any application, the time during which the applicant has been prosecuting with due diligence another civil proceeding, whether in a Court of first instance or in a Court of appeal, against the same party for the same relief shall be excluded, where such proceeding is prosecuted in good faith in a Court which, from defect of jurisdiction, or other cause of a like nature, is unable to entertain it."

Section 2 (7) defines 'good faith' as under:—

"Nothing shall be deemed to be done in good faith which is not done with due care and attention."

15. In order to succeed, the appellant has to cross both the rivers. The one under S. 4 is more formidable than the one under S. 14. The lower Appellate Court has examined this issue at length and observed that the very definition of the expression 'good faith' postulates that the plaintiff has to convince the Court that he has exercised due care and attention, but the plaintiff has not alleged any ground nor led evidence. The burden of bringing the case within the four corners of S. 14 is on the plaintiff and he has to discharge the same. It is further observed that the argument that the point involved was of law and the change in the claim for the purposes of jurisdiction was made on legal advice cannot be taken to establish good faith and due diligence. The circumstances pleaded before us for claiming exclusion of the period between 4th June 1958 and 14th August 1959 were the same as urged before the lower Appellate Court. In our opinion, both the lower Courts have taken the correct view. The appellant has failed to show that he had been prosecuting the suit in the Court of the Civil Judge, Senior Division, Kolhapur, with due diligence and prosecuted the suit in good faith in that Court, in the sense in which the expression 'good faith' is defined. The appellant is not entitled to the exclusion of the period from 4th June 1958 to 14th August 1959.

16. The next period for exclusion is the summer vacation from 3rd May 1958 to 4th June 1958. This period is governed by S. 4. Their Lordships of the Privy Council in *Maqbul Ahmad v. Onkar Pratap Narain Singh*, 37 Bom LR 533: (AIR 1935 PC 85) have stated that there is a marked distinction in the scope and purpose of Ss. 4 and 14. The language employed in S. 4 indicates that it has nothing to do with computing the prescribed period. In interpreting S. 4, it is observed:—

"What it provides is that, where the period of limitation prescribed expires on a day when the Court is closed, the application may be made on the day when the Court reopens. In their Lordships' view that means the proper Court in which the application ought to have been made....."

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17. In *Karim Ismail v. Abdul Rahman*, 55 Bom LR 119: (AIR 1953 Bom 353), the same view has been adopted consistent with the view taken by Madras, Lahore, Calcutta and Nagpur High Courts since 1916. In that case, Abdul (plaintiff-respondent) filed a suit against Karim in the Court of the Civil Judge, Junior Division, at Alibag, to recover a sum of Rs. 6,900 alleged to be due as a balance of a loan of Rs. 10,000 made on 23rd May 1944. The suit, which should have been instituted on 23rd May 1947, came to be instituted on 9th June 1947 as the Court was closed for summer vacation till 8th June 1947 and reopened on 9th June 1947 when the plaint was presented. The learned trial Judge on 11th July 1947 held that he had no jurisdiction to entertain the suit and he returned the plaint for presentation to the proper Court. On 12th July 1947, the plaintiff accordingly filed the plaint in the Court of the Civil Judge, Senior Division, Thana. On these facts, following the Privy Council ruling referred to above, this Court came to the conclusion that the plaintiff cannot claim the exclusion of the vacation period from 23rd May 1947 to 8th June 1947, as he had approached the wrong forum or Court. However, he was entitled to the exclusion of the period taken in litigating the matter in the Court of the Civil Judge, Junior Division, at Alibag, till the plaint was returned to him for presentation to the proper Court under S. 14 of the Indian Limitation Act, 1908. The facts of our case are almost similar to that case.

18. The same view has been confirmed by the Supreme Court in the case of *Amar Chand v. Union of India*, AIR 1973 SC 313. In that case, the plaintiff sustained serious injuries in a train accident while travelling by 2 Down Passenger train from Ambala Cantt. to Delhi on the night between 31st December 1957 and 1st January 1958. The suit was filed in the Court of the Senior Sub-Judge of Karnal on 2nd March 1959 (after giving notice under S. 80, C.P.C.) as on 1st March 1959 the Court was not open. For ministerial purposes, the suit was transferred to the Court of the Sub-Judge, Panipat. The Panipat Court, by an order dated 28th October 1959, returned the plaint for presentation to the proper Court as, according to the Panipat Court, the injury was committed at Mohri Railway Station outside the territorial jurisdiction of the Panipat

Court. Thereafter, the plaintiff presented the plaint on 29th October 1959 in the Court of Senior Sub-Judge, Ambala (referred to as the 'trial Court' in the judgment) together with an application under S. 14 of the Limitation Act for exclusion of the period during which the suit was prosecuted in Karnal and Panipat Courts. Their Lordships of the Supreme Court declined to give the benefit of S. 4 for the reason that Karnal Court was not the proper Court in which the suit should have been filed. After referring to the decision of the Privy Council in *Maqbul Ahmad's case* (AIR 1935 PC 85), Their Lordships made the following observations at page 315:—

"If the plaintiff had filed the suit in the trial Court on March 2, 1959, then, certainly the suit would have been within time under S. 4, as that was the proper Court in which the suit should have been filed. As the Karnal Court had no jurisdiction to entertain the plaint, it was not the proper Court....."

19. Bearing the above legal position in mind, it is clear that the appellant before us cannot take the benefit of S. 4, for he had first gone to a wrong forum. It is only when a plaintiff initially brings the suit in a proper Court that he can take benefit of S. 4. If a suit is brought in a proper Court which has pecuniary and territorial jurisdiction to entertain and try the suit, then the advantage offered by S. 4 can be availed of. In the case before the Supreme Court, the plaint was returned by the Panipat Court as it did not have the territorial jurisdiction to try the suit. In our case and in the case reported in 55 Bom LR 119: (AIR 1953 Bom 353), the question was one of pecuniary jurisdiction. In the present case, the pecuniary jurisdiction was that of Jayasingpur Court in view of the new valuation given by the appellant by amending the plaint and reducing the value of the suit for the purposes of jurisdiction from Rs. 15,000 (Rs. 12,000 market value of the property and Rs. 3,000 mesne profits) to Rs. 1,875 on the basis that the appellant was entitled to redeem half of the property (Rs. 375 half of the mortgage security of Rs. 750) and Rs. 1,500 for past mesne profits. It is unfortunate that in the beginning the appellant wrongly valued his claim for the purposes of jurisdiction and thus chose a wrong forum. His attempt to set his house in order could not bear fruit for

him. It is a case of "from the frying pan into the fire". Therefore, once he cannot exclude the period of the summer vacation under S. 4, the suit clearly becomes barred by limitation. Both the trial Court and the lower Appellate Court were right in their findings that the suit is barred by limitation. In these circumstances, it is not necessary to consider whether the appellant was entitled to exclude the two holidays, namely, 15th and 16th August 1959. The present suit is, therefore, hit by limitation and was rightly dismissed by both the lower Courts.

20. Before concluding, we may state that apart from the preliminary objections raised by Mr. Pendse, he also wanted to urge that the learned District Judge was not right in holding that the plaintiff proved his right to redeem the suit property. He also wanted to support the decree of the trial Court on the grounds that the defendants succeeded in establishing adverse possession and that defendants Nos. 2 to 8 were the bona fide purchasers for value without notice. However, we do not consider it necessary to go into these contentions, as the appeal can be disposed of on the question of law, as indicated above.

21. In the result, the appeal is dismissed with one set of costs in favour of respondents Nos. 2 and 5-A to 5-D.

22. In view of the above judgment, no order is necessary on Civil Application No. 3140 of 1975. Rule discharged. No order as to costs.

Appeal dismissed.

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DESAI AND GANDHI, JJ.

Abdul Rahim Khan, Petitioner v. The Union of India and another, Opponents.

Special Civil Appln. No. 2045 of 1971. D/- 16-7-1976.*

Citizenship Act (1955), Section 9 (2) — Citizenship Rules (1956), Sch. III, R. 3— Nature of enquiry under — Acquisition of foreign passport — Plea that it was obtained on wrong advice and under compelling circumstances — Order without affording further opportunity to substantiate the plea, held was vitiated.

*(To set aside order passed by the Judge City Civil Court at Bombay, D/- 13-7-1971.)

BU/BU/A586/77/MBR/RSK

AIR 1961 Mad 129 Held no longer good law in view of AIR 1965 SC 1623.

The right of personal hearing or the right of representation through a lawyer is not a sine qua non of natural justice. It cannot be asserted that the moment a general or a bald plea is taken claiming that the action in obtaining the passport was not voluntary, that the party raising the plea must be called for a personal hearing. (Para 17)

The question whether the party has had a proper opportunity or has been denied the opportunity would depend upon the contents of the show cause notice. the reply of the party and, to a limited extent, the impact of denial of the opportunity might be required to be considered with reference to the final order determining the issue. Indeed, much depends upon the type of representation made by the aggrieved party. The determining authority will have to apply its mind to the nature of the pleas contained in that representation and decide whether the pleas afford any sort of defence, what is the nature of the evidence indicated in those pleas and whether the party has had the opportunity of bringing such evidence and all other material to substantiate the pleas. If the party has received that opportunity or wilfully chosen not to avail of it, then the determining authority may go ahead and decide on whatever material has been placed before it. If that decision is honestly arrived at, then the procedure adopted cannot be violative of any requirement of natural justice merely on the ground that no personal hearing was afforded to the party or the opportunity to lead oral evidence was denied to that party.

(Para 17)

Now, the question is what are the permissible pleas available to a party who has received a notice threatening deportation because of his obtaining a passport of other country. If a passport has been obtained by force or fraud or misrepresentation, then the person raising such plea and justifying it would be required to be exonerated without there being any further plea or without consideration of his intention of renouncing his Indian citizenship; and the question of intention of renouncement of his Indian citizenship is a factor, which is to be required to be considered apart from the case of fraud or force or misrepresentation resulting in the receipt or

acquiring of the passport. If a passport has been taken as a result of force or fraud or misrepresentation, it is not 'obtained' within the meaning of Para 3 of Sch. III. Similarly, if a person applies for and receives a passport without any intention of renouncing his Indian citizenship or without understanding the nature of what he was doing, it would be an aspect, a factor to be considered by the determining authority. The submission to restrict the available pleas to a case of coercion, compulsion, undue influence, fraud or fear is to be repelled. (Para 24)

The representation submitted by the petitioner to the determining authority in reply to the show cause notice was as follows:— The petitioner who desired to see his ailing father in Pakistan obtained Pakistani passport on the advice of his maternal-uncle without applying his mind and understanding its implications. He had no intention to leave India or to acquire Pakistani citizenship. He however, did not go to Pakistan and did not use the passport as his ailing father had expired. He had married an Indian citizen and all his children were born, brought up and educated in India. Since his arrival in Bombay in 1944 after selling his land in Pakistan and since the partition of the country he had not visited Pakistan, nor had he any relations in Pakistan.

Held the pleas made by the petitioner in his representation could not be said to be irrelevant or useless for the purpose of arriving at a conclusion whether or not he had lost his citizenship. The determining authority was of the opinion that the petitioner's intention and the so-called compelling circumstances were totally immaterial provided his act in applying for a Pakistani passport was voluntary. This opinion was based on a clear misapprehension of the true legal position and the authority would have been apprised of the same had he granted to the petitioner a further opportunity either of making a detailed submission and preferring evidence substantiating the plea or given him a personal hearing. In the circumstances, the denial of opportunity to the petitioner had resulted in prejudice to him. AIR 1965 SC 1623, AIR 1974 Cal 29 and AIR 1974 J & K 48 (FB), Rel. on; AIR 1961 Mad 129 Held no longer good law in view of AIR 1965 SC 1623. (Paras 23, 24, 26)

Cases Referred: Chronological Paras
AIR 1974 Cal 29: 77 Cal WN 695 18
AIR 1974 J & K 48 (FB) 20, 21, 22, 24

(1970) 3 SCC 61	14, 15
(1970) 2 All ER 528	17
AIR 1967 SC 1143: 1967 Cri LJ 1074	13
(1967) 2 QB 617: (1967) 2 WLR 692	17
AIR 1965 SC 1623	11, 12, 13, 17, 21, 22, 23, 24
AIR 1962 SC 1052: 1962 (2) Cri LJ 215	10, 17, 21
AIR 1961 Mad 129	23
(1953) 24 ITR 375 (Bom)	24
AIR 1952 Bom 483: 22 ITR 58	24

A. G. Noorani, i/by M/s. Gagrat & Co.; Attorneys, for Petitioner; L. J. Manjrekar for J. H. Parekh (for No. 1), Raja S. Bhonsale, Govt. Pleader with N. S. Devnani, Asst. Govt. Pleader (for No. 2), for Opponents.

DESAI, J.:— In this Special Civil Application the petitioner has impugned the order dated 31st December 1970 passed by the Joint Secretary to the Government of India, Ministry of Home Affairs, New Delhi, determining the status of the petitioner under S. 9 (2) of the Citizenship Act, 1955. In order to appreciate the grounds of challenge a few facts may be stated:

2. The petitioner was served with a notice dated 5th November 1966 threatening that he will be deported out of the territory of India. Thereupon he filed a suit in the Bombay City Civil Court at Bombay, being Suit No. 98 of 1967, seeking a declaration that he was a citizen of India; he also sought a permanent injunction against the State of Maharashtra and the Union of India restraining them from taking any action against him in the nature of deportation as threatened. In the said suit the following four issues were framed by the trial Court:

"1. Whether the suit is barred by limitation?

2. Whether the plaintiff is a citizen of India under Art. 5 and/or under Art. 6 of the Constitution?

3. If Issue No. 2 is answered in the affirmative, whether the plaintiff's claim to citizenship stands terminated in view of the provisions of S. 9 (2) of the Citizenship Act, read with R. 30 and R. 3 of Sch. III to the Citizenship Rules, 1956?

4. Whether the plaintiff is entitled to any relief; and if so, what?"

As far as the issue as to limitation was concerned, the defendants did not press the same at the hearing and the said issue was answered in favour of the petitioner/plaintiff. As far as Issue No. 2 was concerned, after considering the

evidence led before him the learned trial Judge held that the petitioner (the plaintiff before him) had satisfied the requirements of Arts. 5 and 6 of the Constitution of India. However, as far as Issue No. 3 was concerned, the same was referred to the Central Government for determination in view of the clear legal position that this aspect was required to be decided by the Central Government. The further hearing of the suit was stayed till the decision of the Central Government was received. This was on 17th December 1969. The decision of the learned trial Judge on the question whether the petitioner satisfied the requirements of Arts. 5 and 6 of the Constitution is annexed as Ex. 'A' to the petition. Thereafter a notice dated 26th August 1970 was served on the petitioner; a copy of the said notice is to be found annexed as part of Ex. 'B' (Collectively) to the petition. The operative portion of the said notice (after recital of the circumstances) may be fully set out and the same reads as follows:—

"..... Now, therefore, the said Shri Abdul Rahim is required to prove within a period of three months that he has not voluntarily acquired the citizenship of Pakistan after the 26th January 1950 and before the 25th May 1953 in the manner aforesaid.

And for this purpose the said Shri Abdul Rahim is required to submit within three months from the date of service of this notice on him to the Government of Maharashtra for onward transmission to and consideration of the Central Government, any representation that he may wish to make in the matter and any other material that he may wish to rely upon to prove that he has not voluntarily acquired the citizenship of Pakistan."

In reply to the said notice the petitioner filed a detailed representation dated 27th November 1970 which inter alia contained various factual statements and a submission that the passport had been obtained by him under misapprehension and/or on wrong advice, without knowing the nature and its implications and, therefore, the petitioner had not voluntarily acquired the citizenship of Pakistan. It is thereafter and without any further inquiry or hearing or material that the impugned order dated 31st December 1970 was passed. It may be mentioned that on 13th July 1971 the Bombay City Civil Court dismissed the plain-

tiff's suit with costs and that was on the basis of the decision of the Central Government on Issue No. 3 in the suit, which decision is contained in the said impugned order. A copy of the impugned order of the Central Government is annexed to the petition as Ex. 'C' and a copy of the consequential order of the City Civil Court is annexed as Ex. 'D'.

3. The grounds of challenge to the said decision of the Central Government and the consequential order of the trial Court are summarized in paragraph 11 of the petition, and are as follows (1) It is alleged in the first place that R. 30 of the Citizenship Rules is void and ultra vires the provisions contained in Art. 14 of the Constitution of India. (2) Secondly, it is submitted that R. 30 of the Citizenship Rules and para. 3 of Sch. III thereto are bad and ultra vires the Citizenship Act, 1955. (3) The said Para 3 of Sch. III has been attacked as constituting an unreasonable restriction on the petitioner's fundamental rights under Art. 19 (1) (d) and (e) of the Constitution and consequently claimed to be void and ultra vires. (4) The impugned decision of the Central Government has been attacked as betraying total and complete non-application of mind, and this plea has been sought to be substantiated in a nine-fold manner in paragraph 11 (d) of the petition. (5) Finally, it has been submitted that the impugned decision has been arrived at by contravening the principles of natural justice. It is submitted that no proper or sufficient particulars were given in the show cause notice to the petitioner and accordingly it is submitted that the petitioner did not have a proper opportunity to meet the case against him. It is further submitted that it was incumbent upon the Central Government to give a personal hearing to the petitioner as also a right to have a legal practitioner in the inquiry before it. The petitioner has also claimed an opportunity to confront the evidence against him as also to cross-examine the witnesses and refute the evidence against him. It has also been submitted that the impugned order has been passed in a routine and a pre-determined manner without taking into account the circumstances since urged by the petitioner in the representation made by him to the show cause notice.

4. At the hearing of this Special Civil Application we restricted counsel for the petitioner to the pleas to be found in

sub-paragraphs (d) and (e) of paragraph 11 of the petition as were developed during the course of arguments and inasmuch as we were of opinion that the petition could be disposed of on these pleas, we prevented him from developing the other branches of the argument indicated above. Even as regards the pleas to be found in these two sub-paragraphs, greater emphasis was placed by the learned counsel for the petitioner on the denial of proper opportunity to his client to substantiate his plea, and it was submitted that the rather cursory and unsatisfactory order containing the decision arose because of this denial of opportunity to the petitioner as also as a result of misapprehension on the part of the deciding officer of the true legal position as has been determined by the Supreme Court and the High Courts. In order to appreciate this contention, reference may now be made to the relevant provisions in the statute and in the Rules.

5. Section 9 of the Citizenship Act, 1955 (57 of 1955) provides for termination of citizenship and reads as follows:

"9. Termination of citizenship.—

(1) Any citizen of India who by naturalisation, registration or otherwise voluntarily acquires, or has at any time between the 26th January 1950 and the commencement of this Act voluntarily acquired, the citizenship of another country shall, upon such acquisition or, as the case may be, such commencement, cease to be a citizen of India:

Provided that nothing in the subsection shall apply to a citizen of India who, during any war in which India may be engaged, voluntarily acquires the citizenship of another country, until the Central Government otherwise directs.

(2) If any question arises as to whether; when or how any person has acquired the citizenship of another country, if shall be determined by such authority, in such manner, and having regard to such rules of evidence, as may be prescribed in this behalf."

6. The rule-making power under the said Act is to be found in S. 18 thereof and it is provided that the Central Government may, by notification, make rules to carry out the purposes of this Act; and in particular under S. 18 (2) (h) may make provision in such rules for the authority to determine the question of acquisition of citizenship of another

country, the procedure to be followed by such authority and rules of evidence relating to such cases. The necessary rules in exercise of the power conferred by S. 18 of the said Act were framed in 1956, being designated as the Citizenship Rules, 1956, and we are concerned in particular with R. 30 and Sch. III to the said Rules. Rule 30 provides as follows:—

“Rule 30— Authority to determine acquisition of citizenship of another country.—

(1) If any question arises as to whether, when or how any person has acquired the citizenship of another country, the authority to determine such question shall for the purposes of S. 9 (2) be the Central Government.

(2) The Central Government shall in determining any such question have due regard to the rules of evidence specified in Sch. III.”

7. Paras 1 and 3 of Schedule III may also be set out and they make the following provision:—

“1. Where it appears to the Central Government that a citizen of India has voluntarily acquired the citizenship of any other country, it may require him to prove within such period as may be fixed by it in this behalf, that he has not voluntarily acquired the citizenship of that country; and the burden of proving that he has not so acquired such citizenship shall be on him,

2.

3. The fact that a citizen of India has obtained on any date a passport from the Government of any other country shall be conclusive proof of his having voluntarily acquired the citizenship of the country before that date.”

8. The question whether a citizen of India has between 26th January 1950 and the commencement of the Citizenship Act ceased to be a citizen of India is to be determined in the manner provided by the combined operation of all these provisions earlier set out viz. Section 9 of the Citizenship Act, 1955, and R. 30 read with Sch. III of the Citizenship Rules, 1956.

9. The question as to proper interpretation of these provisions has arisen before the Supreme Court on a number of occasions, and the question not being res integra it will be useful to make immediate reference to the judgments of the Supreme Court which were cited at the bar before us.

10. The vires of Para 3 of Sch. III as well as the constitutionality of S. 9 (2) of the Act were in question in Izhar Ahmed Khan v. Union of India, AIR 1962 SC 1052, and by a majority decision the challenge was negatived by the Supreme Court. The majority held that this was a rule of evidence and fell within the scope prescribed by S. 9 (2) of the Citizenship Act, and the challenge to its validity on the ground that it was a rule of substantive law had therefore to be repelled. Similarly the challenge to S. 9 (2) of the Act on the ground that it enabled the rule-making authority to make a rule to deprive the citizenship rights of citizens was also not sustained. Inasmuch as we have not allowed counsel to urge and develop the plea as to the validity and the vires of these provisions, it is in our opinion unnecessary to refer to this decision in greater detail; in an appropriate case it might be necessary to do so.

11. Izhar Ahmed Khan's case was required to be considered by the Supreme Court in Md. Ayub Khan v. Commissioner of Police, Madras, AIR 1965 SC 1623. In Md. Ayub Khan's case the Supreme Court did not entertain the plea which had been sought to be advanced before it viz. that Izhar Ahmed's case required reconsideration as certain aspects of the question had not been brought to the notice of the Court. The Court, however, construed and interpreted the provisions which are required to be applied by us also viz. S. 9 of the Citizenship Act and R. 30 and Sch. III of the Citizenship Rules. Md. Ayub Khan's case therefore must be considered in some depth. The petitioner before the Supreme Court claimed that he had acquired the status of an Indian citizen on the commencement of the Constitution and was served with a notice dated 17th July 1957 informing him that as he had obtained Pakistani passport No. 071377 dated 1st April 1953, he should leave India within one month from the date of service of the notice; and in default of compliance he was threatened with prosecution and deportation under the Foreigners Act, 1946 as amended by the Foreigners Law (Amendment) Act, 1957. On 19th August 1957 Md. Ayub Khan applied to the Collector of Madras for registration as a citizen of India. Later on he applied to the Central Government under S. 9 (2) of the Citizenship Act for determination of the question whether he continued to remain a citi-

zen of India and prayed that he may be given an opportunity to produce all necessary evidence in support of his claim as regards Indian citizenship. Without affording him that opportunity, however, the Government of India by its order dated 7th May 1958 rejected the application of the appellant under S. 9 of the Citizenship Act. He thereupon preferred a petition before the Madras High Court urging, inter alia, that R. 30 contemplated a quasi-judicial inquiry in which an opportunity must be given to the party sought to be affected to make a representation and to adduce evidence to show that the acquisition of a Pakistani passport was not voluntary. The learned single Judge of the Madras High Court rejected this contention, inter alia, observing that as far as the question of opportunity was concerned the appellant, Md. Ayub Khan, "had not indicated on what points he intended to lead evidence and what kind of evidence he intended to adduce". His appeal to a Division Bench of the Madras High Court was also dismissed, the Bench holding that S. 9 "laid down an objective test and when the individual had brought himself within it, the law determines the legal consequences of the situation. Independently of his intent or understanding". It was accordingly held that there was no scope for inquiry of the nature claimed by the appellant. In paragraph 9 of the report we find that the Supreme Court has observed that the determination of the question postulates an approach as in a quasi-judicial inquiry and this requires that the citizen concerned must be given due notice of the nature of the action which in the view of the authority involves termination of Indian citizenship, and reasonable opportunity must be afforded to the citizen to convince the authority that what is alleged against him is not true. It was further observed that what the scope and extent of the inquiry to be made by the authority on a plea raised by the citizen concerned should be, depends upon the circumstances of each case. These observations were pressed into service by learned counsel for the petitioner before us who contended that after the plea raised by his client, the determining authority was required to give to his client an opportunity to substantiate the plea which opportunity had not been given and no proper inquiry as contemplated by the statutory provisions as indicated

by the Supreme Court in the above decision has been held. We will have to advert to this aspect of the matter a little later on after concluding the discussion of the judicial decisions cited at the bar relevant on this point.

12. Paragraphs 10 and 11 of the reported decision in Md. Ayub Khan's case (AIR 1965 SC 1623) indicate the scope of this inquiry. These observations which we will proceed to quote in full would also seem to suggest the nature of the plea that can be raised, which plea would be required to be substantiated by the party urging the same and which plea would be required to be properly considered and appreciated by the deciding authority. Paragraphs 10 and 11 of the report may now be set out:

"10. Paragraph 1 of Sch. III which raises a rebuttable presumption, when it appears to the Central Government that a citizen has voluntarily acquired foreign citizenship, casts the burden of proof upon the citizen to disprove such acquisition, and Paragraph 2 which authorises the Central Government to make enquiries for the purpose of determining the question raised, strongly support the view that the Central Government must arrive at a decision that the Indian citizen has voluntarily acquired foreign citizenship, before action can be taken against him on the footing that his citizenship is terminated. Paragraph 3 raises a conclusive presumption that a citizen of India who has obtained a passport from a foreign country on any date, has before that date voluntarily acquired citizenship of that other country. By the application of the rule in Paragraph 3 the authority must regard obtaining of a foreign passport on a particular date as conclusive proof that the Indian citizen has voluntarily acquired citizenship of another country before that date. But obtaining of a passport of a foreign country cannot in all cases merely mean receiving the passport. If a plea is raised by the citizen that he had not voluntarily obtained the passport, the citizen must be afforded an opportunity to prove that fact. Cases may be visualised in which on account of force a person may be compelled or on account of fraud or misrepresentation he may be induced, without any intention of renunciation of his Indian citizenship to obtain a passport from a foreign country. It would be difficult to say that such a passport is one which has been 'obtained' within the

meaning of Paragraph 3 of Sch. III and that a conclusive presumption must arise that he has acquired voluntarily citizenship of that country.

11. We are not concerned in this case with the truth or otherwise of the plea raised by the appellant in his petition before the High Court that he was compelled to obtain the passport from the High Commissioner for Pakistan. Bala-krishna Ayyar J. observed that the plea of the appellant was not bona fide. But it is not the function of the Courts to determine the question whether the plea raised is true or not; it is for the authority invested with power under S. 9 (2) to determine the question if it is raised. The High Court in appeal was of the view that S. 9 laid down an objective test and once it was found that the passport was obtained in fact by an Indian citizen from another country, the law determined the legal consequences of that conduct and no question of his "intent or understanding arose". We are unable to agree with that view. If voluntary acquisition of citizenship of another country determines Indian citizenship within the meaning of S. 9 (1), and by virtue of Paragraph 3 of Sch. III of the Citizenship Rules a conclusive presumption of voluntary acquisition of citizenship is to be raised from the obtaining of a passport from the Government of any other country, it would be implicit that the obtaining of a passport was the result of the exercise of free volition by the citizen. The view is strengthened by the scheme of S. 9 (2) read with R. 30 which contemplates an enquiry by an authority prescribed under sub-s. (2) for determination of the question whether citizenship of another country has been acquired by an Indian citizen". (Underlining supplied by us).

13. Reliance had been placed in the course of arguments by the learned counsel for the respondents on Syed Khawaja Moinuddin v. Govt. of India, AIR 1967 SC 1143, where, after considering the representation which had been made by the aggrieved citizen, the Supreme Court observed that the facts put forward by the erstwhile citizen indicated that he had gone voluntarily to Pakistan, and there was no explanation forthcoming for exercising this volition of going to that country. In that case there was a long stay in Pakistan and, according to the Supreme Court, in the

representation to the Government this long stay was also not explained. According to the Supreme Court, in these circumstances the Government of India was not called upon to make any detailed enquiry when the provisions of Paragraph 3 of Sch. III of the Citizenship Rules were clearly applicable. It was urged before us — and this submission will be required to be considered — that the pleas to be found in the representation of the petitioner before us which he had submitted in answer to the show cause notice also did not call for a further enquiry. In any case, it was submitted that by the show cause notice the petitioner had been called upon to tender for the consideration of the deciding Officer whatever material he had with him in order to substantiate his pleas and, therefore, he had been given all necessary opportunity which was postulated and contemplated under the relevant statutory provision and that, therefore, there had been no denial of any opportunity. The argument, shortly put, was that an opportunity had been given and not availed of by the petitioner and, therefore, it did not lay in his mouth to complain that opportunity had been denied to him. In this connection the fact that he had not asked for a personal hearing was sought to be emphasised. We will have occasion to refer to this aspect of the matter after trying to analyse the nature of the pleas submitted by the petitioner in his representation in reply to the show cause notice. In our opinion, Moinuddin's case does not depart from the principles laid down by the Supreme Court in Md. Ayub Khan's case (AIR 1965 SC 1623) nor does it interpret that decision in any manner useful for our purposes. On the facts the Supreme Court had arrived at a particular conclusion and it is clear that whether or not there is denial of opportunity would have to depend upon facts of each case and particularly upon the explanation submitted by the citizen who is told that "You appear to have lost your citizenship." If no explanation is furnished by him or if a proper explanation is not furnished by him, then that person cannot be heard to complain that he had been denied the opportunity of substantiating his plea. In other words, it was found in Khawaja Moinuddin's case that there was no plea which was required to be substantiated and this is all that the Supreme Court has observed in that case.

14. These provisions once again came to be considered by the Supreme Court in Mohd. Ilyas v. Union of India, 1970 (3) SCC 61. One of the contentions raised before the Supreme Court in the said case was that the Government of India was bound to give a personal hearing to those who make representations under S. 9 (2) or to afford opportunity to them to adduce oral evidence. This question was expressly left open, the Supreme Court observing that on the facts of that case it was unnecessary to decide the point (see para. 6 of the report). In paragraph 14 of the report there is reference to the pleas contained in the representation made by the aggrieved person and it is observed that it was not his case that he was compelled or forced to obtain a passport from Pakistan or that he was the victim of any fraud. On these pleas, therefore, the Supreme Court rejected the contention advanced on behalf of the appellant before it that the passport had not been voluntarily obtained by him; it observed that on the admitted facts no occasion arose for the Government to give him a personal hearing or to give him an opportunity to adduce oral evidence.

15. It is clear therefore, that in the decision in 1970 (3) SCC 61, on the facts of that case the Supreme Court kept the question open viz. whether the person served with a show cause notice had a right of personal hearing or to adduce oral evidence and merely observed that on the admitted facts of the case and after considering the pleas it could not be said that further opportunity was required to be given to him to substantiate his contention.

16. Thus in the two later judgments the Supreme Court would seem to have adopted the procedure of *prima facie* considering the pleas contained in the representation made by the aggrieved person in reply to the show cause notice and after applying its mind to these pleas coming to the conclusion whether on these pleas a further inquiry became necessary or not. If on the pleas the view of the Court appears that the case squarely fell within R. 30 and Schedule III, then the Court did not countenance the grievance of the aggrieved person that he was deprived of his citizenship without a proper hearing. It would appear to us that if examination of the petitioner's pleas suggests or shows that a further inquiry is required,

then the order determining or deciding the question made against him without affording him such further inquiry would be required to be quashed as being contrary to the principles of natural justice.

17. Before advertng to two decisions of the Calcutta High Court and of the Kashmir High Court, in which the decisions in Izhar Ahmed's case (AIR 1962 SC 1052) and Md. Ayub Khan's case (AIR 1965 SC 1623) were considered and propositions deduced therefrom, we may dispose of the argument postulated in the petition, viz. that the nature or the importance of the proceeding makes it incumbent in all cases to give a personal hearing to the party on whom a show cause notice had been served as well as the right to adduce oral evidence. It was contended that bearing in mind the nature of the show cause notice served and the consequences of the decision made, it was incumbent in every case in which a plea was raised that the Pakistani passport was not obtained voluntarily that a personal hearing must be given to the person sought to be affected by the decision. It was submitted that admittedly these were quasi-judicial proceedings. Indeed, it was urged that this was an issue in the pending litigation which was required to be determined by the Central Government by the statutory provision. It was accordingly sought to be urged that the proceedings were required to be invested with considerable judicial character and a judicial determination of a *lis* normally postulated personal confrontation. The fact that no appeal was provided by the relevant statutory provision was also emphasised. Now, it would appear to us that the fact that the further hearing of the suit was stayed and the issue was required to be decided in a pending civil proceeding by the Central Government would not by itself alter or affect the character of the determination, though perhaps it would invest it with further solemnity. It is well settled that the right of personal hearing or the right of representation through a lawyer is not a *sine qua non* of natural justice. It is impossible to accept the general submission that the moment a general or a bald plea is taken claiming that the action in obtaining the passport was not voluntary, that the party raising the plea must be called for a personal hearing. Indeed, it is possible to conceive of a situation where a party raising such plea is required to indicate

the nature of evidence in support of that plea, submit such evidence on affidavits, submit documents on which he relies and even indicate the detailed contentions required to be considered by the determining authority in writing. If this is done and it is found from the order that the pleas have been considered and properly appreciated, it would be difficult to hold that such procedure would violate any requirements of natural justice as ordinarily understood. Our attention was drawn by counsel to observations in a fairly recent English case viz. *R. V. Gaming Board for Great Britain ex parte Benaim* (1970) 2 All ER 528, where Lord Denning M. R. made reference to the observations (at page 533) of Lord Parker C. J. in *Re K (K) (an infant)*. (1967) 2 QB 617/630, where in reference to what is required of an immigration officer it was stated "..... even if an immigration officer is not acting in a judicial or quasi-judicial capacity, he must at any rate give the immigrant an opportunity of satisfying him of the matters in the sub-section, and for that purpose let the immigrant know what his immediate impression is so that the immigrant can disabuse him. That is not, as I see it, a question of acting or being required to act judicially, but of being required to act fairly". Reliance was placed on this passage and it was submitted that it would apply with all greater force to a quasi-judicial proceeding of the nature which was being determined by the Joint Secretary where the Joint Secretary was required to inform the petitioner of his prima facie impression of the petitioner's plea whereupon the petitioner could attempt to convince the officer concerned of the force in the pleas and substantiate them if necessary. Indeed, it is well settled that it is not possible to lay down rigid rules as to what the principles of natural justice are or when they are to be applied and in what manner. Their scope, extent and application will vary from case to case and even in the type of the decision with which we are confronted we feel that it would depend upon the type of plea raised by the party receiving the show cause notice. Indeed, in our opinion, much depends upon the type of representation made by the aggrieved party. The moment such representation is made, the determining authority will have to apply its mind to the nature of the pleas contained in that representation and decide whether the pleas afford any sort of defence or justifi-

fication and what is the nature of the evidence indicated in those pleas. It will have to consider whether the party has had the opportunity of bringing such evidence and all other material to substantiate the pleas before the determining authority. If the party has received that opportunity and has availed itself of it or wilfully chosen not to avail of such opportunity, then the determining authority may go ahead and decide on whatever material has been placed before it. If that decision is honestly arrived at, then the procedure adopted cannot be faulted merely on the ground that no personal hearing was afforded to the party or the opportunity to lead oral evidence was denied to that party. The question whether the party has had a proper opportunity or has been denied the opportunity would depend upon the contents of the show cause notice, the reply of the party and, to a limited extent, the impact of denial of the opportunity might be required to be considered with reference to the final order determining the issue. We are unable, therefore, to accept the general submission that a personal hearing or an opportunity to lead oral evidence is a sine qua non of the proper procedure for such inquiries and that the inquiry is vitiated since that procedure was not followed. It may be mentioned at this juncture that this seems to be the main grievance set out in the Special Civil Application. During the course of arguments counsel also contended that even if no personal hearing was required to be given, his client was required to be given a further opportunity to substantiate his case after receipt of the representation by the determining authority, which opportunity has admittedly not been given. Accordingly it was submitted that failure to give such opportunity has resulted in failure of justice inasmuch as relevant considerations which would have been properly brought to the attention of the determining Officer have not been properly and fairly considered by him. We will advert to this aspect of the matter a little later on after completing our discussion of the relevant authorities in connection with the proper scope of S. 9 of the Citizenship Act, R. 30 and Sch. III of the Citizenship Rules.

18. *Izhar Ahmed's case* and *Md. Ayub Khan's case* came to be considered by a Division Bench of the Calcutta High Court in *Md. Nazaharul Haque v. B.*

Bagchi. 77 Cal WN 695: (AIR 1974 Cal 29), where after considering a number of authorities including the abovesaid two Supreme Court decisions Laik J. observed (see para 23 of the report) (Cal WN): (See Para 23 of AIR) as follows:—

"23. At any rate, for the purpose of these types of cases as in the instant appeals the following propositions, for which there is ample authority, might be laid down:

(i) The passport obtained by a person from Pakistan would no doubt be evidence that he was a Pakistani national, but that evidence would be subject to the provisions of S. 9 (2) of the Citizenship Act.

(ii) A Court cannot decide whether an Indian citizen has acquired the citizenship of another country, but the only authority to so decide is the Government of India acting as a quasi-judicial tribunal under the provisions of S. 9 (2) of the Citizenship Act, 1955.

(iii) Section 9 (2) of the Citizenship Act and Para 3 of the Citizenship Rules are intra vires the Constitution and valid law.

(iv) The proposition that as soon as it is alleged that a passport has been obtained by a person from a foreign Government, the State Government can immediately proceed to deport him without the necessary inquiry by the Central Government, is not correct. It is only after the Central Government has decided the point after inquiry that the State Government can deal with the person treating him to be a foreigner. In dealing with the said question the Central Government would undoubtedly be entitled to give effect to Para 3 in Schedule 3 of the Citizenship Rules and would be entitled to deal with the matter in accordance with the other relevant rules framed under the Act, but the question must be first considered by the Central Government. In other words, the decision by the Government of India is a condition precedent in that behalf.

(v) The provision for prescribing rules of evidence, having regard to which the question of acquisition of citizenship of another country has to be determined, clearly indicates that the order is not to be made on the mere satisfaction of the authority without enquiry that the citizen concerned has obtained a passport of another country. The authority has also to determine as to whether the person has voluntarily acquired foreign citizenship.

(vi) The enquiry would be quasi-judicial in nature and the citizen concerned must be given due notice of the nature of the action. Reasonable opportunity must be offered to the citizen to convince the authority that what is alleged against him is not true. If a plea is raised by the citizen that he had not voluntarily obtained the foreign passport, the citizen should be afforded an opportunity to prove the said fact. Termination of Indian citizenship does not merely depend upon action of a foreign country in issuing the passport.

(vii) "The rest of the propositions do not appear to be material for our purposes and are, therefore, not set out.

19. In connection with the aforesaid decision, although it must be conceded that the facts of that case were very much stronger than the facts before us, emphasis was laid by learned counsel for the petitioner on these six propositions above set out which would seem to suggest that the stage of giving opportunity occurs subsequent to the plea raised by the citizen after receipt of the show cause notice, and it was submitted that on the facts of the case before us such opportunity was admittedly not given to the petitioner.

20. The last of the authorities to which detailed reference may be made is the decision of a Full Bench of the Kashmir High Court (consisting of five Judges) in *S. Mosin Shah v. Union Govt. of India*, AIR 1974 J & K 48 (FB). It was reiterated in that decision that an inquiry under S. 9 (2) is quasi-judicial in its nature and must be based on proper appreciation of the evidence and it must comply with the cardinal rules of natural justice. But it was observed that a personal hearing was not a necessary concomitant of the principles of natural justice. It was clarified that whether or not a personal hearing should be given would depend upon the facts and circumstances of each case. This is in accordance with our view indicated earlier that it is not an invariable or a universal requirement but would depend upon the circumstances of each case; and in the type of case which we have indicated earlier where a proper opportunity has been given and the submissions of the party fully considered, the party cannot seek to impugn the ultimate adverse decision merely on the ground that a personal hearing was not given or that

if such hearing had been given, the opportunity could have been availed of to convert the deciding officer to a different point of view.

21. In *S. Mohsin's case* (AIR 1974 J & K 48 (FB)) S. Murtaza Fazl Ali, C. J. (as he then was) speaking for the Full Bench of the Jammu & Kashmir High Court referred to *Izhar Ahmed's case* (AIR 1962 SC 1052) and *Md. Ayub Khan's case* (AIR 1965 SC 1623), and after analysing them observed (see para 8 of the report) as follows:

"(1) That R. 3 of Sch. III raises a presumption that if a person has acquired a passport of another country, that shall be conclusive proof of the fact that the citizenship was lost.

(2) That before this act can be conclusively proved, the word 'obtained' clearly postulates that the passport must be acquired by free volition or voluntarily.

(3) That the onus of proving the fact that the passport was not acquired voluntarily but under duress or other circumstances is on the citizen concerned and once this plea is raised, it has to be examined by the Central Government while making an enquiry under S. 9 (2).

(4) In other words, the expression 'obtained a passport' appearing in R. 3 of Sch. III does not include the physical or mechanical act of receiving a passport by a person but postulates the securing of a passport wilfully and consciously, knowing full well the consequences of the same. Once this is proved, then the presumption under R. 3 will automatically apply to the acquisition of the passport and will become a conclusive proof of the loss of citizenship. Where, however, it is proved that the passport was obtained under duress, compulsion, undue influence, fraud or fear, it will not amount to obtaining the passport within the meaning of R. 3, Sch. III and therefore the question of treating the acquisition of the passport as conclusive proof of the loss of citizenship would not arise....."

22. The learned counsel for the petitioner submitted that in the view of the Kashmir High Court (AIR 1974 J & K 48) (FB) (which view was based on the analysis of the Supreme Court decisions) that it was necessary that the application for a Pakistani passport should have been made "wilfully and consciously", "knowing full well the consequences of the same". On the other hand, it was

urged by the learned counsel for the respondents that although the use of the expression phrase 'wilfully and consciously' would be in accord with the observations of the Supreme Court in *Md. Ayub Khan's case* (AIR 1965 SC 1623) above reproduced, the said High Court was not justified in adding the further qualifying words "knowing full well the consequences of the same", which, it was submitted, was a gloss put by the High Court on the Supreme Court decision. We were urged to read the Supreme Court decision (*Md. Ayub Khan's case*) for ourselves and apply it ignoring the gloss, which, it was submitted, was not justified by the express provisions contained in Para 3 of Sch. III even as interpreted by the Supreme Court. It was also submitted that even the Kashmir High Court had restricted the possible pleas available to a person who had obtained a Pakistani passport to the pleas indicated in sub-para (4) of paragraph 8 viz. that it would be open to the party only to show that the passport was obtained under duress, compulsion, undue influence, fraud or fear. It was submitted that only if one of such pleas is raised and substantiated, then alone it could be held that the receiving of the passport would not amount to obtaining the same within Para 3 of Sch. III and therefore the question of treating the acquisition of the passport as conclusive proof of loss of citizenship would not arise. It was submitted — and, indeed, there is some force in that submission — that the available pleas or justifications should not be unduly extended beyond the cases indicated by the Supreme Court or at least beyond the four or five specific pleas indicated by the Jammu and Kashmir High Court.

23. Now, in order to determine whether the plea raised by the petitioner before us in his representation is a permissible plea in the sense that it would amount to some sort of justification for obtaining the Pakistani passport and take the petitioner out of the rigorous application of Para. 3 of Schedule III, it will become necessary to consider the nature of the plea. A copy of the representation submitted by the petitioner to the Central Government in reply to the show cause notice is to be found annexed as part of Exhibit 'B' to the petition. Paras 1 and 2 of the said representation can be said to deal generally with the previous background and history and the petition-

er in these two paras has brought to the attention of the determining authority various facts such as that in 1944 he had sold his land at the native place viz. Dera Ismailkhan (admittedly part of Pakistan after 1947) and had come down with the sale proceeds to Bombay with the intention of settling down permanently in Bombay. It has been brought to the notice of the authority that after his arrival in Bombay he started doing business in partnership with his cousin brother at Worli, which partnership was subsequently dissolved and the petitioner continued the business after dissolution as the sole proprietor thereof. The petitioner has brought to the attention of the said authority that after the said dissolution the premises were transferred to the name of the petitioner as also the licence for the said business, the transferring authorities being the State of Bombay and the Bombay Municipal Corporation respectively. The petitioner has also mentioned his place of residence and he claims that the rent bills of the said premises stand in his name. Then comes para 3 of the representation in which details have been given by the petitioner about the circumstances in which the petitioner obtained the Pakistani passport, that being the gravamen of the charge against the petitioner to be found in the show cause notice, where it is alleged that the petitioner had voluntarily acquired the citizenship of Pakistan by reason of his having obtained on 25th May 1953 a passport from the Government of Pakistan. According to the petitioner, in 1953 he received a letter from his father that he was ill and the petitioner therefore desired to go to Pakistan to see his ailing father. The petitioner consulted his maternal-uncle who advised the petitioner to obtain a passport. Accordingly the petitioner got the application typed from a typist near Mandvi Post Office and obtained a Pakistani passport on the strength of the said application. The petitioner contended that he did not understand the implications of the passport and he obtained the passport without applying his mind in order to see his ailing father and because of the anxiety caused by the intimation of this news. According to the petitioner: "I never knew what that document was as I am an uneducated man and do not know English or Urdu", and further "the said passport was not obtained with the intention of becoming a citizen of Pakistan. I had no intention

or desire at any time during my stay in this country to leave the same and/or to acquire Pakistani citizenship..... My only intention was to visit Pakistan for the purpose of seeing my ailing father". In his representation the petitioner thereafter goes on to say that subsequent to his obtaining the passport he received intimation that his father who was ailing had expired, and the petitioner therefore did not go to Pakistan and did not utilise the passport for travel. The original passport obtained by the petitioner had been exhibited in the trial Court. We had called for the same and it bears out that it has not been utilised by the petitioner for any purpose. It may be pointed out that the passport was obtained on 25th May 1953. Subsequently in his representation the petitioner draws attention the fact that he got married on 26th June 1954, the petitioner's wife hails from Poona. It is pertinent to note that no subsequent endorsement has been obtained in or made on the said passport for including the petitioner's wife or children. The passport shows that it is issued at New Delhi; it has a life for five years, which would mean that it expired on 24th May 1958; and according to the passport, it is valid for India only. In his representation the petitioner refers to the fact of his marriage, of his having seven children of whom five appear to be receiving education in Poona and Bombay respectively. In his representation the petitioner has emphasised the fact that he has married an Indian citizen, that he has no relations in Pakistan, that all his children have been born, brought up and educated in India and that since his arrival in Bombay in 1944 and since the partition of the country he has not left India or visited Pakistan. A comment was made — and with some justification — that the representation lacks proper particulars, although it would not be possible to call it vague. It is true that the name of the maternal-uncle has not been furnished. It is equally true that although the show cause notice required the petitioner to submit for transmission to the Central Government other material, he did not submit any documents or copies of documents for consideration of the determining authority, in particular the letter which he purported to receive in 1953. Again paragraph 3 of the representation does not specifically say that it was the maternal-uncle who advised the petitioner to obtain a Pakistani passport

or that such advice was given on the footing that an Indian passport would not be given or would not be easily given or would not be available in the short time which was available to the petitioner if he were to see his ailing father. It was also submitted that the contentions which had been urged by the petitioner that he obtained the passport under misapprehension and/or on wrong advice without knowing the nature and its implications, were not relevant to the question to be decided viz. whether the petitioner had lost his Indian citizenship by reason of the provisions contained in S. 9 of the Citizenship Act read with R. 30 and Sch. III. In connection with this branch of the argument our attention was drawn to observations in *Mohomed Usman v. State of Madras*, AIR 1961 Mad 129. One of the pleas considered in the said decision of the Madras High Court was that of one of the petitioners appearing who claimed that he had not received any education and who had acted on information given to him by the police and who contended that he did not have the intention of renouncing Indian citizenship; and this plea appears to have been rejected by the Madras High Court. This rejection, however, appears to be based on the view the Division Bench took of the true meaning of the expression 'voluntarily' in S. 9 (1) of the Act. According to the Division Bench of the Madras High Court, this expression has been used "as contra-distinguished from a foreign nationality resulting from the operation of compulsive laws of the foreign State and not dependent on the explicit consent of the individual concerned and termed in Public International Law 'compulsory', 'involuntary' or 'collective' naturalisation". It appears to us that this along with many of the observations in the above decision with reference to the actual specific pleas of the various petitioners before it would have either to be considered no longer a good law or will require consideration in view of the decision of the Supreme Court in *Md. Ayub Khan's case* (AIR 1965 SC 1623) above referred to.

24. It has become necessary to consider in the light of the decisions as to what are the permissible pleas available to a party who has received a notice of the nature received by the petitioner before us. It is clear that the obtaining of a passport is not to be equated with the

mere receipt thereof. It is equally clear that when the Supreme Court refers to cases where, according to the Court, it would be difficult to accept that the passport could be said to have been 'obtained' (see para 10 of the report in *Md. Ayub Khan's case*) (AIR 1965 SC 1623), it was not giving an exhaustive list of the various types of circumstances in which a person can get out of the consequences of obtaining the passport. Nor was the Court holding that the plea of force, compulsion, fraud or misrepresentation would in addition require an averment that the person had no intention of renouncing his Indian citizenship. Indeed, it would appear that if a passport has been obtained by force or fraud or misrepresentation, then the person raising such plea and justifying it would be required to be exonerated without there being any further plea or without consideration of his intention of renouncing his Indian citizenship; and it would appear that the question of intention of renouncement of his Indian citizenship is a factor, or an aspect which, according to the Supreme Court, is to be required to be considered apart from the case of fraud or force or misrepresentation resulting in the receipt or acquiring of the passport. This would also appear to be sustained by the observations in para 11 of report of the Supreme Court decision, earlier set out where the view of the High Court holding that the intention or understanding was irrelevant was characterised as erroneous. In other words, if a passport has been taken as a result of force or fraud or misrepresentation, it is not 'obtained' within the meaning of Para 3 of Schedule III. Similarly if a person applies for and receives a passport without any intention of renouncing his Indian citizenship or without understanding the nature of what he was doing, it would be an aspect, a factor to be considered by the determining authority. This is in our opinion, implicit in the observation of the Supreme Court to be found in paras 10 and 11 of *Md. Ayub Khan's case*, and this aspect of the matter has been made explicit in the subsequent decision of the Jammu and Kashmir High Court in *S. Mohsin Shah's case* (AIR 1974 J & K 48) (FB). It is clear to us that the Full Bench of the Jammu and Kashmir High Court considered the Supreme Court as having laid down the requirement that a person is within the mischief of Para 3 of Schedule III only if he had secured a pass-

port wilfully and consciously, knowing full well the consequences of the same. It is also not possible to accept the submission that the Jammu and Kashmir High Court has travelled beyond the law as laid down by the Supreme Court and that this Court considering S. 9 of the Act and R. 30 and Sch. III for itself and bearing in mind the decisions of the Supreme Court earlier referred to should hold that the intention of the person who applied for a passport and received it or his lack of understanding or the absence of any intention on his part to acquire foreign citizenship or to renounce Indian citizenship were considerations extraneous to and irrelevant for the decision, to be given by the Central Government and in that view of the matter hold that the representation submitted by the petitioner did not require or warrant further inquiry. In other words, we were invited to restrict the available pleas to a case of coercion, compulsion, undue influence, fraud or fear. This submission is required to be repelled and it would appear that there are two reasons for doing so. In the first place, this is an all India statute with the rules also having an all India application and when interpreted by one High Court, that interpretation should ordinarily be followed. In *Ambika Silk Mills Co. Ltd. v. Commr. of Income-tax, Bombay City*, 22 ITR 58 at p. 64: (AIR 1952 Bom 483 at p. 484), it has been observed by Chagla C. J. that "this High Court has consistently laid down that as far as possible in construing a statute which is an All-India statute there should be uniformity amongst the different High Courts". In a later decision viz. in *Maneklal Chuni-lal & Sons Ltd. v. Commr. of Income-tax (Central)*, Bombay, (1953) 24 ITR 375 (Bom), it was found that the Special Bench of the Madras High Court had considered the point being considered by the Bombay High Court and taken the view in favour of the Commissioner and contrary to the view suggested on behalf of the assessee. It was observed that in conformity with the uniform policy of this High Court as laid down in Income-tax matters, the Madras view was required to be followed "whatever our own view may be". Apart from this principle of uniformity, it would appear to us that what is being urged by counsel for the petitioner would seem to follow from a harmonious reading of the provisions of S. 9 of the Act and R. 30 and Sch. III of the Rules, and it would

be impermissible to consider the plea merely with reference to paragraphs of Sch. III without keeping in mind the section and the Rule. It appears to us that in *Md. Ayub Khan's case* (AIR 1965 SC 1623) the Supreme Court has construed and toned down the scope and operation of Sch. III by a harmonious reconciliation of the paragraphs of that Schedule with the provisions contained in S. 9 of the Citizenship Act, 1955. Bearing in mind the observations of the Supreme Court and of the Calcutta and the Jammu & Kashmir High Court in the decision earlier indicated, it will be impossible to hold that the pleas of the petitioner before us made in his representation to the determining authority were irrelevant and were useless for the purpose of arriving at a proper conclusion whether or not the petitioner had lost his citizenship. It was submitted that the pleas pertaining to the state of mind are not to be easily countenanced and that in almost every case in which a person was sought to be visited with the consequence of his act in obtaining a Pakistani passport he would try to wriggle out of the same by reason of such pleas which would be difficult to repel. It is not to be forgotten, however, that although there are serious consequences involved in the determination of the question, the burden of proof for substantiating the pleas has been cast on the party raising the plea. If that aspect is borne in mind, it would be realised that such pleas frivolously and lightly taken need not be easily or automatically accepted. Such pleas will be required to be closely scrutinised in the light of the available material and ultimately it will be for that party to satisfy the determining authority about the truthfulness of such pleas. For this purpose it appears to us that the various circumstances set out in the representation of the petitioner before us and to which we have briefly alluded in the course of this judgment might have considerable relevance. It will be for the determining authority however, to consider each circumstance and to attach to it the importance it deserves.

25. The question then arises that if, in our opinion, the petitioner had raised certain pleas which were required to be considered, can it be said that he was given proper opportunity to substantiate the same? It was submitted that in the show cause notice the petitioner had

been called upon to submit within three months all other materials on which he wished to rely upon to prove that he had not voluntarily acquired the citizenship of Pakistan and that he chose not to furnish necessary particulars or further material. Again, it was emphasised that in his representation the petitioner had not sought any further opportunity or sought a personal hearing, and, indeed, it was pointed out that in the penultimate paragraph of his representation the petitioner had called upon the determining authority to give the necessary decision, though he requested that one be given in his favour. We have already indicated earlier that in our opinion that it is not necessary that a personal hearing or a right to adduce oral evidence is required to be given in all cases. It is, however, impossible to say that by the show cause notice the petitioner was put on guard that apart from making a plea he was called upon to adduce all evidence in his possession and furnish the same, possibly by affidavits, to the determining authority. Indeed, the nature of the inquiry would seem to suggest that it is to be held not in one stage but in two; in the first place, a reply or a plea is to be sought for, and the second or the latter stage must consist in requiring the person to substantiate his plea. If no plea is raised or no proper plea is raised, then the latter stage may not arise at all. In an appropriate case it is possible to visualise that the party may be required to furnish along with his reply all evidence, all clarifications and all documents upon which he relies. This, however, would hardly seem to be a proper procedure, and, indeed, in the instant case it has not been adopted. The show cause notice in our opinion does not call upon the petitioner specifically to substantiate his plea by adducing necessary evidence on affidavits, and it will not serve the respondents by saying that the petitioner did not ask for any further opportunity to substantiate his plea. Once a view is formed that the pleas raised by the petitioner required consideration, then in our opinion it became incumbent on the determining authority to afford to the petitioner such further opportunity as would be reasonable and proper in the circumstances of the case. Indeed, in an appropriate case, though it must not be taken that we are meaning the present, if the plea is complicated or requires detailed investigation, it may be incumbent

upon the determining authority to offer a personal hearing or even allow legal representation to the person against whom the show cause notice has been issued. As stated earlier, there is no universal rule and the correct and proper procedure would depend upon the facts of each case and in particular upon the pleas submitted by the recipient of the show cause notice.

26. The question does arise and will be required to be considered whether injury has been caused to the petitioner by the denial of the opportunity which was required to be given to him. Normally in such proceedings where the onus is cast heavily on the person raising the plea, it must be presumed that if further opportunity had been given to that person that opportunity would have been availed of either to substantiate the plea or to convince the determining authority that the plea had a bearing and was required to be considered in order to lessen the harshness of the rules of evidence contained in paragraph 3 of Sch. III. Indeed, in the instant case after a perusal of paragraph 3 of the impugned order it would appear, though it is impossible from the rather terse language employed to conclude definitely, that the determining authority thought that such plea as was sought to be urged in the representation was not material. All that is to be found in paragraph 3 of the impugned order is a reference to the fact that the petitioner was born in 1926 and, therefore, would be about 27 years old in 1953. It is presumed by the determining authority that by reason of this age the petitioner had achieved maturity of age and understanding. On this basis the said order goes on to recite that the petitioner should have (not that he did) taken great care to understand the implications of obtaining a Pakistani passport and therefore his plea cannot be accepted. Now, the discussion seems to proceed upon the footing that such a plea was not available in view of the mature age of the person. It is true that in the last sentence of paragraph 3 of the impugned order there is some discussion as to a very important consideration whether the petitioner had tried to obtain an Indian passport or not. The last sentence, however, makes it clear that it is the opinion of the determining authority that the intention, of the petitioner, the so-called compelling circumstances, the reason for visiting Pakistan, are all

totally immaterial provided it is established that his act in applying for a Pakistani passport was voluntary. In our opinion, this is based on a clear misapprehension of the true legal position and the determining authority would have been apprised of the same had he granted to the petitioner a further opportunity either of making a detailed submission and preferring evidence substantiating the plea or giving him a personal hearing. Indeed, a fair perusal of the impugned order would confirm the view that the denial of opportunity to the petitioner has resulted in prejudice to him viz. that the decision has been given and an order has been made without properly and fairly appreciating the pleas to be found contained in the representation.

27. It has to be made clear since our decision will involve a remand of the matter, that no observations in our judgment should be taken to mean that there is material on record which would substantiate the plea or from which it must be held that the petitioner has discharged the burden which is cast on him to show that he had not voluntarily obtained the passport. All that can be said is that there are various aspects to be considered, which would be within the jurisdiction of the Central Government which is the deciding authority, and after which it will be for that authority alone to arrive at the necessary conclusion.

28. As stated earlier, pursuant to the decision of the determining authority the learned Judge of the Bombay City Civil Court has passed a final decree on 13th July 1971 dismissing the plaintiff's suit with costs. This was on the footing that although the Court had found him to be a citizen of India at the commencement of the Constitution, the Central Government had given its decision that his citizenship had been terminated by the act of obtaining a Pakistani passport on 25th May 1953 and therefore he was not entitled to the declaration sought for. It is obvious that if the impugned order dated 31st December 1970 is required to be quashed and the matter remanded back for a proper inquiry and reconsideration in the light of the observations in this judgment, the further order in Suit No. 98 of 1967 and the decree passed therein cannot stand and will be required to be corrected. We are, however, informed that First Appeal No. 729 of 1971

has been filed against the said decision in this Court and it would appear to us that since that appeal has been filed, the order in this petition ought to be restricted to the order of the Central Government passed on 31st December 1970. If that order is quashed, the foundation of the ultimate decision given in Suit No. 98 of 1967 by the decree of dismissal dated 13th July 1971 will vanish and that decree will be required to be varied. That variation, however, will be required to be done in First Appeal No. 729 of 1971.

29. In the result, the Rule is made absolute as far as the impugned order dated 31st December 1970 is concerned. The 1st respondents are directed to give a fresh decision in accordance with the observations made in this judgment. Mr. Noorani desires us to give an order restraining the respondents from deporting the petitioner out of India. Mr. Manjrekar states and submits that there is no question of deportation till the necessary decision is given and that in fact despite such decision the petitioner has been permitted to stay in India subject to his good behaviour. In view of this statement it is unnecessary to make the order sought for by Mr. Noorani. We, however, direct that First Appeal No. 729 of 1971 be placed on our board on Monday, the 19th instant, for necessary orders.

30. Mr. Noorani does not press for costs.

31. The parties are directed to bear their own costs of this Special Civil Application.

Rule made absolute

AIR 1977 BOMBAY 289

VAIDYA AND SHIMPI, JJ.

Haribai, Appellant v. Baba Anna and another, Respondents.

Second Appeal No. 1285 of 1970, D/- 6-7-1976.*

Hindu Adoptions and Maintenance Act (1956), S. 10 (iv) read with S. 3 (a) — Adoption of person who has completed the age of fifteen — Custom — Proof of — S. A. No. 1444 of 1965, D/- 24-4-1972 (Bom), Overruled.

* (Against decision of S. N. Khatri, Extra Asst. J. at Satara, in Civil Appeal No. 353 of 1968.)

CU/CU/A948/77/RSK

Notwithstanding what was stated in the Dharmashastra Books, the Bombay School of Hindu Law never recognised any age limit for adoption. That is the legal custom and *lex loci* generally among Hindus relating to adoption in this part of the country, within the meaning of the definition of 'custom' under S. 3 (a) of the Hindu Adoptions and Maintenance Act. AIR 1972 Bom 98 and (1976) Mah LJ 125, Rel. on. (Para 30)

The definition of 'custom' in S. 3 (a) gives importance not to any particular custom or usage as opposed to Dharma-shastra Text but to any rule which, having been continuously and uniformly observed for a long time, has obtained the force of law among Hindus in any local area, tribe, community, group and family. A distinction between a rule founded on custom and a rule founded on Dharma-shastra is not germane to the definition of the word 'custom' in S. 3 (a). The definition in a way gives effect to the well-known legal maxim: "Via Trita est Via Tuta" (The beaten way is the safe way). S. A. No. 1444 of 1965, D/- 24-4-1972 (Bom), Overruled. (Paras 25, 26)

Cases Referred: Chronological Paras

1976 Mah LJ 125	18, 23, 30, 41
AIR 1972 Bom 98 : 73 Bom LR 667	18, 27
(1972) Second Appeal No. 1444 of 1965 and Civil Appln. No. 409 of 1967, D/- 24-4-1972 (Bom)	17
(1965) Second Appeal No. 713 of 1964, D/- 15-6-1965 (Bom)	14, 27
AIR 1958 Bom 375	20
AIR 1924 Bom 349 : ILR 48 Bom 387	19, 33
(1899) ILR 23 Bom 250	19
(1886) ILR 10 Bom 80	19, 37
(1875) 12 Bom HCR 364	19, 38
(1871) 8 Bom HCR 67	14, 18, 38
(1870) 7 Bom HCR App 26	18
(1868) 5 Bom HC AC 181	34
1 Borr 181	34, 38

K. J. Abhyankar, for Appellant; V. B. Rege, for Respondent No. 1.

VAIDYA, J.:— The above Second Appeal was referred to a Division Bench by Kania, J. on March 24, 1976.

2. The Second Appeal arose out of a suit filed by the appellant, Haribai Dattu Sutar, on April 4, 1967, to get possession of the property described at Serial No. 4 in para 1 and also to get possession of the remaining one-half portion of the property at Serial No. 3 in para 1 of the plaint; and for an injunction restraining the defendants Nos. 1 and 2 from ob-

structing the plaintiffs Vahiwat in the property at Serial No. 5 in the plaint.

3. The property described at Serial Nos. 3 and 4 in para 1 consisted of agricultural lands. The property at Serial No. 5 consisted of a house and an open site. These properties originally belonged to Banubai widow of Tatoba Sutar. She had two daughters viz. the plaintiff and one Bhagirathi. Bhagirathi died long ago. Plaintiff Haribai, who was married, was staying with her mother during Banubai's lifetime, looking after the needs of Banubai. Banubai executed a Will on October 30, 1961. The Will is at Ex. 79. It was executed in favour of the plaintiff and the husband of Bhagirathi-bai, viz. Chandrappa. Chandrappa executed a registered release deed (Ex. 89) in her favour on October 10, 1965, in respect of his one-half share in the property. Banubai died on February 25, 1962.

4. It was alleged in the plaint that in June 1963, the two defendants dispossessed her of the suit properties at Serial Nos. 3 and 4 and were threatening to dispossess her of the property at Serial No. 5 viz. the house which was in her possession. Defendant No. 1 claimed to be the adopted son of Banubai under a registered adoption deed dated November 24, 1961 (Exh. 82). According to the plaintiff, the adoption, even if proved, was not valid, inasmuch as it was alleged to be made and the adoption deed was obtained by practising fraud and misrepresentation on the old woman and also because the defendant No. 1 was more than 15 years old at the time of the alleged adoption. On the basis of the said allegations, the plaintiff claimed possession of properties at Item Nos. 3 and 4 and perpetual injunction in respect of Item No. 5.

5. The defendants resisted the suit. They denied the execution of the Will. They further alleged that the Will must have been obtained by exercising fraud on Banubai and without letting her to know the nature of the document. According to them, they were brought up by the old woman, as if they were her sons and out of love and affection she adopted defendant No. 1, out of them, on November 24, 1961, at Karad, and registered the deed of adoption on the same day. She also executed an agreement, Exh. 81, on the same day in favour of their mother Sitabai. They contended that by these two documents, Banubai

had revoked the Will in favour of the plaintiff. They denied that any fraud was exercised on Banubai for obtaining the adoption deed. They contended that the adoption of defendant No. 1, though he was more than 15 years of age, was permissible under the custom prevailing amongst the community to which the parties belonged and also generally in Karad. Defendant No. 1 thus claimed title to the suit property as the adopted son of Banubai, and submitted that the suit of the plaintiff was liable to be dismissed with costs.

6. The parties led oral and documentary evidence and on consideration of the said evidence, the learned trial Judge held that Banubai had validly executed the will in favour of the plaintiff and Chandrappa; and Chandrappa had released his 1/2 interest in the property in the year 1965. He held that there was fraud practised on Banubai by the plaintiff and Chandrappa. He also held that the old woman adopted the defendant No. 1 on November 24, 1961, but that the adoption was invalid because the defendant No. 1 was more than 15 years old at the time of adoption; and there was no custom duly proved by him validating such adoption.

7. In the result, he decreed the suit with costs by directing that the plaintiff do get possession of the land at Serial No. 4 from the defendant No. 1, that she should also get joint possession of 1/2 portion of the land at Serial No. 3 from the defendants, although it is difficult to explain why he gave only the joint possession. He also restrained the defendants from obstructing the plaintiff "in her cultivation and Vahiwat", although the serial number was treated as only the house and he directed inquiry into mesne profits under O. XX, R. 12 (1) (c) of the Civil Procedure Code, by his judgment and decree, dated August 31, 1968.

8. In an appeal filed by the defendant No. 1, the said judgment and decree were set aside; and the plaintiff's suit was dismissed with costs, as the learned Extra Assistant Judge, Satara, reversed the findings recorded by the trial Court and held that the plaintiff failed to prove the execution and attestation of the Will, as he came to the conclusion, on consideration of the evidence, that the attestation of the Will was not satisfactorily established and the circumstances excited the suspicion of the Court about the genuineness of the Will.

9. He held that the plaintiff herself had admitted in the R. T. S. Proceedings that the will was obtained by Chandrappa by practising fraud on Banubai, in her absence. In this respect, Banubai had herself sent a notice

to Chandrappa complaining about the fraud practised by him on her. When she was confronted with these statements made in the R. T. S. Proceedings, in the present suit, she denied having made such a statement.

10. Secondly, a perusal of the release deed at Ex. 80 also shows that Chandrappa stated therein that after the execution of the Will, the old woman had sent for him and requested him not to act upon the Will and claim any interest for himself thereunder, which appears strange having regard to the statement she had made earlier,

11. Thirdly, the learned Assistant Judge found it rather a strange conduct on the part of Banubai in adopting the defendant No. 1 within three weeks after the execution of the Will. The learned Assistant Judge rightly held that these three circumstances made the genuineness of the Will doubtful; and, therefore, he came to the conclusion that the plaintiff failed to prove conscious execution and attestation of the Will by Banubai, as required by law.

12. The learned Assistant Judge further came to the conclusion that the factum of adoption was proved by the evidence of Ramchandra Bhosale, Yeshwant Yadav and Shrirang Bachal, who were aged 22, 25 and 20 years, respectively, at the time of their respective adoptions. The evidence adduced by them showed that there was such a custom prevailing in the area, where the adoption of defendant No. 1 took place, which validates the adoption of defendant No. 1, he being aged about 15 years.

13. The learned Assistant Judge also relied on the evidence of the defendant No. 1's mother, Sitabai and the evidence of Yeshwant Yadav and Shankar Jangam, who also deposed regarding the prevalence of the custom of the adoption of boys of over 15 years. The learned Assistant Judge was of the view that the trial Judge was wrong in discarding their testimony only because they were not in a position to state that such custom was prevalent in Sutar community.

14. The learned Assistant Judge also relied on an unreported decision of V. S. Desai, J. in Second Appeal No. 713 of 1964, decided on 15-6-1965 (Bom). In that case, after considering the provisions of S. 10 of the Hindu Adoptions and Maintenance Act, and the definition of the word 'custom' in S. 3 of the Act, and the decision of this Court in Nathaji Krishnaji v. Hari Jagoji, (1871) 8 Bom HCR 67, V. S. Desai, J. observed as follows:

"There is no doubt whatsoever that in the part of the country to which the Bombay

School of Hindu Law applied, person of any age is capable of being taken in adoption. He may be even older than the adoptive mother or father. He may also be a married person having children and even grand-children. The adoption of a married person and even of a person who is older than the adoptive father or mother has been regarded as valid in some of the decided cases on the ground that there is no prohibition in the Hindu Law against such adoption. The adoption of a person of any age is also accepted as valid on the same ground as also on the ground that such adoptions have taken place and accepted as valid on the basis of a long established custom."

In other words, there is a rule of conduct in this area which was observed continuously and uniformly for a long time, that a person of any age can be validly adopted. It can, therefore, be said that there is a custom in this area, which permits the adoption of a boy who has completed the age of 15 years. In my opinion, Mr. Bhandare is also right in his contention that the lower Courts have erred in taking the view that the custom referred to in S. 10 is a custom which has come into existence after the coming into operation of the Hindu Adoptions and Maintenance Act."

15. The learned Assistant Judge, following this decision, found that the adoption of defendant No. 1 by Banubai was valid, according to the custom prevailing in the area, governed by the Bombay School of Hindu Law. In view of this conclusion, he came to the conclusion that, under the adoption deed Ex. 82, Banubai had made defendant No. 1 as the absolute owner; and in view of that declaration her previous Will was revoked, within the meaning of S. 70 of the Indian Succession Act. He further came to the conclusion that that declaration which was duly attested by five witnesses under the registered adoption deed amounted to transfer of her interest absolutely to defendant No. 1.

16. The learned Assistant Judge further held that this conclusion was fortified by what was stated in the agreement Ex. 81, which was executed in favour of Sitabai, the natural mother of defendant No. 1, wherein Banubai had reiterated that she had constituted the defendant No. 1 the absolute owner of the property belonging to herself and her husband, further making a declaration that she could not use the rights acquired by her under the Hindu Succession Act to the prejudice of defendant No. 1 and

that he would acquire all these rights absolutely on her death. The learned Assistant Judge held that even this agreement Ex. 81 amounted to revocation of the Will. The findings of the learned Assistant Judge are challenged in the above second appeal by the plaintiff.

17. When the second appeal came up for hearing before Kania, J., a reference was made to the judgment of Malvankar, J., in Second Appeal No. 1444 of 1965, with Civil Appln. No. 409 of 1967, decided on 24-4-1972 (Bom) where a view was taken that the Bombay decisions did not show that the validity of adoption was upheld on the basis of custom; and, therefore, the adoption of a boy of more than 15 years of age was invalid under S. 10 (iv) of the Hindu Adoptions and Maintenance Act, 1956. In view of the said judgment of Malvankar, J. being in conflict with the view taken by V. S. Desai, J., Kania, J. referred this second appeal to a Division Bench for hearing and final disposal.

18. It was urged on behalf of the defendant No. 1, that the view taken by V. S. Desai, J. was the view taken by Nain, J. in *Dnyanu Gopal v. Jijaba Bala*, 73 Bom LR 667: (AIR 1972 Bom 98); and also by one of us (Vaidya, J.) in *Ramchandra v. Baburao*, 1976 Mah LJ 125; and the view of Malvankar, J. was erroneous. On the contrary, it was urged on behalf of the plaintiff that the view taken by Malvankar, J. was based on a careful consideration of the facts and decisions in *Mhalsabai v. Vithoba K. Gulve*, (1870) 7 Bom HCR App 26 and in *Nathaji Krishnaji v. Hari Jagoji*, (1871) 8 Bom HCR 67, and the conclusion drawn therefrom that the rule followed by the Bombay School of Hindu Law was based on *Vyavahara Mayukha* and not on any custom established in those cases.

19. Similarly, it was pointed out in that case by Malvankar, J. that the decisions in *Lakshmappa v. Ramava*, (1875) 12 Bom HCR 364 and in *Dharma Dagu v. Ramkrishna Chinnaji*, (1886) ILR 10 Bom 80, were based on *Vyavahara Mayukha* and other texts of Hindu Law referred to in the said decisions. According to Malvankar, J., in *Gopal Balkrishna v. Vishnu Raghunath*, (1899) ILR 23 Bom 250, in regard to the observations made in the judgment, it was not strictly necessary to discuss the validity of the objection arising out of the difference of age between the adopted son and the adopting mother. It was further observed in that case that the rule prescribing a difference of age in favour of the adopting mother must be only regarded as directory rule, and not a command. Malvankar, J. further observed that in *Balabai Tukaram v. Mahadu Krishna*,

ILR 48 Bom 387 : (AIR 1924 Bom 349), the decision was again based not on custom but was on rules of Hindu Law, as interpreted by the Courts.

20. The learned Judge also relied on a passage in Dr. Derrett's Introduction to Modern Hindu Law, 1963 Edition, page 112, where the learned author has observed:

"The adoption of married boys was regular under the text of Vyavahara Mayukha for all castes, and thus became a common place in the former Bombay Presidency. It was reported as customary in certain castes in other parts of India."

He pointed out that even the decision in Vishwasrao v. Sahebrao, AIR 1958 Bom 375, was really based on the texts of Vyavahar Mayukha.

21. Notwithstanding the passages in Mayne's Hindu Law and Usage, 1953 edition, paragraph 181, pages 235 and 236, Hindu Law by H. R. Raghavachariar, 6th edition, page 149, paragraph 143, and Mulla's Hindu Law, 13th edition, Section 480 sub-section (3) at page 500, Malvankar, J. observed:

"But all these authorities are based on the decision which I have discussed above and in none of them, there is any indication that the rule that an adoption of a person exceeding 15 years of age is permissible as a result of any custom. I am, therefore, of the opinion that the rule which permitted any person more than 15 years of age to be taken in adoption was based on the text or rule or interpretation of Hindu Law and not on any custom and, therefore, the adoption of the present appellant was rightly declared invalid by both the Courts below."

22. The learned Judge further considered the definition of the word "custom" contained in S. 3 (a) of the Hindu Adoptions and Maintenance Act. In connection with the argument that Vyavahar Mayukha was itself nothing more than crystallised custom in Bombay Presidency, while rejecting the argument he observed:

"In fact, if the argument is accepted, any text of Hindu Law would in one sense be congeries of customs and, therefore, S. 4 of the Act would be rendered meaningless, inasmuch as every text or rule of Hindu Law can be interpreted to mean congeries of customs and, therefore, saved wherever there is express provision in the Act including S. 10 (iv). I, therefore, do not see any substance in this argument."

23. It must be noted at the outset that the judgment of Nain, J., which was decided on September 22, 1970, was not brought

to the notice of Malvankar, J., and none of the above judgments were brought to my notice, when I decided the case in Ramchandra v. Baburao, (1976) Mah LJ 125.

24. What we have to consider, in connection with the validity of adoption of a boy of more than 15 years, in an area which fell within the limits of the Bombay Presidency to which the Bombay School of Hindu Law applies, is first the definition of the word "custom" in S. 3 of the Hindu Adoptions and Maintenance Act, 1956, which is as follows:

"In this Act, unless the context otherwise requires,—

(a) the expressions "custom" and "usage" signify any rule which, having been continuously and uniformly observed for a long time, has obtained the force of law among Hindus in any local area, tribe, community, group or family;

Provided that the rule is certain and not unreasonable or opposed to public policy; and

Provided further that, in the case of a rule applicable only to a family, it has not been discontinued by the family."

25. The definition gives importance not to any particular custom or usage as opposed to Dharmashastra Text but to any rule which, having been continuously and uniformly observed for a long time, has obtained the force of law among Hindus in any local area, tribe, community, group or family. It does not speak of any rule not based on any text or based on custom. It may be a rule having its origin or the genesis in a text or in a decision of the Court of law. If in any particular local area, the rule has been continuously and uniformly observed for a long time, it must be considered as the "custom" and "usage" for the purpose of the Hindu Adoptions and Maintenance Act.

26. The definition in a way gives effect to the well-known legal maxim: "Via Trita Via Tuta". (The beaten way is the safe way). The definition which Malvankar, J. with great respect, appears to have assumed to apply made distinction between a rule founded on custom and a rule founded on Vyavahar Mayukha or other Hindu Dharma Shastras or the text. Such a distinction is not germane to the definition of the word "custom" in S. 3 (a). All that is required for purposes of that definition is that a rule must have been continuously and uniformly observed for a long time; and it must have obtained the force of law among Hindus in any local area, tribe, community, group or family. Whether it was based on a book of Dharma

Sastras like Vyavahar Mayukha or any other text was irrelevant to the definition of 'custom' under the Act.

27. This view was the one which was adopted by V. S. Desai, J. in Second Appeal No. 713 of 1964, decided on June 15, 1965, after referring to the case in Nathaji Krishnaji v. Hari Jagoji and other cases. Nain, J. also appears to have taken a similar view on consideration of S. 10 (iv) of the Hindu Adoptions and Maintenance Act, which runs as follows:

"No person shall be capable of being taken in adoption unless the following conditions are fulfilled, namely—

- | | |
|----------|-----|
| (i) xx | xxx |
| (ii) xx | xxx |
| (iii) xx | xxx |

(iv) he or she has not completed the age of fifteen years, unless there is a custom or usage applicable to the parties which permits persons who have completed the age of fifteen years being taken in adoption."

Nain, J. observed in Dnyanu Gopal v. Jijaba Baba, 73 Bom LR 667 at page 668 : (AIR 1972 Bom 98):

"In the judgment of the learned District Judge reliance for proving the custom has been placed on two instances, one of 1942 and another of 1948 and certain oral evidence. These instances may not be sufficiently ancient to establish a custom. But what S. 10 (iv) of the Hindu Adoptions and Maintenance Act, 1956, talks of is not only custom, but also usage. The instances and evidence would be sufficient to establish a usage. However, this sufficiency of evidence for establishing a custom or usage loses all importance in territories which were formerly part of State of Bombay, such as Satara District. Even prior to the passing of the Hindu Adoptions and Maintenance Act in 1956, the Hindu law applicable to the Bombay State was that a person may be adopted at any age even though he may be older than the adoptor and even though he may be married and had children. It is well known that Hindu law in India is derived from various texts and commentaries some of which have by custom held the field in various parts of India. Hindu law, therefore, is by itself customary law, except to the extent to which it has been subsequently codified. In my opinion, therefore, the prohibition contained in S. 10 (iv) against the person adopted who has completed the age of 15 years has no meaning in relation to male persons adopted in the territories which were comprised in the former State of Bombay which include the District of Satara from where this appeal comes. The custom or rule of Hindu law

prevailing in these territories permitting adoption of males over the age of 15 years is expressly saved by S. 10 (iv)."

28. Nain, J. has not expressly referred to the definition of Section 3, but it appears that his observations were impliedly based on the definition which makes no distinction between the rule which prevailed in a particular area, as a result of interpreting the Dharmashastra text, or as a result of custom amongst the communities to which parties belong.

29. As already stated above, what is required by the definition of the words "custom" and "usage" makes no difference between custom, usage and text. All that Section 3 (a) lays down is that the rule must be followed and observed for a long time continuously and uniformly, in the community and it has obtained the force of law among Hindus in any local area, tribe, community, group or family.

30. In Ramchandra v. Baburao, (1976) Mah LJ 125, the passage in Dr. Kane's History of Dharmashastra, Volume III, p. 680, was quoted; and it was held that notwithstanding what was stated in the aforesaid Dharmashastra Books, the Bombay School of Hindu Law never recognised any age limit for adoption. That is the legal custom and *lex loci* generally among Hindus relating to adoption in this part of the country, within the meaning of the definition of 'custom' under the Hindu Adoptions and Maintenance Act.

31. The history of the evolution of the rule in this country is dealt with great scholarship and precision by Dr. Kane in History of Dharmashastra at pp. 679 to 681, as follows:

"As to the age of the boy to be adopted there is great divergence among the medieval writers which is also reflected in the case law. In this connection certain verses of the Kalikapurana assume great importance. The Vyavaharamayukha and the Dattaka-chandrika hold that the passage is of doubtful authenticity (as the verses are not found in several mss.), while the D. M. (Dattaka Mimansa) and the Nirnyasinidhu hold them to be genuine, and the Sam. K. (Samskara-Kaustubha) pp. (169-172) after referring to these views states that those verses are opposed to what is stated in the Ait. Br. (Aitarya Brahmana) about Sunhasepa who was adopted by Visvamitra as a son even after Upanayana. The verses are: 'O King; that son, whose samskaras up to (including) the cūda (tonsure) ceremony are performed with the gotra of his (natural) father, does not (i. e. cannot) attain the status the adopted son of another. When the ceremonies of cūda and upanayana

are performed under his own gotra (by the adoptive father) the dattaka and the other kinds become (recognised as) sons (in the adoptive family); otherwise they are called *dasa* (slave). After the fifth year the adopted son and the rest cannot be (recognised as) sons. Having taken one who is five years old, one (the adopter) should first perform the *putresti*. These verses state four propositions: (1) If all *samskaras* from *jata-karma* to *cuda* (i. e. including it) have been performed in the family of birth that boy cannot be adopted in another family; (2) if a boy's *cuda* and other later ceremonies are performed in the family of adoption he is fully an adopted son; (3) a boy over five years of age cannot be adopted at all; (4) a boy whose *cuda* has been performed in the family of birth may be adopted up to five years, provided the rite called *putresti* is first performed in the adoptive family before any other ceremony is performed on the adopted boy. The D. M. (Dattaka Mimansa) says that the best time for adoption is up to three years, then from three years to five is the next best (*gauna*) and that after five no boy can be adopted. The D. C. (Dattaka Chandrika) (p. 36) holds that a boy of the three higher classes can be adopted up to *upanayana* and that a *sudra* boy can be adopted till his marriage. The *Nirnayasindhu* seems to be of the same opinion. The V. Mayukha (*Vyavahar Mayukha*) and Sam. K. (*Samskara Kaustubha*) both hold that even a boy not of the same gotra may be taken in adoption after *upanayana* or after marriage and even when the person to be adopted has himself had a son. In Bengal, Banaras and Bihar the courts hold that the boys must be adopted before *upanayana*. The same rule holds good in Madras; but there it is further held that if the boy to be adopted is of the same gotra as the adopter, the adoption may be made after *upanayana* but before marriage. In Bombay a person may be adopted at any age, even after marriage and even after he has had children and he may be even older than the adopter. In the whole of India, a *sudra* may be adopted only before his marriage, but in the Bombay Presidency the adoption of a married man and of one having even a child is allowed also among *sudras*."

32. Having regard to the above authoritative statement of the law, it must be held that the view taken by Malvankar, J. is, with respect, inconsistent with the long line of authorities of this Court, which establish the rule which has been continuously and uniformly observed for a long time and has obtained the force of law among Hindus in

this part of the country. That rule amounts to a 'custom' and 'usage' within the meaning of the words "custom" and "usage" contained in S. 3 (a) for the purposes of S. 10 (iv) of the Hindu Adoptions and Maintenance Act.

33. Moreover, the attention of Malvankar, J. was also drawn to a decision in *Balabai Tukaram v. Mahadu Krishna*, 26 Bom LR 222: (AIR 1924 Bom 349), where Macleod, C. J., and Shah, J., observed as follows:

"It is quite true that the adoption of a boy who is older than the adoptive father is contrary to the recognised notions of Hindus as to adoptions, and to the fundamental idea of an adopted son. That is the reason why such adoptions are very rare. But having regard to the lines on which these rules relating to adoptions have been interpreted by the Courts, it is difficult to hold that the consideration that the adopted boy should not be older than his adoptive father, can be treated as having the force of a prohibitive rule."

Malvankar, J. has interpreted this to mean: "the decision is not based on custom, but the rules of Hindu law as interpreted by the Courts". Here again, with respect, the distinction which Malvankar, J. made is foreign to the definition of the words "custom" and "usage" contained in S. 3 (a) of the Hindu Adoptions and Maintenance Act.

34. The law as stated by this Court, as early as in 1871, over 100 years ago, in *Nathaji Krishnaji v. Hari Jagoji*, (1871) 8, Bom HCR 67, which was mainly relied upon by V. S. Desai, J. was the law "obtaining the force of law in Western India." Melvill, J., has no doubt referred to *Dattaka Chandrika*, Sir Thomas Strange, Mr. Norton and the earlier decisions as well as to *Vyavahar-mayukha* as discussed by Macnaghten. But he has also stated at page 72:

"And other authorities on this side of India are, so far as they go, of the same tendency. In a case of great importance, *Sree Brijbhokunjee Maharaj v. Sree Gookooloot-saojee Maharaj*, reported in 1 Borr 181 (ed 1825), the opinion of the Pandits was that "when a relation is to be adopted, no obstacle exists on account of his being of mature age, married, and having a family, provided he possesses common ability, and is beloved by the person who adopts him," and the court upheld the adoption. The opinion of the Shastris in that case was recognised as an authority (though on another point) by this court in *Rakhmabai v. Radhabai*, (1868) 5 Bom HC AC 181."

In terms, Malvill, J., observed at the end of the discussion:

"Independently of the Hindu law, we think that there is sufficient authority for holding that such adoptions are in the Dakhan recognised by the custom of the country. Mr. Steele (Law and Custom of Hindu Castes in the Dekkan) p. 44, says, speaking of the law: "The Poona Sastrees do not recognise the necessity that adoption should precede Moonj and marriage," though subsequently, speaking of existing customs, he says the adoptee "should be adopted previously to the performance of his Moonj or marriage, at least if not a near relation" xx xx xx xx Upon a review of all the authorities, we think that we are justified in holding that in Western India the adoption of a sagotra or relation is not invalid because the person adopted was married at the time of the adoption."

35. With great respect, when quoting from the judgment of Melvill, J., Malvankar, J., has missed the significance of the above passage, which followed immediately after the passage quoted by him in his judgment, Melvill, J. rested his judgment on custom in addition to the other authorities and texts he has quoted; and yet Malvankar, J. held that the decision was not based on any custom but on the text, rule or interpretation of Hindu Law.

36. It is difficult for us to agree with that view, as it is clear from what Melvill, J. has stated that Melvill, J. was only giving effect to the rule established in Western India as a result of interpretation of texts and having the force of law based on custom and views expressed by various authorities as explained in several cases and recognised in various cases decided by this Court.

37. In *Dharma Dagu v. Ramkrishna Chinnaji*, (1886) ILR 10 Bom 80, Sargent, C. J., and Birdwood, J. held that the adoption of a married asagotra Brahman to be valid, not only by applying the rule of Hindu Law administered in Western India, but also applying the doctrine of *factum valet*. The case by case evolution of law was discussed; and once again, it was laid down that having regard to the Hindu Law administered in Western India, the adoption could not be held to be invalid.

38. It must be noted that in that case, strong reliance was placed on a passage in the judgment in *Nathaji's case* ((1871) 8 Bom HCR 67) and *Lakshmappa v. Ramaya* (1875) 12 Bom HC Rep 364, where it was said at page 83:

"If marriage," observes Nanabhai Hari-das J., "because incapable of annulment dis-

qualifies a Sudra for adoption, it must equally, on that ground, disqualify a Brahman for that purpose. But we fail to find it mentioned as a disqualifying cause either by Manu, Kulluka Bhatta, Yajnavalkya or Vijnaneshwara, or by any of the other authorities of weight in this Presidency. On the contrary, we find the *Dharma Sindhu*, the *Sanskara Kaustubha*, and the *Vyavahara Mayukha* distinctly recognising the adoption of a married man, the latter even going a step beyond the other two, and laying it down that a married man, who has even had a son born, may become an adopted son; and, accordingly, in the case of *Shri Brijbhukunji Maharaj v. Shri Gookoolotsavji Maharaj*, (1 Borr 181) the adoption of a married Brahman of the age of forty-five and having a family was considered a good adoption. The argument, therefore, based upon the assumed invalidity of a married Brahman's adoption falls to the ground." The difficulty of interpreting the passage of *Mayukha* and *Nilkantha's* quotation from *Kalika Purana*, was discussed and ultimately after referring to Steel, Mandlik and other books, in that case also, it was observed that the adoption of a married asagotra Brahman was not prohibited by the Hindu law in force in the Presidency of Bombay.

39. Malvankar, J., with respect, has quoted the above passage and has not made any comment with regard to the position, which according to us, is the rule of Hindu law as interpreted and applied for over a century by this Court with respect to the territory of what was formerly known as the Bombay Presidency.

40. Therefore, with respect we are unable to agree with the conclusion, drawn from these cases decided by this Court, by Malvankar, J., that these decisions were based merely on *Vyavahar Mayukha* and not on custom. In fact, we find that they were based on the rule of Hindu Law, as recognised and enforced in the courts in this part of the country, relying on the absence of any prohibition in *Manusmriti*, *Yadnyavalkya* and *Vijnaneshwara*, as well as the recognition in *Vyavahar Mayukha* and also as part of the *lex loci* applicable to all Hindus in the Bombay Presidency, even assuming that the difference between custom, usage and texts were of any relevance for the purpose of the definition of the words "custom" and "usage" in S. 3 (a) of the Hindu Adoptions and Maintenance Act. However, as already stated above, we are of the view that the definition does not require us to make any such distinction between a rule based on custom or a rule based on any interpretation of *Dharmashastra* and texts.

41. We must, therefore, hold that the law as stated by Malvankar, J., with respect, is not correct, and the law as stated by V. S. Desai, J., Nain, J. and in the decision in *Ramchandra v. Baburao* (1976 Mah LJ 125), is the true view of the law on the point, particularly having regard to the provisions of the definition of 'custom' and 'usage' under S. 3 (a) and S. 10 (iv) of the Hindu Adoptions and Maintenance Act; and the uniform and continuous recognition and enforcement of the law regarding the limits on the age of the boy to be adopted, as part of the *lex loci* applicable generally to Hindus domiciled in this part of the country.

42. Having regard to the above conclusions, the validity of the adoption of defendant No. 1 cannot be questioned by the plaintiff on the ground that he was more than 15 years of age. The factum of adoption cannot also be questioned by the plaintiff in the plaint, particularly when the learned Assistant Judge has rightly come to the conclusion, having regard to the oral and documentary evidence produced, agreeing with the finding of the trial Court, that the adoption of the defendant No. 1 by Banubai, was proved beyond any shadow of doubt. The concurrent finding of fact cannot be challenged in second appeal, in view of the limits on the powers of this Court under Ss. 100 and 101 of the Code of Civil Procedure.

43. It was next contended that the learned Assistant Judge erred in doubting the genuineness of the Will made by Banubai. This is a matter of appreciation of evidence. The learned Assistant Judge carefully considered the circumstances, which created a strong doubt about the genuineness of the Will and the attestation made by the witnesses. We find ourselves in complete agreement with the reasonings and findings recorded in this behalf.

44. Moreover, the learned Assistant Judge was quite right in his conclusion that the Will, even if proved, must be held to be revoked within the meaning of S. 70 of the Indian Succession Act, in view of Banubai adopting the defendant No. 1, under the registered adoption deed at Ex. 82; and the agreement, which she had entered into with Sitabai, which is at Ex. 81, as the two documents are also attested by more than two persons. The plaintiff cannot, therefore, rely on the Will.

45. It was lastly contended by Mr. Abhyankar, the learned counsel for the appellant, that under S. 14 of the Hindu Succession Act, the deceased Banubai had become the absolute owner of the suit property

when she made the Will on October 30, 1961; and the adoption having taken place, on November 24, 1961, after the Hindu Adoptions and Maintenance Act, came into force, the adopted son, defendant No. 1, could not divest Banubai of her right in the property, but she continued to be the owner till she died on February 25, 1962. He, therefore, submitted that the Will could still operate as it was not expressly revoked by Banubai, before she died on February 25, 1962, after the adoption.

46. There is no merit in this contention, firstly, as already stated above, the Will became revoked and ineffective after the adoption and the execution of the adoption deed (Ex. 82) and the agreement (Ex. 81); Secondly, the Will could not come into operation till the death of Banubai; and Banubai had divested herself by making a gift or family arrangement or transfer, under the adoption deed and the agreement with Sitabai, declaring that as a result of the adoption, the adopted son shall become the absolute owner of her estate immediately. This, in our opinion, divested the widow and vested all the property in the son, defendant No. 1, before her death.

47. The Will, therefore, became infructuous before she died, because when she died she left no property which could be acquired under that will. Moreover, under the Agreement (Ex. 81), she had even declared that she shall not exercise any right vested in her under the Hindu Succession Act, to the prejudice of the adopted son; and as this undertaking was given in consideration of the adoption to Sitabai, who had given defendant No. 1 in adoption, that agreement was binding on her. The plaintiff, who claims as her heir, is also bound by the declaration; and she cannot claim any right against the defendant No. 1.

48. Even then, it was contended on behalf of the appellant that the plaintiff is the daughter of Banubai and she had half share in the property under the Hindu Succession Act; and the defendant No. 1 had another half share as the adopted son of Banubai. This argument ignores the agreement (Ex. 81) and the declaration made in Ex. 82. The learned Assistant Judge, in our opinion, rightly held that the declaration (Ex. 82) amounted to transfer of Banubai's interest; and it was a gift of all the property vested in Banubai to her adopted son. The deed was signed by the defendant No. 1 when he was aged 22; and there can be no doubt that it would operate as a gift by acceptance of the gift by him. Although, the deed was called an adoption-deed, it fulfils all the requirements of

the gift-deed, as the document was registered and attested as required by S. 123 of the Transfer of Property Act.

49. In the result, it must be held that the learned Assistant Judge was quite right in dismissing the plaintiff's suit. The Second Appeal is, therefore, dismissed. The judgment and the decree passed by the learned Assistant Judge are confirmed. Having regard to the relations between the parties, there shall be no order as to costs.

Appeal dismissed.

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KANTAWALA, C. J.

Vithal, Appellant v. Ansabai and another, Respondents.

A. F. A. D. No. 1363 of 1969, D/- 30-11-1976.

Hindu Law — Adoption — Adoption by two co-widows is invalid. (1914) ILR 37 Mad 199 (PC) and AIR 1929 Nag 211, Followed. (Para 3)

Cases Referred:	Chronological	Paras
AIR 1929 Nag 211		3
(1914) ILR 37 Mad 199 (PC)		3

R. G. Deo, for Appellant; A. M. Dabir, for Respondent No. 2.

JUDGMENT:— Plaintiff has filed this appeal against a concurrent decree passed by both the Courts dismissing his suit for a declaration that he is the adopted son of one Deobhan Buwa and that he is entitled to possession of Survey No. 384/C admeasuring 9 acres 20 gunthas situate at village Isad, Taluka Gangakhed, and for perpetual injunction. His case in the plaint was that Deobhan died leaving two widows Yashodabai and Ansabai defendant No. 1. Both these widows adopted him on 10-7-1856 Fasli after performing due ceremonies and an adoption deed was executed which was registered at Shirad-Shahpur. According to the plaintiff, the original registered adoption-deed was in possession of defendant No. 1. He, however, was unable to produce a certified copy thereof as the records at Shirad-Shapur were transferred to the Office of the District Sub-Registrar, Parbhani and the same were burnt. His case was that in view of his adoption he became the owner of the suit property and was in possession thereof until June 20, 1965, when he was dispossessed by the defendants. It is on these allegations that the plaintiff has filed a suit for possession and injunction. The suit was resisted by both the defendants.

The trial Court took the view that the plaintiff's adoption was not proved. After the evidence of both the sides was completed before the trial Court, an application was made on behalf of the plaintiff to produce a certified copy of the Registered adoption-deed, but the same was rejected by the trial Court. As the adoption of the plaintiff was not proved, the suit was dismissed. In an appeal preferred by the plaintiff, the learned Assistant Judge, Parbhani, took the view that the trial Court ought to have permitted the plaintiff to produce the certified copy of the registered adoption-deed. In view of an application also made before the appellate Court, the certified copy was taken on record. The appellate Court, however, took the view that the adoption was invalid as, according to the plaintiff, the adoption was made by both the widows which, under the Hindu Law, is not permissible. As the adoption was held to be invalid, the suit was dismissed and it is against this dismissal of the suit by both the Courts that the present appeal is filed by the plaintiff.

2. Mr. Deo on behalf of the plaintiff submitted that the appellate Court was in error in taking the view that the plaintiff was adopted by both the widows Yashodabai and Ansabai, defendant No. 1. He urged that the adoption was done by Yeshodabai, the entire ceremonies were performed by her and that was done with the consent of Ansabai. He, therefore, submitted that the appellate Court was in error in taking the view that the adoption was made by both the widows and was, therefore, invalid in law. He submitted that in the certified copy of the registered adoption-deed that was produced by the plaintiff it is clearly mentioned that the adoption was made by Yeshodabai and not by both the widows.

3. Question whether the adoption was by Yeshodabai, one of the widows, or by both will depend upon the facts of this case. In the present case it is quite clear that the plaintiff was hardly 4 or 5 years old when his adoption took place. To support the case of adoption, plaintiff has led oral testimony of three witnesses, Venkatrao, Sambhaji and Sukhalabuwa. Each one of the three witnesses has stated in the beginning of the deposition that both Yeshodabai and Ansabai, defendant No. 1, adopted the plaintiff. If that was so, it is not possible for this Court to re-appreciate the evidence with a view to see what the view ought to be taken. The appellate Court has come to a conclusion that having regard to the evidence of witnesses adduced on behalf of the plaintiff, plaintiff

was taken in adoption by both the widows Yeshodabai and Ansabai defendant No. 1. Hindu Law does not permit an adoption by even two co-widows together, what is the effect or validity of the adoption when such adoption is made by two co-widows has been considered by their Lordships of the Privy Council in the case of *Narasimha v. Parthasarathy*, (1914) ILR 37 Mad 199 (PC). At page 220 it is observed:—

“..... In the next place only one wife can receive the child in adoption so as to step into the position of being its adoptive mother. This is evident from the cases which establish that the receiving mother acquires in the eye of the law the same position as a natural mother to such an extent that her parents become legally the maternal grandparents of the child. To hold that a child could bear such a relationship to more than one mother would be entirely contrary to settled law and would produce inextricable confusion in the law of inheritance.”

These observations of their Lordships have been followed by the Nagpur High Court the case of *Yamuna Bai v. Jamuna Bai*, AIR 1929 Nag 211. It is held that whether the adoption is made during the lifetime of the husband or after the death, only one wife can receive a child in adoption so as to step into the position of being its adoptive mother. It is clear from these decisions that Hindu law does not contemplate adoption by two co-widows. In this view of the matter, having regard to the oral evidence led by the plaintiff, the appellate Court was right in taking the view that the adoption was invalid in law. If that was so, then the suit was liable to be dismissed.

4. In the result, the appeal fails and is dismissed. As the plaintiff was adopted at the time when he was a mere child, the fair order as to costs would be that each party will bear its own costs of the case.

Appeal dismissed.

AIR 1977 BOMBAY 299

APTE AND JAHAGIRDAR, JJ.

Ghatge and Patil (Transport) Ltd. Applicant v. M/s. Madhusudan Ramkumar, Opponent.

Civil Revn. Appln. No. 685 of 1973, D/- 16/17-11-1976.*

*(From Order passed by S. L. Dharurkar Addl. J., Sm. C. C. at Pune, D/- 27-6-1973.)

CU/CU/B726/77/RSK

Civil P. C. (1908), Ss. 20, 9 — Suit on contract — Place of suing — Words ‘subject to Kolhapur jurisdiction’ on forwarding note — Implication of.

Plaintiff placed an order for sarees with a dealer at Belgaum. The dealer entrusted the sarees ordered by the plaintiff to the defendant transport company at their Belgaum office under a ‘Goods Forwarding Note’. The defendant company had its registered office at Kolhapur and carried on the business at Kolhapur also. The words “Subject to Kolhapur Jurisdiction” were prominently printed in Italics at the top of the Note. The contents of the note were in English and the consignor knowing full well the contents signed in English. This consignment ought to have reached within 3 or 4 days at Pimpri (within the jurisdiction of the Court at Poona) but was not so received. The plaintiff, therefore, filed a suit at Poona for immediate delivery or to pay the price of sarees, together with interest. The defendant objected to the jurisdiction of Court at Poona because of the ‘subject to Kolhapur Jurisdiction’ clause in the note. The trial court accepting the contention of the plaintiff held that the forwarding note did not amount to a contract between the parties and since the consignment was delivered at Belgaum and was to be handed over to the consignee at Pimpri no part of the cause of action having taken place at Kolhapur the Court at Kolhapur had no jurisdiction to try the suit.

Held in the present case since the defendant-company had its registered office at Kolhapur and it also carried on business at Kolhapur in addition to some other places in India, a suit against the defendant company could be instituted in a Court at Kolhapur. The argument that the Kolhapur Court had no inherent jurisdiction and therefore merely by incorporating such words as “Subject to Kolhapur Jurisdiction” in the Goods Forwarding Note the jurisdiction to entertain a suit could not be conferred on Kolhapur Court was therefore untenable. (Para 16)

A person who signs a document which contains contractual terms is normally bound by them even though he has not read them and even though he is ignorant of their precise legal effect. It is only when the document is not signed but is merely delivered to him that the question would arise whether the terms of the contract were adequately brought to his notice. (1934) 2 KB 394, Rel. on. AIR 1959 Mad 227, Ref.; AIR 1968 Andh Pra 330, Disting. (Para 18)

Further it was also not possible to hold that any great hardship would be caused to

the plaintiff by requiring him to institute the suit in a court in which according to the contract it was agreed to be instituted. AIR 1967 Cal 24 and (1970) 1 Mad LJ 548 and AIR 1960 Cal 45, Disting. (Para 27)

Cases Referred:	Chronological	Paras
AIR 1971 SC 740		15
(1970) 1 Mad LJ 548		24, 25
AIR 1968 Andh Pra 330		20
AIR 1967 Cal 24		24
AIR 1960 Cal 45		24
AIR 1959 Mad 227		25
(1958) 1 WLR 159 : (1958) 1 All ER 333		25
AIR 1957 J & K 7		9
(1934) 2 KB 394 : 103 LJ KB 730		19
(1922) 11 LLL Rep 6		25
(1913) P 130 : 83 LJ (P) 23		25
(1903) 1 KB 249 : 72 LJ KB 211		25

C. R. Dalvi, for Applicant; C. G. Gavnekar for M. V. Sali, for Opponent.

Tuesday, 16th November, 1976

APTE, J.:— The petitioners who were original defendants in the Court below are a public limited company doing business of transport by road and having their Head Office at Kolhapur. They have also sub-offices at different places to accept goods from the clients and to carry them to their destinations and deliver them to the consignees.

2. One of their offices is at Belgaum and also one at Pimpri within the limits of the Municipal Corporation of Poona.

3. The respondent is a shop styled as M/s. Madhusudan Ramkumar of which Shamsunder Lalchand Mundada is the proprietor. It is doing business of dealing in cloth at Poona.

4. It appears that the respondent-plaintiff placed an order for some handloom sarees with one Harinarayan Govindlal Zanvar of Shahapur, which is a suburb of Belgaum. Harinarayan Zanvar on receiving this order, entrusted a bundle containing sarees ordered by the plaintiff to the defendants at their Belgaum office under what is called 'Goods Forwarding Note' at Exh. 72. At the top of this note it was written in Italics in brackets "Subject to Kolhapur Jurisdiction." This Note is in the form of a request by the consignor to the defendants to accept these goods for transport and deliver them at Pimpri. There is a tabular form in this Note, the first column of which is meant to mention the name and full postal address of the sender; the second column is meant to mention the name and full postal address of consignee (if addressed to self the word 'self' is required to be written). Then the third column is meant for description of articles or packages and then the columns that follow are meant for mention-

ing the number of articles and the value thereof.

5. Now, in Exh. 72 in the first column the name of the sender shown is H. G. Zanwar of Shahapur-Belgaum and in the second column the name of Madhusudan Ramkumar, has been mentioned as the consignee and the place has been mentioned as Pimpri. The description of the articles is given as 'H. L. Sarees' i. e. Handloom sarees, one gunny case. The value of the articles is shown as Rs. 1576.00. Below this tabular form there is an endorsement as follows:

"I/We do hereby certify that I/We have satisfied myself/ourselves, the description, marks or weight or quality of goods consigned by me/us have been correctly entered in the forwarding note and the "consignment is booked with a full knowledge of conditions recorded on the reverse which conditions I/We accept."

This endorsement has been signed by the consignor. The consignment was booked on May 13, 1970 from Belgaum.

6. The plaintiff's case was that this consignment of sarees which were purchased by him from the consignor ought to have been received by him within 3 or 4 days at the most at Pimpri but they were not received. He made repeated enquiries at the office of the defendants at Pimpri but he did not get any satisfactory reply and therefore ultimately he concluded that the consignment had been lost by the defendants. He, therefore, served a notice dated July 8, 1970 through his Advocate on the defendants calling upon the defendants to deliver the consignment immediately or in the alternative to pay the price of Rs. 1576/- thereof together with interest at 10 per cent per annum.

7. No reply was received from the defendants to this notice and, therefore, the suit in which this civil revision application arises was instituted by the plaintiff on September 9, 1970 in the Court of Small Causes at Poona claiming to recover Rs. 1880/- from the defendants which included Rs. 1576/- as the price of the articles, Rs. 157/- on account of loss of profit which the plaintiff would have earned by sale of these articles, Rs. 30/- as interest in lieu of damages from 15-7-1970 till the date of suit, and Rs. 17/- being the expenses incurred for giving notice.

8. The claim was resisted by the defendants contending inter alia that the consignment having been accepted by the defendants for transport from the consignor subject to Kolhapur jurisdiction, the Court at Poona had no jurisdiction to entertain the suit. It was also contended that the plaintiff had no right

to sue since he was merely a consignee and that the suit was not maintainable inasmuch as under the terms of the contract, it was incumbent on the plaintiff to serve a notice on the defendants within 30 days from the date of booking.

9. The trial Court held that although the Goods Forwarding Note, Exh. 72, mentioned at the top "Subject to Kolhapur jurisdiction", that document did not amount to a contract between the parties. In this respect he relied on *Amritsar Transport Co. Ltd. v. S. Sohanlal*, AIR 1957 J. and K. 7, and he held that since the consignment in this case was delivered to the defendants at Belgaum and it was to be handed over to the consignee at Pimpri within the jurisdiction of the Poona Court, no part of the cause of action having taken place at Kolhapur the Court at Kolhapur had no jurisdiction to try the suit but the Court at Poona had jurisdiction to try the suit. On the question as to whether the plaintiff had a right to sue, the trial Court found that plaintiff having paid price of the goods had become owner of the goods and had therefore a right to sue. In fact, the observation of the learned Judge that the plaintiff had paid the price is contrary to what the plaintiff himself has stated in his evidence. The plaintiff has stated that he had not paid the price. But that, however, is not very material for our purpose. As regards the contention of the defendants that in the absence of notice within 30 days from the date of booking the suit was not maintainable, the view taken by the learned Judge is that the term printed on the reverse of the Goods Forwarding Note, Exh. 72, could not be said to be a part of the contract between the parties and, therefore, it was not a valid term.

10. As a consequence of these findings, the learned Judge decreed plaintiff's claim to the extent of Rs. 1750/- with interest at the rate of 4 per cent per annum on the principal amount of Rs. 1576/- from the date of suit till payment. The defendants have now come in revision.

11. When this revision application came up for final hearing before My Lord the Chief Justice on April 29, 1976, as the question of jurisdiction which was rather important was involved, the matter was referred to a Division Bench. That is how this revision application has come to be placed before this Division Bench for final hearing.

12. On behalf of the petitioners it was contended that in view of the specific mention in the Goods Forwarding Note, Exh. 72, that the contract of consignment was subject to Kolhapur jurisdiction, it was incumbent on

the plaintiff to bring the suit in the competent Court at Kolhapur and that therefore the Small Cause Court at Poona had no jurisdiction to entertain this suit.

13. Now, in the present case there can be no doubt that since the consignment was handed over to the defendants by the consignor at Belgaum, part of the cause of action arose within the jurisdiction of the Court at Belgaum and as the consignment was to be delivered to the consignee at Pimpri within the jurisdiction of the Civil Court at Poona, part of the cause of action arose within the jurisdiction of the Poona Court. Under Section 20 (c) of the Code of Civil Procedure, therefore, this suit could ordinarily have been instituted either at Belgaum or at Poona. Now, it is well settled that where more than one Court has jurisdiction to entertain a suit, by agreement the parties can restrict the forum to a particular Court, or in other words the parties can agree that in case of dispute the suit may be filed in one of the Courts which are competent to entertain the suit.

14. On behalf of the respondent-plaintiff, however, it is contended that in the present case no part of the cause of action having arisen within the jurisdiction of the Court at Kolhapur, the Kolhapur Court had no jurisdiction. It was submitted that by agreement the parties cannot confer jurisdiction on a Court which has no inherent jurisdiction to entertain a suit. There can be no dispute or quarrel about this proposition.

15. However, in the present case, as can be seen from the Roadway Bill in respect of this consignment which has been produced at Exh. 68, the defendant-company had its registered office at Kolhapur and they also carry on their business at Kolhapur. Under S. 20 (a) of the Code of Civil Procedure, therefore, a suit can also be instituted in a Court within the local limits of whose jurisdiction the defendant, or each of the defendants where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides or carries on business or personally works for again, Explanation II to this section says that a corporation shall be deemed to carry on business at its sole or principal office in India, or, in respect of any cause of action arising at any place where it has also a subordinate office at such place. The word "corporation" used in this Explanation includes not only statutory corporation but it also covers a company registered under the Companies Act, as has been explained in *Hakam Singh v. Gammon (India) Ltd.* AIR 1971 SC 740.

16. It is, therefore, obvious that in the present case since the petitioners-defendants-

company have its registered office at Kolhapur and it also carries on business at Kolhapur in addition to some other places in India, a suit against the defendant-company could be instituted in a Court at Kolhapur. The argument that the Kolhapur Court had no inherent jurisdiction and therefore merely by incorporating such words as "Subject to Kolhapur Jurisdiction" in the Goods Forwarding Note the jurisdiction to entertain a suit could not be conferred on Kolhapur Court is therefore untenable.

17. On behalf of the respondent it was argued that such a printed term can never be binding on the person to whom such a forwarding Note is issued unless the party to whom the document is handed over indicates either by word or deed that he has accepted the term. This argument also, in our view, cannot be accepted. As has already been stated above, the words "Subject to Kolhapur Jurisdiction" have been prominently printed at the top of the front side of the Goods Forwarding Note, Exh. 72, and this Note is in the nature of a letter by the consignor to the defendants to transport the consignment from Belgaum to Pimpri for delivery to Madhusudan Ramkumar and the same has been signed in English by the consignor Mr. Zanwar. It can, therefore, be safely presumed that before the consignor affixed his signature to this document, he had gone through the contents of this Forwarding Note from the beginning to end and had after knowing them full well he lent his signature thereto. There is no reason to assume otherwise.

18. A person who signs a document which contains contractual terms is normally bound by them even though he has not read them and even though he is ignorant of their precise legal effect. It is only when the document is not signed but is merely delivered to him that the question would arise whether the terms of the contract were adequately brought to his notice. In this case, at the cost of repetition it may be mentioned that the consignor has affixed his signature in English below this Forwarding Note. The contents of the Forwarding Note are in English and the consignor has also signed in English. It cannot therefore even be argued for a moment that the consignor could not have understood what was printed above his signature in this Forwarding Note.

19. In this connection reference may usefully be made to *L'Estrange v. F. Graucob Ltd.* (1934) 2 KB 394. In that case the buyer of an automatic slot machine signed and handed to the sellers an order form containing in ordinary print and writing the essential terms

of the contract, and in small print certain special terms one of which was "any express or implied condition, statement or warranty, statutory or otherwise not stated herein is hereby excluded." The sellers thereupon signed and handed to the buyer a printed order of confirmation assenting to the terms in the order form. The machine was delivered by the sellers to the buyer, who paid to the sellers an instalment of the price. The machine did not work satisfactorily, and the buyer brought an action against the sellers in the County Court claiming (inter alia) damages for breach of an implied warranty that the machine was fit for the purpose for which it was sold. The sellers pleaded (inter alia) that the contract expressly provided for the exclusion of all implied warranties. The buyer replied that the time when she signed the order form she had not read it and knew nothing of its contents and that the clause excluding warranties could not easily be read owing to the smallness of the print. There was no evidence of any misrepresentation by the sellers to the buyer as to the terms of the contract.

20. On these facts it was held that as the buyer had signed the written contract and had not been induced to do so by any misrepresentation, she was bound by the terms of the contract, and it was wholly immaterial that she had not read it and did not know its contents. Consequently the action failed and the sellers were held entitled to judgment.

21. Mr. Gavnekar for the respondent-plaintiff submitted that even in the presence of such a term in the contract, a party can institute a suit in a different Court having jurisdiction. In support of this argument he first relied on *C. Satyanarayana v. L. Narasimham*, AIR 1968 AP 330. That was a case arising out of a suit filed by the plaintiff for recovery of certain amount from the defendants who were partners of a firm C. Satyanarayana and K. Kotilingam Setty and Company. The plaintiff's case was that defendant No. 3 who was one of the partners of the firm had borrowed an amount of Rs. 500/- on February 25, 1953 from the plaintiff at Janardanapuram of Kandukor Taluka, in Andhra Pradesh.

22. All the defendants, except defendant No. 3, denied any liability. Defendant No. 3 who was alleged to have borrowed the money also denied to have borrowed any money but he in the alternative, inter alia, contended that the transaction had not taken place at Janardanapuram but had taken place in the City of Madras and hence the Court

of District Munsiff of Kanigiri within whose jurisdiction Janaradanapuram was situate had no jurisdiction to entertain the suit. In this respect reliance was placed by the 3rd defendant on a letter written by him on which the words "subject to Madras Jurisdiction" were printed, and it was on the strength of this letter that it was contended that the Madras Court alone would have jurisdiction to try suit. A single Judge of the Andhra Pradesh High Court held that merely because the defendants had written a letter on the top of which "Subject to Madras Jurisdiction" was printed, it could not become part of the contract unless it was agreed to by the plaintiff.

23. It is difficult to see how this ruling would be of any assistance to the plaintiff in this case. Simply because the defendant on his side wrote on the letter written by him the words "Subject to Madras Jurisdiction", the plaintiff to whom the letter was addressed could not be held to be bound by what was written on the letter by defendant No. 3, unless of course the plaintiff had agreed to this term. It is obvious from the report that the plaintiff had never agreed to this term unlike in the present case where the consignor has himself signed the Forwarding Note, Exh. 72, which at the top contains the words "Subject to Kolhapur Jurisdiction".

24. Similarly our attention was also invited to three other rulings B. R. H. and M. (India) Ltd. v. S. E. A. Co. Ltd, AIR 1967 Cal 24, M/s. B. S. S. Line v. M. and M. Trading Corporation, (1970) 1 Mad LJ 548 and Lakshminarain v. N. V. Vereenigde, AIR 1960 Cal 45.

25. No doubt, in all these cases the document of contract contained a clause similar to the one in this case. However, the suits were instituted in the Court other than the one mentioned in the contract. But all these cases relate to contracts with foreign firms and the forum provided in the contract was in the foreign country whereas part of the cause of action had admittedly arisen within the jurisdiction of the Courts in India in which these suits were filed. However, relying on the clause in the contract, on behalf of the defendants a contention similar to the one raised in the present case was raised. Even so, it was held that the suits were maintainable in spite of this specific provision in the contract restricting the forum to a particular Court in foreign country. A perusal of the reports of all these cases shows that having regard to the fact that the forum mentioned in the contract was in a foreign country, the balance of convenience was taken into account. No doubt, the parties

who make the choice of tribunal normally are bound by the contract and that should especially be the case as to the choice of the law applicable to the contract. However, enforcement by the Indian Courts of the choice of a foreign tribunal could not be ruled as imperative but it was observed in the case reported in (1970) 1 Mad LJ 548 that it should depend on the balance of convenience in particular circumstances and the exigencies of justice. The following passage from Cheshire in his Private International Law was in this connection quoted:

"As distinct from the express or implied choice of the proper law, the express choice of a foreign tribunal is not absolutely binding. In accordance with the excellent principle that a contractual undertaking should be honoured, there is indeed, a *prima facie* rule that an action brought in England in defiance of an agreement to submit to arbitration abroad will be stayed. The *Cap Blanco* (1913) P. 130, *Austrian Lloyd Steamship Co. v. Gresham Life Assurance Society Ltd.*, LR (1903) 1 KB 249, but nevertheless the Court has a discretion in the matter and where the parties are amenable to the jurisdiction, as for example, where the defendant is present in England, it will allow the English action to continue if it considers that the ends of justice will be better served by a trial in this country (*The Athene* (1922) 11 LLL Rep 6. *The Fehmarn* (1958) 1 WLR 159).

26. Now, in all these three cases the substantial part of the cause of action had arisen in this country and also major part of the evidence was available in this country and, therefore, on the ground of convenience it appears to have been held that in spite of the contract to the contrary, the actions were maintainable in the Courts in this country.

27. It was argued on behalf of the respondent that similar considerations also arise in this case. It was submitted that the consignment was to be delivered by the defendant's office at Pimpri within the jurisdiction of Poona Court and, therefore, the person in charge of the office at Pimpri would be the person who would be able to state whether the consignment was received and if so when and what happened to the consignment and why it could not be delivered to the consignee. In our view, however, since the Court or the forum which the parties had chosen by their contract in this case was not so inconvenient as to cause any injustice to the parties, this argument should not prevail. It is also not possible to hold that any great hardship would be caused to the plaintiff by requiring him to institute the suit in

which according to the contract it was agreed to be instituted.

23. It was also attempted to be argued for the respondent that even if by the terms of the contract the parties agree to choose a particular forum, it does not mean that other Courts otherwise competent to entertain the suit cannot entertain and try it or in other words the jurisdiction of such Courts is thereby ousted. Mr. Gavnekar in this connection invited our attention to *M/s. Patel Bros. v. M/s. Vadilal*, AIR 1959 Mad 227.

29. In that case the plaintiff which was a firm carrying on business at Madras had entered into a contract at Bombay for the purchase of one bale of cotton cloth with the defendants, a limited liability company carrying on business at Bombay. According to the plaintiff, the delivery was to be made at Madras. The defendants contested the claim and one of the objections taken was that the Madras Court had no jurisdiction over the subject-matter of the suit. A bill, Ex. P. 1, issued by the defendants to the plaintiff was in this connection relied upon. This bill evidenced the contract between the parties and at the top of it the words "Subject to Bombay jurisdiction" similar to the words in the present case were mentioned and underlined. There was nothing to indicate in the contract itself that the delivery was to be made at Bombay and that the document stated that the goods were to be despatched to Madras and specific mention was also made to "No. 7, Godown Street, Madras", which was presumably the place where the goods were to be consigned. There was no evidence as to how the price was to be realised by the plaintiff nor was there any evidence to show as to when the property in the goods were intended to pass to the buyer. The averments in the plaint seemed to suggest that the delivery was intended to be made at Madras. It was held that the mere printing of the words "subject to Bombay jurisdiction" in Ex. P. 1 could not amount to a contract that both the parties agreed to have Bombay as the venue for the settlement of disputes. The mere recital on the top of the bill could not be incorporated as a term of the contract. It was further held that ouster of jurisdiction of a court to which a person is entitled to resort to under the Civil Procedure Code or any other statute cannot be a matter of assumption or presumption but one to be proved by express words contained in the contract or at least by necessary or inevitable implication. On the facts of that case it was held that this test was not satisfied in that case.

30. In the case in hand, however, as we have already discussed above, the words "Subject to Kolhapur Jurisdiction" were prominently printed in Italics at the top of the Forwarding Note. The contents of the entire Forwarding Note are in English and the consignor also signed in English. The consignor, therefore, very well knew or can be presumed to have known what were the contents of this Forwarding Note to which he subscribed his signature. There would, therefore, be an inevitable implication that the consignor knew full well when he signed this Forwarding Note that this contract was subject to the jurisdiction of the Court at Kolhapur and knowing this full well he entered into this contract. In our view, therefore, having regard to the terms of the contract, the parties by their agreement had agreed that any dispute arising out of this contract would be decided by the Court at Kolhapur.

Wednesday 17th November 1976.

31. In this view of the matter it is obvious that the Small Cause Court at Poona had no jurisdiction to entertain the suit and, therefore, it ought to have returned the plaint to the plaintiff for presentation to the proper Court.

32. Lastly Mr. Gavnekar for the respondent-plaintiff submitted that this being an action in tort and not on contract, the term of the contract contained in the Goods Forwarding Note, Exh. 72, would not be applicable to the present suit or would not govern this suit. This argument, however, is without any foundation. A bare reading of the plaint would show that the suit has not been based on any tortious act alleged to have been committed by the defendants. The allegations made in the plaint disclose that the claim has been based entirely on the contract to transport the goods from Belgaum to Pimpri and to deliver them to the plaintiff pursuant to the contract contained in the Goods Forwarding Note, Exh. 72. There is not even a remotest suggestion from which any case based on tort could be spelt out. No negligence or conversion of goods has been alleged by the plaintiff against the defendants. It is also not shown that the defendants owed any duty to the plaintiff and the former failed to discharge that duty or did not act with due care and caution in the discharge of that duty. In these circumstances it is not possible to accept the argument that the suit as framed should be treated as one based on tort and should be held to be within the jurisdiction of the Poona Court.

33. In the view which we have taken on the question of jurisdiction, it is not neces-

sary for us to decide the other questions raised on this revision petition, namely, as to whether the plaintiff had a right to sue and whether in the absence of any notice as stipulated in clause 19 printed on the reverse of Exh. 72 the suit would be maintainable.

34. In the result, we make the rule absolute, set aside the decree passed by the Court of Small Causes at Poona and direct that the trial Court on receipt of the record should return the plaint to the plaintiff for presentation to the proper Court at Kolhapur. We make no order as to costs throughout.

Order accordingly.

AIR 1977 BOMBAY 305

MRIDUL, J.

M/s. Bhurmal Kapurchand and Co., Judgment Creditors v. M/s. Premier Machine Tools Co., Judgment-Debtors.

Insolvency Notice No. N/174 of 1976, D/- 30-9-1976.

Presidency Towns Insolvency Act (1909), Ss. 9 (i) and 9-A (Bombay) — Issuance of insolvency notice — Decree more than two years old — Insolvency Registrar before issuing notice can insist on order of competent court under O. 21, R. 23 C. P. C. (Civil P. C. (1908), O. 21, Rr. 22, 23). Daljit Krishna v. Nihalchand Jethaji decided by Mukhi, J. on 19-7-1973 (Bom), Dissented from.

There is sufficient authority in law to uphold the practice of the Insolvency Registrar to insist upon order of the competent court under Order 21, Rule 23 of the Code of Civil Procedure, in cases where decrees come under the coverage of O. 21, R. 22 of the Code of Civil Procedure. (Para 21)

From the provisions of Ss. 9 (i) and 9-A of the Act it follows that a judgment-debt to sustain an insolvency notice must arise out of an enforceable decree and not out of decree which otherwise is unenforceable. A decree which is more than two years old, is by its own force (*proprio vigore*) unexecutable. The judgment-debt arising out of such a decree is equally unenforceable unless leave as required by O. 21, R. 22 is first obtained in that behalf. Daljit Krishna v. Nihalchand Jethaji decided by Mukhi J. on 19-7-1973 (Bom), Dissented from. (Para 6)

The issuance of insolvency notice is an equitable mode of execution of a decree or order. In absence of a leave under O. 21,

Rr. 22 and 23 of the Code of Civil Procedure, it is not open to the judgment-creditors to execute the decree which is more than two years old. The judgment-creditors are not also entitled to resort to any equitable mode of execution thereof. This is further buttressed by the principle that if it is not permissible for the judgment-creditors to execute the decree under the provisions of the Code of Civil Procedure directly, court in exercise of its discretion cannot allow the judgment-creditors to execute the said decree indirectly by circuitous method of insolvency proceedings. Case law discussed. (Paras 13, 16)

Cases Referred: Chronological Paras
(1975) 77 Bom LR 119 20
(1973) Unreported Judgment D/- 19-7-1973 (Bom), Daljit Kishan v. Nihalchand Jethaji 17, 19, 20

(1958) 60 Bom LR 923 18, 19, 20
AIR 1947 Bom 430 21
AIR 1914 PC 129 : 41 Ind App 251 15
(1908) ILR 32 Bom 572 14
(1908) 1 KB 344 : 77 LJ KB 409 7, 10
(1893) ILR 20 Cal 370 15

U. J. Makhija, for Judgment-Creditors.

ORDER:— In this matter which has come up for directions before me, the judgment-creditors put in issue the practice adopted by the Insolvency Registrar with regard to issuance of insolvency notice founded on a decree which is more than two years old. The Insolvency Registrar insisted that before an insolvency notice could be issued, in respect of a judgment-debt under a decree which was more than two years old and thus required compliance with the provisions of O. 21, R. 22 of the Code of Civil Procedure proceeding in that behalf must be adopted and the said notice made absolute by the competent court. This practice has been prevalent in this court for last several years. This practice is assailed on the ground that it is contrary to the provisions of law or is otherwise unreasonable.

2. On 1st August 1974 a decree was passed in favour of the judgment-creditors by the City Civil Court, Bombay, in Summary Suit No. 3778 of 1974 against M/s. Premier Machine Tools Co., the judgment-debtors. On 26th April 1976 the judgment-creditors made an application to the Insolvency Registrar for issuing an insolvency notice contemplated by S. 9-A of the Presidency Towns Insolvency Act (hereinafter referred to as "the Act"). The said application was processed by the office of the Insolvency Registrar. The draft of the notice which was submitted by the attorneys of the judgment-creditors was approved by the office

of the Insolvency Registrar and sent back to the attorneys. The said insolvency notice was then duly engrossed and submitted again to the office of the Insolvency Registrar for being sealed. The time which was taken in this process rendered the decree passed on 1st August 1974 more than 2 years old and thus required leave of the court for execution under O. 21 R. 22 of the Code of Civil Procedure. Upon the said query being raised or the requisition being made in that behalf by the office of the Insolvency Registrar, the attorneys for the judgment-creditors by their precipe dated 16th August 1976 raised objections that the said query or the requisition was unjustified. By the said precipe the attorneys required the Insolvency Registrar to place the matter before me for directions. The said precipe along with a comprehensive and a well-considered note prepared by the Insolvency Registrar, was submitted to me. I directed that the matter be placed on Board for determination of the issues involved therein.

3. In the precipe of the attorneys of the judgment-creditors it is contended that the Insolvency proceedings are not execution proceedings; that the only requirements which have to be fulfilled before an insolvency notice could be issued are those postulated by the relevant provisions of the Presidency Towns Insolvency Act (hereinafter referred as "the Act") and the rules of this court relating thereto, viz., debt not being barred and the execution of the decree not being stayed; that the purpose of O. 21, R. 22 of the Code of Civil Procedure was merely to prevent a surprise being sprung upon a judgment-debtor and further the judgment-debtor has an opportunity to show cause against an insolvency notice and to have it set aside on the ground available to him under the provisions of the said Act and the said Rules. In light of these assertions the contention of the judgment-creditors in the said precipe is that the practice adopted by the Insolvency Registrar is not only without sanction of law but is contrary thereto.

4. Shri Makhija appears for the judgment-creditors. The Insolvency Registrar though present in court, is not represented by any counsel. I must observe that the matter being ex parte as if it were, the learned counsel in the best traditions of the bar approached the problem in a very fair and reasonable manner and rendered even handed assistance to this court. According to the learned counsel there are several reasons, for holding that the position adopted by the Insolvency Registrar or the long standing practice of this court adverted to by him is

plainly erroneous and requires judicial interdict.

5. The submission of the learned counsel is twofold. The first submission is that upon a true construction of the provisions of S. 9 (i) and S. 9-A of the Act, the only fetters with regard to acts of insolvency based upon an insolvency notice are, (i) 'execution of a decree not having been stayed' (ii) 'the debtor having a counter-claim which equals or is in excess of the judgment-debt' and (iii) the quantum of the debt being disputed. These fetters which are explicit on the language of the said provisions, according to the learned counsel, also constitute restrictions in the matter of issuance of insolvency notice. These restrictions or fetters do not take within their sweep absence of leave under O. 21 R. 22 of the Code of Civil Procedure. The learned counsel argues that the absence of leave under O. 21 R. 22 is no impediment in the way of a judgment-creditor to have an insolvency notice issued for enforcement of his right arising from the 2 years old decree. The other submission is that the issuance of insolvency notice is not an execution of a decree because an insolvency proceeding founded on a decree is not a mode of execution postulated by the provisions of the Code of Civil Procedure. The provisions of the Civil Procedure Code merely deal with the specific modes of execution enumerated in Order 21 R. 11 sub-sec. (2). Thus, absence of leave under O. 21 R. 22 does not impinge upon or otherwise control the provisions of the Act and rules relevant to the insolvency notices issued under provisions thereof or the proceedings subsequent thereto.

6. The first question turns on the interpretation of the provisions of S. 9 (i) read with S. 9-A of the Act. The said provisions are well known and need not be reproduced here. Suffice it to notice that S. 9 (i) by its material provision inter alia provides that if a creditor has served an insolvency notice upon a debtor in respect of a decree or an order for the payment of any amount due to such creditor, execution of which is not stayed and default is made by the judgment-debtor in complying therewith, such a default constitutes an act of insolvency. Sub-s. (i) of section 9 read with the proviso thereto contemplates two limitations: (a) decree the operation whereof is stayed cannot sustain an insolvency notice and (b) a debtor is immunised from non-compliance if the debtor 'has a counter-claim or set off which equals or exceeds the decretal amount' and which counter-claim or set off the debtor 'could not law-

fully set up in the suit or proceedings in which a decree or order was made against him.' Section 9-A envisages a third limitation. It inter alia provides by sub-s. (2) thereof that an insolvency notice can be invalidated on ground that the debtor had given a notice to the creditor within the period prescribed by the insolvency notice to the effect that he disputed the validity of the notice on the ground of misstatement as to the actual amount due. There is no doubt that the aforesaid are the only fetters postulated by the Act in regard to act of insolvency or to the process leading to a finding that a debtor has committed an act of insolvency so as to give jurisdiction to the court to make an order upon the basis thereof. These limitations or fetters in my opinion, however do not detract from the two basic concepts that are to be found in the provisions of S. 9 (i) of the Act. The said concepts are 'a creditor', and 'the decree or an order'. The term "creditor" is defined by S. 2 (a) of the Act as including a decree-holder. Conceptually, a decree-holder is a person who not only has a decree in his favour but is in a position to enforce such a decree. A decree-holder must of necessity be a person who is able to enforce a decree or an order. Absence of any such right in the decree-holder merely gives him a husk without a kernel. Law abhors such empty rights. There cannot be a decree without its enforceability. If there is a valid decree it must have the attribute of enforceability. It therefore follows that a judgment debt to sustain an insolvency notice must arise out of an enforceable decree and not out of decree which otherwise is unenforceable. A decree which is more than two years old, is by its own force (*proprio vigore*) unexecutable. The judgment-debt arising out of such a decree is equally unenforceable unless leave as required by Order 21 R. 22 is first obtained in that behalf.

7. It may also be seen that S. 9 (i) of the Act is modelled on the provisions of S. 1 sub-sec. (1) clause (g) of the English Bankruptcy Act, 1914, Sub-sec. (i) of S. 9 of the Act corresponds to proviso (i) to the said section of the English Act. The said section has been interpreted by the English courts as designating "any person who is for the time being entitled to enforce a final judgment or final order". (see Williams on Bankruptcy, 18th Edn. p. 36). There is no reason why S. 9 (i) of the Act should also not receive the same construction. Similar result follows from the interpretation of the other concept, viz., execution not having been stayed. By a catena of cases in England it is fairly established that the execution of a de-

cree or order would be deemed to be stayed if the judgment-creditor is not in a position to or is not entitled to sue immediate execution. All the English cases need not be cited; it is enough to notice the rule laid down by the Court of Appeal in *re A debtor Ex Parte the Debtor*: (1908) 1 KB 344. It was a case where the judgment-creditor a Solicitor, brought an action against the debtor for the bill of costs in which a compromise judgment was signed by the court. The judgment-debtor paid some amount in part satisfaction of the judgment-debt and for the balance a bankruptcy notice was served. Subsequent thereto the debtor accepted the bill at one month for the amount of the balance of the debt as also the costs of the bankruptcy notice drawn by the creditor. Acceptance of the bill was consequent upon a letter written by the judgment-creditor to the judgment-debtor. The said letter provided for extension of time for the judgment-debtor to pay the amount owing by him. The bill was endorsed by the Solicitor in favour of his Bank. The bill was on presentment dishonoured. A further bankruptcy notice followed and was served upon judgment-debtor. On these facts it was argued on behalf of the judgment-debtor that having regard to the facts that the bill was outstanding and in the hands of the bank and that the bill operated as an agreement, the judgment-creditor was not entitled to any remedy upon the judgment. In this framework of facts *Cozens Hardy M. R. inter alia* held at page 349 as follows:—

"It cannot possibly be right that the creditor should be allowed to present a bankruptcy notice, and found upon it a petition in bankruptcy, when he has by taking this bill, agreed that he will not enforce his rights, and agreed that he will suspend his remedies not only during the currency of the bill, but afterwards while the bill is in the hands of a third party".

8. Fletcher Moulton P. J., in his concurring judgment was more explicit. At the same page the learned Judge observed as follows:—

"The extremely able argument of Mr. Hogg raised all the points that could be raised on behalf of the respondent in this case and did so in a way which has much assisted me in common with the other members of the Court. He relies on the bare language of S. 4, sub-s. (1) (g) of the Bankruptcy Act, and says that this bankruptcy notice was good because the creditor had obtained final judgment, and execution had not been stayed upon it. There might have been a question as to whether those words are to be taken in their strictest literal sense i. e. whether

they refer solely to a formal stay by order made in chambers or in court suspending the right to enforce execution. But Mr. Hogg very properly felt that he could not press it so far as that. He admitted that by taking the bill in the present case his client had suspended during the currency of the bill the right to issue execution, and that this operated to prevent his serving a bankruptcy notice by reason of its bringing him within the words "execution having been stayed", although no formal stay had been ordered by chambers. In other words, where there are circumstances under which the court would, if applied to, prevent the issue of execution, those circumstances may bring the case within the interpretation which the court has put upon the words "execution having been stayed".

9. The learned Judge did not rest his decision on the admissions made by the learned counsel. He in terms held that the judgment-creditors must show that they 'were in a position to receive at the date when' they "served the bankruptcy notice" (p. 351). The test not being satisfied, the claim of judgment-creditor was negatived. Halsbury's Laws of England, Fourth Edn. Vol. 3, in paragraph 262 sums up the position as follows:—

"Generally speaking, a stay of execution prevents the issue of a bankruptcy notice. For this purpose execution is considered to be stayed if, at the date of the notice, the judgment creditor is not entitled to issue immediate execution on the judgment".

10. It may be observed that the aforesaid exposition of law by Halsbury is based on the ratio of the decision *In re a Debtor, Ex Parte the Debtor* (1908) 1 KB 344 (supra).

11. On legal parameters noticed above can it be predicated for the judgment-creditor before me that they have a right to immediate execution of the decree dated 1st August 1974. Upon the plain language of Order 21, R. 22, the question, must be answered against the judgment-creditors. The said rule enjoins upon a court to issue a notice where an application for execution is made in respect of a decree which is more than 2 years old (period of 2 years in so far as Bombay is concerned). It is only when the court has issued such a notice and has heard the objection of the judgment-debtor and has made a finding, express or implied, that no cause had been shown for an execution of a decree that the court can pass an order directing the execution of the decree. In absence of such leave it is not controverted before me that no execution of a decree or

order under Order 21 R. 22 of the Code of Civil Procedure is permissible to a judgment-creditor.

12. The second submission of the learned counsel is ingenious and attractive. There seems to be justification in the contention that an insolvency proceeding is not an execution proceeding for the purpose of and within the meaning of relevant provisions of the Code of Civil Procedure. Equally justified is the submission that modes of execution under the Code of Civil Procedure are those that are to be found in Cl. (j) of sub-rule (2) of R. 11 of Order 21. They do not take within their sweep the so-called mode of execution by insolvency proceedings. This, however, is not the whole truth. It is a well-settled principle of law that insolvency ultimately is an equitable mode of enforcement of a creditor's right. I need not however, express any opinion on this larger question. For the purpose of the present proceedings it is enough to investigate as to whether an insolvency proceeding based upon the enforcement of a judgment-debt is or is not a form of execution. In my opinion, there is intrinsic evidence in the provisions of S. 9 (i) read with S. 9-A of the Act to warrant an inference that the insolvency proceedings contemplated by the said provisions are in the nature of equitable mode of execution of a decree in favour of the judgment-creditor. The said provisions create a statutory ground for an act of insolvency. Section 9 (i) in terms provides that if a notice of the description mentioned in S. 9-A is not complied with, such a non-compliance amounts to an act of insolvency upon which not only the judgment-creditor in question but even the other creditors can found a petition for adjudication. This is the mode of execution of judgment-debt arising out of a decree or an order. This enforcement, it is true, is not a right exclusive to a decree-holder but a right which the decree-holder shares with other creditors in so far as an act of insolvency is concerned. But this does not detract from the basic purpose of an insolvency proceeding which is for realisation of assets including the debts of the decree-holder by the court seizing property of the judgment-debtor and providing for the rateable distribution of the proceeds of such assets amongst insolvents' creditors. If it is not an execution what else can it be said to be? It is undoubtedly true that under the provisions of the Act a discretion has to be exercised by the court but that does not nullify the nature of the insolvency proceedings pertaining to the enforcement of a judgment-debt. It merely renders such proceedings an equitable mode of execution.

13. In view of the legal provision discussed above viz., that issuance of insolvency notice is an equitable mode of execution of a decree or order, the only question which is required to be decided is as to the effect of non-compliance with the provisions of O. 21, R. 22 of the Code of Civil Procedure. The decree is dated 1st August 1974. It obviously was more than two years old on the date when the insolvency notice was sought to be issued. There is no running away from the inference which is implicit in the scheme of O. 21 Rr. 22 and 23 of the Code of Civil Procedure that in absence of leave to execute the decree, the execution could not be levied in pursuance thereof. Reliance by the learned counsel upon a judgment of this court in Vallabhadas Narandas v. Kantilal G. Parekh; AIR 1947 Bom 430, is unhelpful. Indisputably this court held therein that the purposes of the provisions of O. 21 R. 22 is to prevent a surprise being sprung upon a judgment-debtor. That however is not relevant to the controversy before me. On the material question which arises before me, the decision does not shed any light. It does not deal with a situation where there was no compliance with the provisions of Order 21 R. 22. It was a case where at the stage when the court heard objections pursuant to a notice issued under O. 21, R. 22 of the Code of Civil Procedure, the court was called upon to decide the question of maintainability of the application of the decree-holder. Kania J. dealt with the facts of the case to determine the issue whether the said application on behalf of the judgment-creditor was not maintainable. In my opinion, the principle laid down in the said decision is not attracted in the present case.

14. As to the effect of non-compliance with the provisions of Order 21 rule 22 the ratio of the decision of this court in Parshram Hanmanta Patil v. Balmukund Lachiram; (1908) ILR 32 Bom 572 is apposite. In that case a Division Bench of this court while dealing with the corresponding provisions of the Code of Civil Procedure, 1882 invalidated the sale on the ground that the notice was not issued to the judgment-debtor. Implicit in the said decision of this court is a legal principle that absence of notice vitiates all subsequent proceedings.

15. The Privy Council in Raghunath Das v. Sundar Das Khetri, 41 Ind App 251 : (AIR 1914 PC 129), characterised the execution proceedings without compliance with the corresponding provisions of Civil Procedure Code, 1882, as lacking in jurisdiction. At page 257 after referring to an earlier deci-

sion of the same court in Gopal Chunder Chatterjee v. Gunamoni Dasi; (1893) ILR 20 Cal 370, the Privy Council observed at p. 257 as follows:—

“A notice under S. 248 of the Code is necessary in order that the Court should obtain jurisdiction to sell property by way of execution as against the legal representative of a deceased judgment-debtor. In the case of 27 Indian Appeals, such a notice had been served, and the court had determined, as it had power to do for the purpose of the execution proceedings, that the party served with the notice was in fact the legal representative. It had therefore jurisdiction to sell, though the decision as to who was the legal representative was erroneous. There being jurisdiction to sell and the purchasers having no notice of any irregularity, the sale held good unless or until it was set aside by appropriate proceedings for the purpose. The present case is of a wholly different character. No proper notice was served under the section, and the respondents had full notice of, and indeed were responsible for, the irregularities of the procedure adopted”.

16. In the light of the principle laid down by the Privy Council, the Privy Council upheld the contention of the judgment-debtor as to the invalidity of the sale for want of leave of the court for execution against legal representative. The same principle must also apply to a case where the leave of the court is necessary in regard to a decree which is more than two years old because in principle there can be no distinction between the two situations in so far as the requirement of the leave of the court is concerned. I therefore, must hold that in absence of leave under O. 21, Rr. 22 and 23 of the Code of Civil Procedure, it is not open to the judgment-creditors herein to execute the said decree. The execution of the said decree is not permissible under the provisions of the Code of Civil Procedure. It must also be held that the judgment-creditors herein are not entitled to resort to any equitable mode of execution thereof. This is further buttressed by the principle that if it is not permissible for the judgment-creditors to execute the decree under the provisions of the Code of Civil Procedure directly, this court in exercise of its discretion will not allow the judgment-creditors to execute the said decree indirectly by circuitous method of insolvency proceedings.

17. Reliance by the learned counsel on an unreported judgment of this court in Daljit Kishan v. Nihalchand Jethaji, decided by Mukhi J. on 19th July 1973 (Bom), is misplaced. The ratio of the said decision is plain-

ly. distinguishable. The factual horizons of the said case and those obtaining in the present case are altogether different. It was a case where an insolvency notice was taken out at point of time when no leave under O. 21, R. 22 was necessary. The insolvency notice however, was served after the expiry of the period of two years contemplated for execution of decrees under Order 21 R. 22 of the Code of Civil Procedure. It was in the context of this fact that the learned Judge dealt with the argument of the judgment-debtor. The learned Judge, no doubt, took the view that he was "unable to agree that resort to the procedure under insolvency Act can be equated with the execution of a decree". The further view taken by the learned Judge was that even though no leave under O. 21, R. 22 was obtained, the decree existed and was not stayed. The latter observation however, was made by the learned Judge upon a concession made at the bar to the effect that there was no stay of the execution of the decree. This is very clear from the concession recorded by the learned Judge in the following words:—

"Now there is no controversy before me that the execution of the decree in question had not been stayed".

18. In my respectful opinion, the aforesaid two observations of the learned Judge, with great respect to him, are enunciations per incuriam. The learned Judge with great respect to him, completely overlooked the statutory provisions contained in S. 9 (i) of the Act, more particularly the interpretation accorded to the terms "creditor" and "execution whereof is not stayed". That apart, it is in so far as this court is concerned, a settled law that in order to sustain an insolvency proceeding it must be shown by the judgment-creditor that he is in a position to enforce the decree or order given in his favour. This is what the Division Bench of this court in J. P. Tiwari v. Bhimraj Harlalka; (1958) 60 Bom LR 923 firmly laid down. It was a case where in regard to the grounds available for challenging an insolvency notice, it was held by the Division Bench of this Court at p 969 as follows:—

"It is well settled that if there is any impediment in the way of a judgment-creditor executing the decree or if the decree is not presently executable, no insolvency notice can be founded on such a decree. It is not necessary that execution of the decree should be stayed formally by the executing court. Even without any such formal order of stay, if the judgment-creditor is not in a position

to satisfy the insolvency court that he has a right to execute the decree in praesenti the insolvency notice taken out by the judgment-creditor must fail". (emphasis supplied).

19. This binding authority of the Division Bench of this court was however, not brought to the notice of the learned Judge in Daljit Kishan's case (supra). I have no doubt in my mind that had this authority been brought to the notice of the learned Judge, the observations which fell from him might not have been made. In any event, with respect, I am bound by the ratio of the Division Bench of this Court in J. P. Tiwari's case (1958) 60 Bom LR 923 and must hold that the principle of law laid down by Mukhi J. in Daljit Kishan's case is not the correct statement of law. I respectfully dissent from the aforesaid exposition of law.

20. It may also be observed that the principle enunciated by Chagla C. J. in J. P. Tiwari's case (1958) 60 Bom LR 923 was followed by another Division Bench of this court to which Mukhi J. was also a party. In Ali D. Gandhi v. S. L. Thakurdas, (1975) 77 Bom LR 119, the Division Bench of this court took the view that an insolvency notice can be invalidated upon the grounds inter alia that the subsequent events had rendered the enforceability of the decree at the hands of a judgment-creditor, untenable. The Division Bench in the said case laid down that if the supervening circumstances "rendered the decree unexecutable" (page 127) it was open to a judgment-debtor to successfully impugn the insolvency notice upon the said ground. Having regard to the ratio of the judgment of the Division Bench in Ali D. Gandhi's case (supra) to which Mukhi J. himself was a party, it must be held that the exposition of law in Daljit Kishan's case is impliedly overruled by the said Division Bench.

21. In the result, I find sufficient authority in law to uphold the practice of the Insolvency Registrar to insist upon order of the competent court under O. 21, R. 23 of the Code of Civil Procedure, in cases where decrees come under the coverage of the O. 21 R. 22 of the Code of Civil Procedure. The submissions of the judgment-creditors to the contrary are rejected and the action and the view of the Insolvency Registrar affirmed.

Ordered accordingly

AIR 1977 BOMBAY 311

SAPRE, J.

Kumari Indumati N. Hirve, Applicant v. Arun Laxman Samant, Opponent.

Civil Revn. Appn. No. 432 of 1972, D/-13-7-1976.

(A) Presidency Small Cause Courts Act (1882), S. 38 — "Where suit has been contested" — Meaning.

Where the suit was dismissed for default of the plaintiff and the defendant had not only put in her appearance but had also filed certain defences, it was a suit that was contested and hence the Small Causes Court had jurisdiction to entertain the application to set aside the order of dismissal and to restore the suit. The contention that because the suit was dismissed for default, it was not a suit that was contested is not correct, (1906) 3 Cal LJ 199, Distinguished.

(Para 4)

(B) Presidency Small Cause Courts Act (1882), S. 38 — "The decree or order in the suit" — Dismissal of suit for default — Application to set aside dismissal — Order refusing to set aside dismissal has force of decree and it is an order in the suit. AIR 1930 Bom 412 and AIR 1951 Mad 672, Distinguished.

(Paras 5, 6)

Cases Referred:	Chronological	Paras
AIR 1951 Mad 672		7
AIR 1930 Bom 412 : 32 Bom LR 1009		6
(1906) 3 Cal LJ 199		4
(1903) ILR 26 Mad 163		5

M. S. Rane, Advocate, for Applicant; Opponent served.

ORDER:— This is an application in revision against an order made by the Full Court of the Court of Small Causes, Bombay, under S. 38 of the Presidency Small Cause Courts Act, 1882, hereinafter referred to as "the Act".

2. The respondent brought a suit against the applicant to recover money in the Small Causes Court, Bombay. In that suit, the applicant appeared and filed certain defences. The suit was ultimately fixed for hearing on 7th September 1970. On that date, when the suit was called out, the respondent was absent and, therefore, the suit was dismissed for default. The respondent subsequently filed an application for setting aside the dismissal of the suit for his default. Rule was issued to the applicant and after hearing the parties, the trial Court discharged the notice, thus refusing to set aside the dismissal of the suit for default of the respondent. The respondent thereupon filed an application

under S. 38 of the Act to the Full Court of the Court of Small Causes which set aside the order of the trial Court and restored the suit of the respondent to file. It is this order which is being challenged in this revision application.

3. Section 38 of the Act is in these words:—

"38. New trial of contested cases.— Where a suit has been contested, the Small Cause Court may, on the application of either party, made within eight days from the date of the decree or order in the suit (not being a decree passed under S. 522 of the Code of Civil Procedure) (XIV of 1882), order a new trial to be held, or alter, set aside or reverse the decree or order, upon such terms as it thinks reasonable, and may, in the meantime, stay the proceedings.

Explanation— Every suit shall be deemed to be contested in which the decree is made otherwise than by consent of or in default of appearance by the defendant."

4. Mr. Rane appearing for the applicant has questioned the jurisdiction of the Full Court of the Court of Small Causes to entertain and proceed with the application under S. 38 of the Act. As before the Full Court, the main ground urged in support of the above contention is that for the applicability of S. 38, what is required is that the suit should have been contested. This, however, could not be a suit that had been contested, because the suit had been dismissed for default of the plaintiff-respondent. As rightly pointed out by the Full Court, the defendant-applicant had not only put in her appearance but she had also filed certain defences and, therefore, it was a suit that had been contested. Mr. Rane has not been able to point out any authority taking the contrary view. The only authority referred to by him is the decision in Ananta Coomari Dassi v. Radharani Dassi (1906) 3 Cal LJ 199. That case is clearly distinguishable because there the defendant had not at all appeared and the suit was decreed ex parte. It could not, therefore, be a suit which had been contested. In fact, the Explanation to S. 38 makes it clear that where a decree is made in default of the defendant's appearance, it cannot be deemed to be a contested suit.

5. Although the above was the only ground urged before the Full Court, Mr. Rane has urged a few more points in support of his contention that the Full Court had no jurisdiction under S. 38 of the Act to entertain and proceed with the application. Mr. Rane does not dispute that S. 38 can be

resorted to not only against a decree but even against an order. But his contention is that if the application is made against an order, that order must have the force of a decree and secondly, that order must have been made in the suit. According to him, the order against which the application was made had neither the force of a decree, nor could it be said that the order was made in the suit, inasmuch as it was made in the application to set aside the dismissal of the suit. So far as the first point is concerned, he relies upon the decision in *Chinnathambi v. Veerabadriah Naidoo*, (1903) ILR 26 Mad 163. In that case, the Court had dismissed the suit in default of the plaintiff's appearance and on an application by the plaintiff to set aside the dismissal of the suit and to restore the suit to file, the Court had set aside the dismissal of the suit and restored the suit to file. The effect of this was that there was no final termination of the suit as the suit had been revived and, therefore, the order setting aside the dismissal of the suit and restoring it to file could not be an order having the force of a decree but was only an interlocutory order. This is made quite clear in the judgment of Benson J. at page 165 of the Report. In the present case, the effect of the order of the trial Court refusing to set aside the dismissal of the suit and to restore it to file was to terminate the suit finally, inasmuch as the earlier order of the dismissal of the suit stood and such an order naturally had the force of a decree. It is, therefore, not possible to accept the first part of the argument of Mr. Rane.

6. On the second part of the argument, Mr. Rane has not cited any direct authority but has only relied upon the wording of S. 38 which says that the application can be made within eight days from "the date of the decree or order in the suit". I do not think that such a restricted interpretation could be placed on the word "suit" in Section 38 as not to cover the application made to set aside the dismissal of the suit for default of the plaintiff and to restore it to file. Mr. Rane has relied upon the decision in *Kanji v. Jivaraj*, (1930) 32 Bom LR 1009 : (AIR 1930 Bom 412), where a question arose whether the order against which an application under S. 38 of the Act had been made could be said to be an order in the suit. In that case, an *ex parte* decree was passed in the Court of Small Causes at Bombay against a certain firm, when Kanji Vishram, a partner in the firm, was not served as a partner. The decree-holder got a notice issued to Kanji Vishram under Order XXI, R. 50, sub-rule (2) of the Civil Procedure Code to show cause

why his name should not be brought on record as a partner in the firm of Kanji Khimji and Co. and execution issued against him. After considering the objections of Kanji Vishram, the trial Court ordered that Kanji's name be brought on record and the decree executed against him. Kanji Vishram filed an application under S. 38 of the Act to the Full Court. That Court held that it had no jurisdiction to entertain and proceed with such an application. The matter was taken to the High Court and the Division Bench of this Court agreed with the view of the Full Court that it had no jurisdiction to entertain and proceed with the application. The question of jurisdiction depended upon whether a proceeding in which leave is applied for to execute a decree, under O. XXI, R. 50, sub-rule (2), was a suit. The High Court held that such a proceeding is in the nature of a subsidiary application after the decree is passed and before the decree can be executed against the partner against whom the application is made under O. XXI, R. 50, sub-rule (2). I do not think that an analogy of this view can be applied to the facts of the present case to hold that an application filed, after the dismissal of the suit for default of the plaintiff, to have the dismissal set aside and the suit restored to file, cannot be in a suit within the meaning of S. 38 of the Act.

7. In support of his contention that the Full Court had no jurisdiction to entertain and proceed with the application under Section 38, Mr. Rane finally relied upon a decision in *Fire Stone Tyre and Rubber Co. v. Ramanuja*, AIR 1951 Mad 672. But the question decided there was totally different. In that case, the Full Bench of the Small Cause Court had dismissed an application, for default of appearance, made to it under S. 38 of the Act for a new trial. An application was made to that Court to set aside the order of dismissal of that application for default and the question that arose for consideration was whether the Full Bench of the Small Cause Court could entertain such an application. The question that arose for decision in that case was thus totally different.

8. These were the only submissions made by Mr. Rane. As they have all been rejected, the application in revision fails and is dismissed. The Rule is discharged. There will be no order as to costs, as there is no appearance on behalf of the respondent.

Application dismissed.

AIR 1977 BOMBAY 313

VAIDYA AND SHIMPI, JJ.

Jagannath Yeshwant Badade and others,
Appellants v. Kazi Janimiya Mainoddin Patel
and others, Respondents.

S Appeal No. 1222 of 1967 from Appel-
late Decree with Civil Appln. No. 3282 of
1974, D/- 14-6-1976.

Constitution of India, Art. 19 (1) (f) —
Law of pre-emption — Customary law of
pre-emption on basis of vicinage imposes un-
reasonable restrictions on right to property
and hence void.

The customary law of pre-emption on basis
of vicinage imposes unreasonable restrictions
on the right to acquire, hold and dispose of
property guaranteed by Art. 19 (1) (f) and
hence is void, AIR 1962 SC 1476 and AIR
1965 SC 314, Followed. (Paras 3, 5)

As far as Mahomedan Law of pre-emption
is concerned, no distinction can be made be-
tween pre-emption based on custom and pre-
emption based on personal law, as personal
law must also be read subject to the provi-
sions of the Constitution. Although it is a
matter of personal law, the law of pre-emp-
tion is applied to Mahomedans as a matter of
"Justice, equity and good conscience". After
the coming into force of the Constitution,
however, it is not open to the Courts to say
that the pre-emption right which is void
under Art. 19 (1) (f) can be recognised as a
matter of "justice, equity and good con-
science". What is opposed to the Constitu-
tion must be held to be opposed to "justice,
equity and good conscience." AIR 1952 Bom
84 and AIR 1952 Mad 193, Distinguished.

(Paras 3, 4)

Cases	Refereed:	Chronological	Paras
AIR 1965 SC 314			1
AIR 1962 SC 1476			1
AIR 1952 Bom 84 : 58 Bom LR 779 : 1952			6
Cri LJ 354			6
AIR 1952 Mad 193 : 1952 Cri LJ 434			6

K. J. Abhyankar, for Appellants; S. M.
Hussein, (for No. 1), for Respondents.

VAIDYA, J.:— The only question which
arises in the above second appeal and which
was referred to the Division Bench, was whe-
ther the plaintiff was entitled to a decree for
pre-emption having regard to the decisions
of the Supreme Court in Bhau Ram v. Baij
Nath Singh, AIR 1962 SC 1476, and in Sant
Ram v. Labh Singh, AIR 1965 SC 314, where
it was laid down that the customary law of
pre-emption on the ground of vicinage im-
posed an unreasonable right to hold, ac-

quire and dispose of property guaranteed
under Art. 19 (1) (f) and was void.

2. The ground on which the learned As-
sistant Judge, in this case, distinguished the
present case was that although the right of
pre-emption based on custom, was void, ac-
cording to the said decisions of the Supreme
Court, the plaintiff's right to claim pre-emp-
tion on the basis of his personal law, which
had continued to operate after the coming
into force of the Constitution, was not affect-
ed by the said decisions.

3. Mr. Abhyankar, the learned counsel
for the appellants, has rightly argued that the
personal law of the plaintiff viz. Mahomedan
Law, was itself based on custom as one of
its sources, and, therefore, the learned Judge
erred in law in making a distinction between
pre-emption based on custom and pre-emp-
tion based on personal law. The contention
must be upheld, as personal law must be
also read subject to the provisions of the
Constitution. The definition of the phrase
"laws in force" in Art. 13 (3) (b) was held
to include law based on custom and usage in
India; and the customary law of pre-emption
on the ground of vicinage was held uncon-
stitutional and void as it imposed unreasonable
restrictions on the right to acquire, hold and
to dispose of property guaranteed by Arti-
cle 19 (1) (f) of the Constitution.

4. The Mahomedan Law of pre-emption
is applied by the Courts in India to Mahome-
dians as a matter of "Justice, equity and good
conscience", except in the Madras Presidency
where the right of pre-emption is not re-
cognised at all unless by local customs as in
Malabar. After the coming into force of the
Constitution, however, it is not open to the
Courts to say that the pre-emption right
which is void under Art. 19 (1) (f) can be
recognised as a matter of "justice, equity
and good conscience". What is opposed to
the Constitution must be held to be opposed
to "justice, equity and good conscience."

5. It should be noted that the Advocate
for the plaintiff did not dispute before the
learned Assistant Judge that on the date of
the sale deed taken by the appellants from
defendant No. 1, the road between the ad-
joining lands was not in existence. It is,
therefore, clear that the right of pre-emption
was claimed by the plaintiff in the suit only
on the basis of vicinage. Such a right is
held to be void in the aforesaid decisions of
the Supreme Court. The plaintiff's suit is,
therefore, liable to be dismissed.

6. Mr. Hussain, the learned Counsel for
the plaintiff, submitted that the two Supreme
Court decisions are distinguishable, as they

dealt with the validity after the Constitution of the customary law and not with the validity of personal law, relying on a decision of the Division Bench of this Court in State v. Narasu Appa Mali, (1951) 53 Bom LR 779 : (AIR 1952 Bom 84), in which it was held that the Bombay Prevention of Hindu Bigamous Marriages Act, 1946, was a valid Act; and a decision of the Division Bench of the Madras High Court in Srinivasa Aiyar v. Saraswathi Ammal, AIR 1952 Mad 193, in which Madras Hindu (Bigamy Prevention and Divorce) Act, was held to be valid.

7. It is true that a distinction is made between personal law and customary law in those decisions; and a view is taken that the words "laws in force" used in Art. 13 may not include personal law. These observations must be understood in the context of the futile challenge to the Hindu Bigamous Marriages Act, which was considered there. They were not observations made in connection with the law of pre-emption, which, as stated above, was applied in this part of the country by this Court, as a matter of "justice, equity and good conscience" before the Constitution, as stated in Mulla's Mahomedan Law, Seventh Edition, 1972, at para 227 at page 230.

8. Although it is a matter of personal law, the law of pre-emption is applied as a matter of "justice, equity and good conscience." The law declared by the Supreme Court is binding on us under Art. 141 of the Constitution. Hence, we do not think it possible to hold that notwithstanding that the Supreme Court has come to the conclusion that a right of pre-emption based on the basis of vicinage is inconsistent with Art. 19 (1) (f), such a right can exist in this country as a matter of "justice, equity and good conscience". "Justice, equity and good conscience" must yield to the Constitution after the Constitution comes into force.

9. In the facts and circumstances of the case, therefore, we allow the appeal, set aside the judgment and decree passed by the two Courts below and dismiss the plaintiff's suit. The parties should bear their respective costs throughout.

10. In view of this, no order is necessary in Civil Application No. 3282 of 1974, filed by the respondent-plaintiff to join the purchaser pendente lite of the subject matter of the suit, as a party in the above Second Appeal.

Appeal allowed.

AIR 1977 BOMBAY 314

DIGHE, J.

Smt. Alka Vinayak Pendse and others, Applicants v. K. V. Kirpekar, Opponent.

Civil Revn. Appln. No. 555 of 1973, D/-2-3-1976.

Bombay Rents, Hotel and Lodging House Rates Control Act (57 of 1947), S. 20 — Suit for recovery of rent paid in excess of standard rent — Limitation — Time spent in prosecuting application for fixation of standard rent whether can be excluded. (Limitation Act (1963), S. 14 (1)).

The tenant made an application under Section 11 of the Rent Act for fixation of standard rent and made a specific prayer therein that he may be permitted to adjust or deduct from future rent the amount recovered by the landlord in excess of the standard rent that may be fixed. The standard rent was fixed but the court could not grant the prayer for adjustment as it was outside S. 11. Soon thereafter the tenant filed a suit for recovery of the rent paid in excess of the standard rent fixed. Held, prayer in S. 11 application in effect was for asking back the overpayment. The matter in issue in the suit and in S. 11 application thus being the same, in computing the period of six months under S. 20, the time spent in prosecuting S. 11 application could be excluded in view of S. 14 (1) of the Limitation Act. AIR 1969 SC 37, Distinguished; (1925) 1 KB 9, Referred.

(Para 15)

Cases Referred:	Chronological	Paras
AIR 1969 SC 37 : 71 Bom LR 89		6
(1925) 1 KB 9		9
(1924) 2 KB 136		9
(1899) 1 QB 4		9

D. S. Marathe, for Applicants; S. H. Thatte, for Opponent.

ORDER:— The question arising for determination in this Civil Revision Application is regarding the computation of limitation period for the recovery of rent paid to the landlord which is determined as excessive payment on account of the standard rent getting fixed at a lower amount.

2. The facts of the case are not in dispute. The petitioners, original plaintiffs, had filed Miscellaneous Application No. 82 of 1969 on 28-1-1969 for fixing of standard rent of the premises occupied by them and owned by the opponent, original defendant. In that application a prayer was made for permission to deduct from future rent amount recovered by the landlord in excess of the standard rent that may be fixed. This appli-

cation was decided on 13-10-1970 and the standard rent was fixed at Rs. 50/- per month as against the contractual rent of Rs. 245/- per month. However, the Court did not grant any adjustment of the overpayment observing that the same was beyond the jurisdiction of the Court to which the application was made. On 16-10-1970, therefore the notice (Ex. 28) was served by the petitioners against the landlord seeking to recover excess payment made during the months of July 1968 to December 1968. The suit out of which the present revision petition arises, being Civil Suit No. 3328 of 1970, was filed by the petitioners against the respondent for getting a sum of Rs. 1,170/- as the excess rent and Rs. 10/- more as notice charges. The Small Causes Court Judge, Poona, who heard the suit, allowed the decree in a sum of Rs. 985/- and proportionate costs with future interest at 6 p. c. p. a. This was for the excess rent paid during the months of August 1968 to December 1968 and the notice charges. Excess payment for July 1968 was taken as time-barred. Civil Appeal No. 55 of 1972 was filed against that decision in the District Court at Poona. The Extra Assistant Judge, Poona, allowed the appeal and the decree passed by the trial Court was set aside. According to the learned Assistant Judge, as the claim was not filed within 6 months of the accrual of the cause of action as required by Section 20 of the Bombay Rent Act. In his opinion, under Sec. 14 of the Limitation Act, there could not be the exclusion of time taken in prosecuting the standard rent application. Although the learned Judge held that by reason of S. 29 (2) of the Limitation Act, S. 14 was applicable in computing the period of limitation, sub-section (1) of S. 14, which governed the proceedings, was inapplicable, because the matter in issue in Civil Suit and in the earlier proceedings was not the same.

3. Aggrieved by that decision, the plaintiffs have preferred this revision petition. S. 20 of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947, to the extent relevant, is as follows:—

Any amount paid on account of rent after the date of the coming into operation of this Act, shall, except in so far as payment thereof is in accordance with the provisions of this Act, be recoverable by the tenant from the landlord to whom it was paid or on whose behalf it was received or from his legal representatives at any time within a period of six months from the date of payment and may, without prejudice to any other remedy for recovery, be deducted by such tenant

from any rent payable by him to such landlord."

The learned trial judge has held the claim for the months of August 1968 to December, 1968 recoverable. On the phraseology of S. 20 (1) of the Bombay Rent Act for recovering the excess payment for the above noted months a suit ought to have been filed in February 1969 so as to keep the claim for August 1968 in time. The suit here has actually been filed on 2nd of November 1970, so that prima facie no amount asked for is sought to be recovered within the period of six months.

4. It is true that the application for fixation of standard rent, which was given in January 1969, was not decided till 13th of October 1970. Mr. Divekar, the learned Advocate for the petitioner, therefore, argues that until determination of the standard rent on that day the plaintiffs-petitioners could not have taken up any steps for recovery in the absence of knowing what was the excess amount. It is, however, difficult to hold that for that reason alone we can overlook the provisions of S. 20 of the Bombay Rent Act and come to the conclusion that the limitation actually starts running from 13th of October 1970.

5. The only other way in which the suit could be brought in time is by excluding the time taken in the standard rent application proceedings from 28th January 1969 to 13th of October 1970. In this connection reliance is placed on S. 14 of the Indian Limitation Act. Sub-s. (1) of S. 14 relates to the filing of a suit, while sub-sec. (2) is in connection with the filing of any application. Since here exclusion of time of proceedings bona fide taken in the standard rent petition is sought while Suit No. 3328 of 1970 was filed, we will be concerned with sub-s. (1) of S. 14. It runs as follows:—

"In computing the period of limitation for any suit the time during which the plaintiff has been prosecuting with due diligence another civil proceedings whether in a court of first instance or of appeal or revision, against the defendant shall be excluded, where the proceeding relates to the same matter in issue and is prosecuted in good faith in a court which from defect of jurisdiction or other cause of a like nature, is unable to entertain it."

According to this provision, if time is spent in other civil proceedings which are prosecuted with due diligence and if the proceedings relate to the same matter in issue and are prosecuted in good faith, the time taken up by these proceedings could be excluded if

those proceedings were not entertained by reason of the defect of jurisdiction or other cause of a like nature. In addition to the proceedings relating to the same matter in issue, they must not have been entertained by reason of lack of jurisdiction etc. and that these proceedings must have been prosecuted in good faith and with due diligence. Mr. Thatte, appearing for the respondents, contends that this provision could not apply chiefly because the matter in issue in the standard rent petition and the suit is not the same. It has to be remembered in this connection that while Miscellaneous Petition No. 82 of 1969 was filed by the petitioners in that very application, they had asked for adjustment of overpayment. It is, however, contended that under S. 11 of the Rent Act, Courts could not pass any order either of adjusting the amount or allowing recovery of the amount but that only fixation of rent could be declared, and as such the matter in issue in the two proceedings cannot be the same.

6. In developing this argument Mr. Thatte, relied upon the decision reported in *Maganlal Chhotalal Desai v. Chandrakant Motilal*, (1969) 71 Bom LR 89 : (AIR 1969 SC 37). The Supreme Court there was concerned in finding out whether the defendant paid or was ready and willing to pay rent due from him. According to the defendant, he was compelled to pay Rs. 15,224/- between March 14, 1950 and August 4, 1954. The Courts below found that between these two dates he paid Rs. 14,169-2-0 on account of rent from October 1, 1948 at the rate of Rs. 300/- per month. These payments were in excess of the standard which was eventually fixed at Rs. 125/- per month. The rent falling due after August 4, 1954 was not paid. The question was whether the rent was in arrears. Claim was made that the over-payment should be treated as rent paid, by adjustment or deduction of the over-payments. That claim was denied by making the following observations:

"The section gives the tenant a general right of recovery of the overpaid rent within six months from the date of payment. Without prejudice to any other mode of recovery, he may deduct the overpayment from any rent payable by him to the landlord. Deduction is one mode of recovery. If the amount is incapable of recovery because of the bar of limitation, it cannot be recovered by deduction. In other words, the right of recovery by deduction is barred at the same time as the right of recovery by suit. If the tenant seeks recovery of the overpaid amount

he must bring the suit or make the deduction within six months."

7. Apparently, the defendant had not filed any suit for the recovery of the overpayments and on the date the Supreme Court was concerned in finding out whether adjustment could be made, the claim was time-barred by reason of S. 20 of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947. That is why the Court held that the amount was not recoverable because of the bar of limitation and that the right of recovery by deduction is also barred at the same time as the right of recovery by suit.

8. In my opinion, the point raised for decision here is different. Adjustment by way of deduction was claimed retrospectively in the suit before the Supreme Court when that was out of limitation. The question for our consideration in the present revision petition is whether such limitation is saved or whether time is extended by reason of the application of S. 14 (1) of the Limitation Act.

9. During the course of arguments Mr. Thatte, for the respondent, referred me to the decision in *Diment v. Robert*, (1925) 1 KB 9. The provision in S. 8 of the Mortgage Interest Restriction Act with which the Court of Appeal was concerned is almost similar and the word 'recoverable' appears in that section as well as in S. 20 of the Bombay Rent Act in similar circumstances. The head-note of the case runs as follows:—

"The effect of the provisions of S. 8, sub-s. (2) of the Rent and Mortgage Interest Restriction Act, 1923, whereby any rent or interest paid by a tenant or mortgagor in excess of the increases allowed by the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, shall be 'recoverable at any time within six months' is that the tenant to recover the excess, must take some kind of legal proceeding, as by issue of a writ of summons within the prescribed period. It is not necessary that he should actually have obtained judgment before the six months have expired".

Mr. Thatte, emphasises the statement that the tenant must take some kind of legal proceedings within the prescribed period of six months. However, the controversy in that suit and the other decisions referred to, one of which is *Lewis v. Makay*, (1924) 2 KB 136, centred round the interpretation of the word 'recoverable'. It was contended that within that period of six months the tenant himself actually must have obtained a judgment for repayment of the excess and not simply taken some steps towards recovery. The contention was repelled. Dealing with that contention, Pollock

M. R. in the passage at page 11 observes as follows:

"Now what is the meaning of the word Recoverable? Does it mean that the money must have been recovered, in the sense that a judgment must have been given to enforce its recovery, or does it mean that a suit for its recovery has been commenced? The Divisional Court decided that it means that the tenant must have taken steps to recover by issuing legal proceedings, and I think that view is correct. Counsel for the appellant referred to *Ings. v. London and S. W. Rly. Co.*, but it seems to me that that case has no bearing on the present one. One must always look at the purpose of an Act of Parliament and the basis of such decision. There were other cases: *Morris v. Duncan* (1899) 1 QB 4, was relied upon but it seems to me that the judgment in that case was the exact opposite of the argument presented to us by counsel. I am satisfied that the judgment of the divisional Court was right. It is impossible to suppose that the Legislature intended to leave the tenant to the chance of his right to recover falling within the area of very busy court, or to be determined by the changes or chances of the Court's business." The contention, depending upon the contingency of the decision being obtained from the Court over which the litigant had no control, was negatived, and it was held that mere taking of some legal proceeding was sufficient.

10. In our case, on behalf of the petitioners-plaintiffs, it is said that the petitioners had taken steps by filing Miscellaneous Application No. 82 of 1969 in which they had also prayed for adjustment, and that, therefore, it could be held that they had started the proceedings. Again, therefore, the question falling for determination in the present matter would be whether the petitioners could relate back their claim in Suit No. 3228 of 1970 to the filing of the application on 28th of January 1969. That they could do only by the help of S. 14 (1) of the Limitation Act and the question would be whether, in the circumstances of the case, that is permissible.

11. According to Mr. Thatte, the petitioners cannot link the two matters. He argues that it was open for the petitioner to file a suit just when they filed the application for fixation of standard rent. In that suit, they could have claimed the relief of recovery of overpayment simultaneously with the prayer for fixation of standard rent. In other words, although the standard rent was not fixed and though the exact amount recoverable was not known at

the time of the filing of such a contemplated suit, it is argued that he could have envisaged some figure as standard rent and could have framed his plaint in terms of such a figure. According to him, this kind of suit is contemplated by S. 20 of the Rent Act and he relies upon the observations made in Dalal's Bombay Rent Act, (4th Edition) at page 542, which are as follows:—

"It is, however, not a condition precedent to the filing of a suit for the recovery of the amount paid in excess of the standard rent and permitted increases that the standard rent or permitted increases should have been already fixed by the court under an application. The scheme of the section is to give a right of recovery within a period of six months from the date of payment. It is in a suit filed for the recovery of such an amount, that the court will have to decide after a proper trial as to whether the amount is in excess of the amount payable in accordance with the provisions of this Act. It is in such a suit that the court will, if required, decide the standard rent and/or the permitted increases, as the case may be. A tenant may, therefore, file a suit to recover an amount which, according to him, is in excess of the standard rent and permitted increases and therein pray for the determination of the standard rent and/or permitted increases." The case on which these observations of the learned Author are based was also cited before me. It is a decision of a Bench of Small Causes Court, of 15th October, 1965 in RAR Appeal No. 360 of 1960 in RAE Suit No. 2146/11321 of 1955 (*Moosaji Adamji Lakdawalla v. Lingappa Puttal Pujari*). Principal facts of the case can be usefully noted. The appellant Moosaji Adamji had let out to the respondent Lingappa Puttal Pujari a plot of land by an indenture of lease dated 7th October 1952 at a monthly rent of Rs. 135/-. On the same day, he borrowed from the respondent a sum of Rs. 1,625/- on a promote. Rs. 60/- per month was the instalment of repayment of that loan with liberty to adjust the same with the rent falling due. In July 1953 Lingappa filed an application for fixation of the standard rent of the premises. Pending disposal of the petition, a Commissioner was appointed for valuing and suggesting fair rent. He had indicated that Rs. 55-8-0 could be the fair rent. However, on 1-12-1955, the main petition was dismissed on the ground that the provisions of the Rent Act were not applicable to the premises in question. An appeal filed over it was also dismissed on 29-2-1956. On 27-8-1955, Lingappa filed the suit claiming to recover from the appellant under the provisions of

S. 20 of the Rent Act, certain sum paid by him in excess of the standard rent. Obviously while filing this suit, the standard rent he has envisaged is of Rs. 55-8-0 as suggested by the Commissioner. But the whole proceedings could not have attracted S. 20 of the Rent Act because of the finding in the earlier petition and in appeal over it that the Rent Act did not apply to the premises in dispute. Had that finding been maintained, the fate of the suit was very clear. However, in between the filing of the suit and the ultimate decision of it, certain other events happened. On 11th September 1956 Civil Revision Application filed by Lingappa in the standard rent proceedings was allowed and the matter was remanded for fixation of standard rent. The trial Court then fixed it in April 1957 at Rs. 76/- per month. Appellate Bench changed the figure to Rs. 40-33 on 25-9-1957 and the same was maintained in the Civil Revision Application filed over it. On the date of the decision of the Suit, therefore, the plaintiff then could easily lay hand on the finding of standard rent at Rs. 40.33. In the suit, Lingappa had given credit to the landlord of the standard rent he had envisaged and had also calculated the dues under the pronote.

12. One of the contentions raised in opposing the suit was that there was no cause of action for the suit when it was filed, inasmuch as no standard rent was fixed on that date. In dealing with the objection, the learned judges have observed that the standard rent application was not pending but the revision application filed by the tenant was pending whereunder the standard rent application was remanded to the trial Court for disposal. In this context the following are further observations:—

“We are of the view that it is not a condition precedent to the filing of a suit under S. 20 of the Rent Act to recover back the amount of excess over the standard rent paid to the landlord, that the standard rent should have already been fixed by the Court. In a case where the contractual rent charged from the tenant happens to be the rent at which the premises were first let after 1st September 1940, it is no doubt true that prima facie such contractual rent would be regarded as the standard rent till the standard rent is fixed by the Court either upon an application made under S. 11 of the Rent Act or in a suit. But it is open to a tenant in such a case to file a suit to claim back what is excess over the standard rent according to him and at the same time pray that the standard rent be fixed and decree may be passed for such amount paid to the landlord within the

prescribed period as is in excess of the standard rent so fixed. In the present case it was not necessary for the trial Court to go into the question of fixation of the standard rent as when the suit came up for hearing, the standard rent was already fixed by the appellate Court in the standard rent application filed by the respondent. We are, therefore, unable to uphold the contention of Mr. Tunara that the respondent had no cause of action for filing the suit on the date when it was filed.”

The language used in these observations shows that the fixation of the standard rent is not a condition precedent for the filing of the suit so that it could not be urged that before fixing of the standard rent, no action under S. 20 of the Rent Act could be taken. The possibility of the tenant filing a suit simultaneously with the prayer to fix standard rent has been considered and approved. Now, what is sought to be argued is that that is the only mode by which recovery of excess payment by suit can be made and that unless such an action is taken, the tenant is deprived of his remedy to file a suit and recover the amount. This is on the background of the expiry of the period of six months before the fixation of the standard rent in a proceeding started. That the filing of a suit as indicated above is possible and permissible would not however, mean that other remedy is not possible. If, for instance, in the present case action taken by the tenants at the time of the filing of the standard rent application in praying for adjustment is looked upon as a step for adjustment of the overpayment or a step in the nature of recovering the excess payments, and if in a regular suit filed thereafter time spent in those proceedings could be excluded, then the ruling given by the learned Judges of the Small Causes Court, ought not to come in the way of a tenant. Hence also, the crucial question falling for determination in this revision application is, in the circumstances as existing in the present case, whether S. 14 (1) of the Indian Limitation Act is applicable. The learned trial Judge was of the view that the matter in issue in the Miscellaneous Application No. 82 of 1969 and the subsequent suit, being Suit No. 3328 of 1970, was the same. He did not appreciate the distinction made on behalf of the landlord that the relief claimed in the standard rent application was one of adjustment, whereas the relief claimed in the suit was for recovery of the amount. He felt that the argument had the ring of the phraseology used in sub-section (2) of Section 14 of the Limitation Act which obviously was not applicable and in finding that the

matter in issue in both the proceedings was the same he concluded that in the Standard Rent Application, the plaintiffs had claimed adjustment in respect of the amount paid in excess of the standard rent and in the suit also they claimed back the same amount.

13. The learned Appellate Judge, has not found favour with that reasoning. He calls this view erroneous. According to him, the cause of action for filing standard rent application arose under S. 11 of the Rent Act when the tenant found that the agreed rent charged by the landlord was excessive. That application was essentially for fixing of the standard rent and although there was an ancillary prayer for permission to deduct from future rent that much amount recovered by the landlord in excess of the standard rent that may be fixed for a period of six months immediately preceding the months in which the application was filed, he concludes that the matter in issue was not the same. According to him, the making of adjustment was outside the purview of the application under S. 11 of the Rent Act. Then he observed:

“Merely because the plaintiffs had made a prayer in the standard rent application for permitting them to make adjustment of the amount recovered in excess of the standard rent in future rent that was certainly not “a matter in issue “in that application which is now in issue in the present suit.”

It cannot be denied that an order for recovery of amount or for adjustment could not be passed under S. 11 of the Rent Act, but in fact such a prayer for adjustment, which, in effect, was for appropriating the excess amount paid was made. That prayer could not have been granted and has not been granted by the Court deciding that application because that court had no jurisdiction to grant such a claim. The matter, however, does not rest upon drawing distinctions in the real function of S. 11, but in finding out precisely whether when some other prayer was made that prayer was made in good faith and was prosecuted with diligence, and as such, when an adverse finding is obtained on the score of lack of jurisdiction it could be looked upon as sufficient to exclude the time taken in prosecuting those proceedings.

14. If the contention raised by Mr. Thatte is accepted almost always a tenant would have to file a suit under S. 20 of the Rent Act in which the relief under S. 11 may have to be claimed. It is seldom that standard rent petitions get decided in six months. It would have also one more curious result. After presenting an application for

fixation of standard rent usually an interim order under sub-s. (3) of S. 11 is passed for depositing the rent intermily fixed or paying it out and out to the landlord. In a given case, the amount so fixed intermily may happen to be in excess of the standard rent ultimately fixed. It would also be that a tenant may prefer to make payment out and out to the landlord after obtaining such order. If the standard rent proceedings last for more than 6 months, as they often so last, amount paid during the pendency of the proceedings and which happens to be in excess of the standard rent ultimately fixed, would also become non-recoverable, thus, putting a premium on the landlord's conduct of recovering excess amount. I do not think that that result was intended by the Legislature. A diligent litigant aware of his rights rushes to the Court for fixation of standard rent. In case the same is fixed quickly, he could easily obtain a relief for the excess payment made during the previous six months. On the other hand, if because of the congestion of work in Court he is unable to obtain an order, he stands to lose and that is dependent, not upon his volition but upon the exigencies of the Court. The King's Bench ruling cited above, has not looked upon such a result with favour.

15. The question for our consideration is whether the proceedings in the two actions relate to the same matter in issue so that under S. 14 of the Limitation Act, time could be extended. In the application for fixation of standard rent the Court is invited to fix the correct rent, and thus, to determine what rent was excessively charged. In the suit for recovery of overpayment, the determination of the excessively charged amount has also to be looked into before granting further relief. To my mind, to that extent, the matter in issue is the same in the two proceedings, more so, where in the application of the type, with which we are concerned, a precise prayer for adjustment, which is one of the modes of recovering of the excess payment was also made. Fixation of the standard rent always operates retrospectively. In both the proceedings, therefore, there is determination of the excessive rent charged. I feel, therefore, that the view taken by the learned Extra Assistnat Judge cannot be upheld, when there was an express prayer at the time of the filing of the standard rent application to grant adjustment. It was in effect a prayer for asking back the overpayment. The same could not have been known till the proceedings lasted and immediately thereafter separate suit was filed. The matter in issue thus being the same, computation of the limitation period would be after taking into account

the period spent in prosecuting the standard rent application as provided in S. 14 (1) of the Limitation Act. Consequently the decree of the trial Court will have to be restored. Hence, I pass the following order:

ORDER

The rule is made absolute.

The revision application is accepted, the order passed by the Extra Assistant Judge Poona, on 19-4-1973 is set aside and the decree of the trial Court dated 11-2-1972 is restored.

The opponent to pay the costs of the petitioners and to bear his own.

Revision allowed.

AIR 1977 BOMBAY 320 KANTAWALA, C. J. AND TULZAPURKAR, J.

M/s. Mohanlal Devdanhbai Choksey and others, Appellants v. M. P. Mondkar and others, Respondents.

Appeals Nos. 81 and 84 of 1972 and Misc. Petn. No. 141 of 1970, D/- 2-3-1976.

Customs Act (1962), Ss. 110 (2) and 124 — Failure to issue show cause notice within prescribed time — Not a fetter upon power to initiate confiscation proceedings. AIR 1973 All 433, Not Foll.

The object underlying S. 110 is not initiation of proceedings for confiscation of goods or for imposition of personal penalty, but is to indicate what will happen if such initiation has not taken place within the time prescribed by the section itself. The consequences of non-initiation of proceedings within the prescribed time are that the goods shall be returned to the person from whose possession they were seized. All the provisions of Ch. XIII are steps to facilitate investigation machinery and failure to issue a show cause notice under Cl. (a) of S. 124 within the prescribed time will only result in an obligation on the part of the Customs Authorities to return the goods to the person from whose possession they were seized. There is nothing in the language of S. 110 to indicate that a fetter or limitation is imposed upon the power of the Competent Authority to initiate proceedings under S. 124. On the other hand, S. 124 is contained in Ch. XIV which contains substantive provisions relating to confiscation of goods etc. and imposition of penalty. Under S. 124 issue of a show cause notice prior to passing an order of confiscation or imposition of personal penalty is man-

datory, but the language of S. 124 is clear and precise and no restriction or limitation or even a fetter is imposed as regards the time when proceedings may be initiated by issue of a show cause notice. S. 124 prescribed the conditions precedent which are to be fulfilled by the Authority before an order of confiscation of goods or an order imposing any penalty can be passed against any person. These conditions precedent are laid down in Cls. (a), (b) and (c) of S. 124. None of the three conditions precedent even suggests that there is a limitation on the exercise of the power either as regards the time or existence of seizure. On a plain reading of S. 124 it will be open to the Competent Officer to pass an order of confiscation of goods or imposing any penalty without seizing any goods or after returning the goods under the proviso to S. 110 (2) for failure to initiate proceedings within the prescribed time. An investigation machinery cannot be equated with a limitation upon a substantive power contained in S. 124; more so, when the only consequence that follows for failure to give notice within the prescribed time is laid down in S. 110 (2), namely return of goods to the person from whose possession they were seized. AIR 1968 Cal 28 and AIR 1972 SC 689 and AIR 1975 Mad 43 and (1975) 16 Guj LR 119 and AIR 1975 Punj and Har 130 and (1975) 79 Cal WN 663 Foll.; AIR 1973 All 433, Not Foll.

(Para 7)

Cases	Referred:	Chronological	Paras
(1975) 79 Cal WN 663			13
(1975) 16 Guj LR 119			12
AIR 1975 Mad 43 : (1974) 2 Mad LJ 88			11
AIR 1975 Punj and Har 130			13
AIR 1973 All 433			8
AIR 1972 SC 689			2, 6, 9
AIR 1968 Cal 28 : 1968 Cri LJ 33			9

A. K. Sen with M/s. S. J. Sorabjee, P. A. Mehta and N. K. Thakore, for Appellants in Appeal No. 81 of 1972 and for Respondents in Appeal No. 84 of 1972; R. J. Joshi with C. J. Shah and S. B. Sukhtankar, for Respondents in Appeal No. 81 of 1972 and for Appellants in Appeal No. 84 of 1972.

KANTAWALA, C. J.:— The firm of Messrs. Mohanlal Devdanhbai Choksey (petitioner No. 1) consisting of three partners, petitioners Nos. 2 to 4, carries on business of sale and purchase of gold and silver bullion. On Jan. 10, 1969 the petitioners delivered to the proper officer under the Customs Act, 1962 (hereinafter referred to as "the Act") an intimation under S. 11J of the Act in respect of their shop at Sheikh Memon Street as being the place where the silver and gold bullion which were the goods notified

under S. 11-I of the Act are being kept or stored by them. According to them between 14th and 23rd Jan. 1969 they sold and delivered three consignments of silver bullion to a firm carrying on business at Nasik. On Jan. 23, 1969 they effected sale of 22 bars of silver weighing in the aggregate 666.533 Kgs. valued at Rs. 3,70,356/- to the said firm at Nasik. On the same day they obtained from the Competent Officer a transport voucher under S. 11K for transport of the said goods by road from Bombay to Nasik. In the said transport voucher it was mentioned that the goods would leave the petitioner's shop at Sheikh Memon Street at 6 p. m. on Jan. 23, 1969. Such time was mentioned in the transport voucher according to the petitioners because the Excise Officer declined to sign a transport voucher on that day if the goods were to be transported the next day as intended by the petitioners. On Jan. 23 1969 at about 7.30 p. m. a party of Customs Officers raided the garage and residence of the petitioners Nos. 2, 3 and 4 at building "Triveni", situate at Walkeshwar Road, Bombay and seized 22 bars of silver from that garage along with 11 small pieces of silver contained in a gunny bag which was found on the loft. The Customs Officers also seized a Willy's Station Wagon bearing No. MRW-9690 and some old books of account. They also seized from the residence of petitioners Nos. 2, 3 and 4 in building Triveni currency notes of the value of Rs. 54,000/- and 7 gold coins and some cash. On Jan. 24, 1969 from the shop of the petitioners at Sheikh Memon Street books of account, documents and other things were taken charge of. On July 22, 1969 the Collector of Central Excise and Customs, Bombay passed an order to the effect that he was satisfied that there were sufficient grounds for extending the period by six months for the issue of notice prescribed under S. 124 of the Act and accordingly, in exercise of the powers conferred by S. 110 (2) of the Act he extended the period for issue of the notice by six months from July 23, 1969. On January 22, 1970 the Assistant Collector, Directorate of Revenue Intelligence, Bombay Unit, issued a show cause notice to the petitioners calling upon them to show cause why the silver bullion which was seized should not be confiscated and they should not be held liable for imposition of the penalty under Chapter XIV of the Act. By the said notice the petitioners were also called upon to show cause why the Willy's Station Wagon bearing No. MRW-9690 and the 'Contex-30' calculating machine that were seized should not be confiscated. On Feb. 20, 1970 the petitioners filed a petition under

Art. 226 of the Constitution on the Original Side of the High Court inter alia to challenge the validity of the order of extension dated July 22, 1969 and the show cause notice dated Jan. 22, 1970. They prayed for a writ of mandamus or other appropriate relief directing the respondents, their officers, servants and agents to return to them forthwith all the goods seized, currency notes of Rs. 72,278/-, 7 gold coins, 'Contex-30' calculating machine, Willy's station wagon bearing No. MRW-9690 and the books of account and other documents seized by them and to withdraw and cancel the order of extension dated July 22, 1969 and the said show cause notice dated Jan. 22, 1970. In this petition the Assistant Collector, Directorate of Revenue Intelligence, Bombay Unit, the Collector of Central Excise, and the Collector, Directorate of Revenue Intelligence, Bombay Unit and the Union of India were made party respondents. The petition was resisted by the respondents and affidavits in reply were filed by the Assistant Collector, Directorate of Revenue Intelligence and the Superintendent of Central Excise and Customs.

2. When the petition came up for hearing before the learned trial Judge two contentions were urged on behalf of the petitioners. Firstly it was contended that the order dated July 22, 1969 whereby the period for issue of a show cause notice under S. 124 of the Act was extended, was in breach and violation of the principles of natural justice as the said order was issued by the Officer without giving any opportunity whatsoever to the petitioners. Secondly, it was contended that even the seizure of the goods was unjustified, because, on the facts of the case it was impossible for any officer to entertain any reason to believe that the goods that were seized were liable to confiscation within the terms of S. 110 (1) of the Act so as to justify the seizure. On that ground the validity of the show cause notice dated January 22, 1970 issued under S. 124 of the Act was challenged. The learned Judge following the decision of the Supreme Court in Asst. Collector of Customs and Supdt. Preventive Service Customs, Calcutta v. Charan Das Malhotra, reported in AIR 1972 SC 689, took the view that as the order extending the time for issuing the show cause notice under Section 124 was passed without giving any opportunity to the petitioners of being heard, the said order was liable to be quashed. So far as the validity of the show cause notice dated Jan. 22, 1970 was concerned, he took the view that the attempt on the part of the petitioners to show that the customs authori-

ties would have had no reason to believe that the goods in question were liable to confiscation was an ill-advised and ill-founded attempt and he had no hesitation in rejecting the said contention. In view of these findings having regard to the provisions of S. 110 of the Act he issued a writ of mandamus against the respondents directing them to return to the petitioners forthwith the 22 bars of silver, 11 small pieces of silver, Willy's station wagon bearing No. MRW 9690, books of account and other documents seized from the garage and 25 pieces of silver, 'Contex-80' calculating machine, books of account and other documents seized from the petitioner's shop. By his order he also directed the respondents to withdraw and cancel the order of extension of time dated July 22, 1969. While this petition was pending criminal proceedings were also adopted by the Officers of the Customs Department in the Court of the learned Presidency Magistrate and in view of the pendency of the said proceedings he directed that the property which was directed to be returned should not be returned to the petitioners in compliance with the judgment till two weeks from the date of delivery of the judgment so as to give the respondents an opportunity to apply for an order under S. 516A of the Code of Criminal Procedure to the learned Magistrate before whom the criminal proceedings were pending. It is against this order passed by the learned Judge that these two cross appeals are filed. Appeal No. 81 of 1972 is filed by the petitioners while cross appeal No. 84 of 1972 is filed by the original respondents.

3. Mr. Sen the learned counsel on behalf of the petitioners contended that having regard to the provisions of the Act seizure under S. 110 was *sine qua non* to exercise of the powers of confiscation under S. 124 of the Act. He submitted that a notice under S. 124 of the Act cannot be issued unless there is valid seizure of the goods under S. 110; that such valid seizure is a fetter upon the power of the authorities to issue a show cause notice under S. 124 and that a notice under S. 124 of the Act is a condition precedent to exercise of the power of confiscation of the goods. He submitted that the impugned show cause notice dated Jan. 22, 1970 in so far as it relates to confiscation of the goods must be quashed once the six months' period prescribed in S. 110 expires and no show cause notice is issued within that period and when no valid order of extension of the period of seizure or for issue of the show cause notice is passed by the appropriate authorities. According to his

submissions, a show cause notice under Section 124 cannot be given once the period of six months or the extended period mentioned in the proviso has elapsed since the date of the seizure. His submission was that as under the order of the trial Court the goods are ordered to be returned to the petitioners, the proceedings initiated pursuant to the notice dated Jan. 22, 1970 under S. 124 of the Act cannot be continued and they should be quashed. On the other hand, Mr. Joshi on behalf of the original respondents contended that S. 110 and S. 124 are entirely independent provisions that S. 110 is contained in Chapter XIII which deals with searches, seizure and arrest. He submitted that these provisions constitute the machinery to facilitate proper investigation of a case and anything contained in a provision contained in a section in Chapter XIII cannot affect or impose a fetter upon the powers conferred in the substantive provisions which are contained in Chapter XIV of the Act. Chapter XIV of the Act according to his submission contains substantive provisions for confiscation of goods and conveyances and imposition of penalties. S. 124 is contained in Chapter XIV and it makes the issue of a show cause notice a condition precedent before any order confiscating any goods or imposing any penalty on any person can be passed under this Chapter. He submitted that the provisions of S. 124 are independent provisions and thereby no limitation as to time is prescribed for the issue of such a show cause notice, nor do they contain any provision to the effect that an order of confiscation cannot be passed or proceedings for such confiscation cannot be instituted unless they are first seized and continued under seizure while proceedings are initiated and continued. He also submitted that for initiation of proceedings under S. 124 no limitation or restriction as regards time is imposed and S. 110 contained in Chapter XIII and S. 124 contained in Chapter XIV should be considered in their proper perspective and nothing contained in S. 110 can be regarded or considered as a fetter upon the exercise of powers under Section 124. He urged that the consequences of non-compliance with the principles of natural justice while passing an order of extension under S. 110 are provided in the section itself and it would not be permissible to the Court to enlarge the scope of S. 110 beyond what is contained therein.

4. So far as the cross appeal preferred by the original respondents is concerned, he submitted that the order of the learned Judge directing return of the books of account and documents to the petitioners should be modi-

fied as some of the said books of account and documents have been tendered as exhibits in the criminal proceedings pending before the learned Magistrate and some of them are likely to be tendered as exhibits in the proceedings initiated for confiscation of the goods and imposition of personal penalty against the petitioners. He therefore, submitted that having regard to the subsequent events this order qua return of books of account and documents should be modified. So far as the return of silver bullion is concerned, he drew our attention to the events that have taken place after the matter was disposed of by the learned Judge and submitted that in view of the subsequent events that have taken place the order passed by the learned Judge should be modified or in any event a clarification should be made so that the original respondents may not be hauled up for contempt in case, in view of the order that may be passed by the learned Magistrate or in view of the order of confiscation that may be passed by the authorities under the Act, it may not be possible for any of the original respondents to return the silver bullion, the Willy's station wagon and/or the 'Contex-30' calculating machine to the petitioners.

5. By Central Ordinance No. 1 of 1969 which was promulgated on Jan. 3, 1969 Chapters IVA and IVB were added in the Act and the said provisions were continued later on by Act 12 of 1969. These Chapters IVA and IVB have been introduced in the Act with effect from Jan. 3, 1969. Section 11-I authorises the Central Government by notification to specify goods of any particular class or description in regard to which special measures may be deemed necessary for checking its illegal export. It is common ground that under the said section Central Govt. has specified silver bullion and coins as being such goods. Under S. 11J it is obligatory upon any person who possessed goods so specified by the Central Government to intimate particulars of the place where such goods were kept or stored by him. Sections 11K, 11L and 11M regulate the transport thereof. Chapter XIII of the Act contains provisions relating to searches, seizure and arrest. Sec. 110 in this Chapter deals with seizure of goods, docu-

ments and things and its provisions are as under:—

"110. (1) If the proper officer has reason to believe that any goods are liable to confiscation under this Act, he may seize such goods:

Provided that where it is not practicable to seize any such goods, the proper officer may serve on the owner of the goods an order that he shall not remove, part with, or otherwise deal with the goods except with the previous permission of such officer.

(2) Where any goods are seized under sub-sec. (1) and no notice in respect thereof is given under Cl. (a) of Section 124 within six months of the seizure of the goods, the goods shall be returned to the person from whose possession they were seized:

Provided that the aforesaid period of six months may, on sufficient cause being shown, be extended by the Collector of Customs for a period not exceeding six months.

(3) The proper officer may seize any documents or things which, in his opinion, will be useful for, or relevant to, any proceeding under this Act.

(4) The person from whose custody any documents are seized under sub-sec. (3) shall be entitled to make copies thereof or take extracts therefrom in the presence of an officer of customs."

Chapter XIV of the Act contains provisions relating to confiscation of goods and conveyances and imposition of penalties. Section 111 enumerates the types of goods which are liable to confiscation. After the Ordinance No. 1 of 1969 was promulgated; Cl. (p) was added in S. 111 whereby one of the types of goods that are liable to confiscation was added as under:—

"(p) any notified goods in relation to which any provisions of Chapter IVA or of any rule made under this Act for carrying out the purpose of that Chapter have been contravened."

Section 112 provides for imposition of personal penalty. Section 113 enumerates the types of goods liable to confiscation. By Ordinance No. 1 of

1969 which was continued by Act 12 of 1969 Cl. (1) was introduced in this section and one of the types of goods which could be confiscated under this clause was any specified goods in relation to which any provisions of Chapter IVB or of any rule made under the Act for carrying out the purposes of that chapter have been contravened. Section 124 provides for issue of show cause notice before confiscation of goods etc. and its provisions are as under:—

"124. No order confiscating any goods or imposing any penalty on any person shall be made under this chapter unless the owner of the goods or such person—

(a) is given a notice in writing informing him of the grounds on which it is proposed to confiscate the goods or to impose a penalty;

(b) is given an opportunity of making a representation in writing within such reasonable time as may be specified in the notice against the grounds of confiscation or imposition of penalty mentioned therein; and

(c) is given a reasonable opportunity of being heard in the matter:

Provided that the notice referred to in Cl. (a) and the representation referred to in Cl. (b) may, at the request of the person concerned be oral."

Section 126 provides that when any goods are confiscated under the Act, such goods thereupon vest in the Central Govt. and the officer adjudging confiscation shall take and hold possession of the confiscated goods.

6. The proviso to sub-sec. (2) of S. 110 empowers the Collector of Customs on sufficient cause being shown to extend the period of six months mentioned in the main provision of that sub-section by a further period not exceeding six months. In the present case such an order of extension was passed on July 22, 1969 and it is common ground that the said order of extension was passed by the Collector of Central Excise without giving any opportunity to any of the petitioners to show cause why the period specified therein should not be extended. In the case of *Asst. Collector of Customs v. Malhotra*, (AIR 1972 SC 689) the Supreme Court has taken the view

that the power under S. 110 (2) is quasi-judicial and that at any rate one requiring a judicial approach. While power of seizure under Section 110 (1) can be exercised on the basis of reasonable belief on the part of the concerned officer, the power of extending the period to give notice under S. 124 (a) is to be exercised only on "sufficient cause being shown." This expression envisages at least some sort of enquiry on facts placed before the authority and determination by him of those facts. Extension order is not to be passed mechanically. The power under sub-sec. (1) cannot be equated with the power under the proviso to sub-sec. (2) of Section 110. The Supreme Court accordingly took the view that the Collector could not extend the period for giving notice of confiscation under S. 124 (a) without giving an opportunity of hearing to the person whose articles are seized. In view of this decision of the Supreme Court the order of the learned Judge quashing the order of the Collector of Central Excise dated July 22, 1969 extending the period for issue of the notice under S. 124 by six months from July 23, 1969 is not challenged, because the said order is passed in view of the decision of the Supreme Court in *Malhotra's case*.

7. Before the learned Judge the validity of the show cause notice issued under S. 124 (a) was challenged on the ground that the Competent Officer concerned could not have reason to believe that the goods seized were liable to confiscation. In view of the circumstances enumerated by him in his judgment that contention has not been canvassed before us. However, it is urged by Mr. Sen before us that upon a proper interpretation of Section 110 seizure of the goods which are liable to confiscation is a condition precedent to initiation of any proceedings for confiscation thereof and if such goods are not either validly seized or are not continued under seizure before issue of a show cause notice under Section 124, then it is not open to the Authority to initiate proceedings by giving a show cause notice under S. 124 (a). He strongly relied upon the provisions of sub-s. (2)

of Section 110 and submitted that it is implicit in the provisions of the said section that a show cause notice under Cl. (a) of S. 124 cannot be issued after the expiry of the period of six months from the date of seizure if there is no extension, or after the expiry of the further period of six months if there is an extension as contemplated by the proviso to sub-sec. (2), particularly when the goods are required to be returned to the person from whose possession they were seized. The effect of S. 110 has to be judged in the light of the provisions of Chapter XIII in which this section occurs. Chapter XIII deals with machinery for searches, seizure and arrest with a view to facilitate investigation. Sub-sec. (2) of Section 110 only provides for the consequences that will follow in case goods are seized as contemplated by sub-sec. (2) thereof and no notice in respect thereof is given under Cl. (a) of Sec. 124 within the specified period of six months or within the extended period contained in the proviso. He emphasised the words of the proviso to sub-sec. (2) of S. 110 to the effect that the aforesaid period of six months may on sufficient cause being shown, be extended by the Collector of Customs for a period not exceeding six months. His submission was that the expression "the aforesaid period of six months" related to the period prescribed for issue of a notice under Cl. (a) of S. 124. Thus the provisions of sub-sec. (2) according to his submission are a fetter or limitation upon the exercise of the powers conferred by S. 124 for initiation of proceedings for confiscation of goods or imposition of personal penalty. He also emphasised that even though in sub-sec. (1) of S. 110 the word "may" is used in the expression "he may seize such goods", it should be interpreted as "shall" and seizure is compulsory before any order of confiscation can be passed. He also referred to the provisions of Section 126 which provides inter alia that the officer adjudging confiscation shall take and hold possession of the confiscated goods. According to his submission taking and holding of possession of the confiscated goods antici-

pate that they are in the custody of the Authority as a result of initial seizure and the provisions of S. 110 have to be construed and given effect to in the light of the chapter in which they are contained. It should not be overlooked that the object underlying S. 110 is not initiation of proceedings for confiscation of goods or for imposition of personal penalty, but is to indicate what will happen if such initiation has not taken place within the time prescribed by the section itself. The consequences of non-initiation of proceedings within the prescribed time are set out in the section and they are that the goods shall be returned to the person from whose possession they were seized. All the provisions of Chapter XIII are steps to facilitate investigation machinery and failure to issue a show cause notice under Cl. (a) of S. 124 within the prescribed time will only result in an obligation on the part of the Customs Authorities to return the goods to the person from whose possession they were seized. There is nothing in the language of S. 110 to indicate that a fetter or limitation is imposed upon the power of the Competent Authority to initiate proceedings under Section 124. On the other hand, S. 124 is contained in Chap. XIV which contains substantive provisions relating to confiscation of goods etc. and imposition of penalty. Under S. 124 issue of a show cause notice prior to passing an order of confiscation or imposition of personal penalty is mandatory, but the language of S. 124 is clear and precise and no restriction or limitation or even a fetter is imposed as regards the time when proceedings may be initiated by issue of a show cause notice. Section 124 prescribes the conditions precedent which are to be fulfilled by the Authority before an order of confiscation of goods or an order imposing any penalty can be passed against any person. These conditions precedent are laid down in Cls. (a), (b) and (c) of S. 124 and they are: The owner of the goods or such person who is liable for penalty is to be given a notice in writing informing him of the grounds on which it is proposed to confiscate the goods or

to impose a penalty; — secondly, such owner or person is to be given an opportunity of making a representation in writing within such reasonable time as may be specified in the notice against the grounds of confiscation or imposition of penalty mentioned therein and thirdly, such owner or person is to be given a reasonable opportunity of being heard in the matter. None of the three conditions precedent even suggests that there is a limitation on the exercise of the power either as regards the time or existence of seizure. On a plain reading of S. 124 it will be open even to the Competent Officer to pass an order of confiscation of goods or imposing any penalty without seizing any goods or after returning the goods under the proviso to sub-sec. (2) of S. 110 for failure to initiate proceedings within the prescribed time. An investigation machinery cannot be equated with a limitation upon a substantive power contained in S. 124; more so, when the only consequence that follows for failure to give notice within the prescribed time is laid down in Section 110 (2), namely return of goods to the person from whose possession they were seized. Even if the provisions of Ss. 110 and 124 are to be harmoniously read, it will not be possible for us to imply such a fetter, restriction or limitation on the exercise of the powers conferred by S. 124.

8. Reliance was placed by Mr. Sen upon the decision of the Allahabad High Court in the case of Mohammad Hanif v. Collector of Customs and Central Excise, AIR 1973 All 433. In this case the facts are:— Petitioner's goods were seized but no notice under Section 124 was served stating why the goods should not be confiscated; on the petitioner's application claiming back the goods, a show cause notice was served on him without giving him an opportunity of being heard. It was held that the statutory period of six months within which notice must be given could not be extended. There is not much discussion in this judgment. The learned Judge with respect has omitted to consider the scheme of Chapters XIII and XIV of the Act. He has

also omitted to take into account the consequences that will follow for failure to give a notice, which are indicated in S. 110 (2) of the Act. Even there is no discussion as regards the unrestricted language used in S. 124. In the absence of proper discussion, with respect, it will not be possible for us to accept the view that has been taken by the learned Judge especially when it is inconsistent with the view that has been expressed by the Supreme Court and by the other High Courts in various decisions.

9. The question was first considered by the Division Bench of the Calcutta High Court in Malhotra's case reported in AIR 1968 Cal 28: (1968 Cri LJ 33). In that case one of the prayers made before the Court was for return of the goods seized. The Court held that the notice under S. 124 (a) not having been issued within six months and the extension having been illegally obtained *ex parte* the goods were liable to be returned. The notice under S. 124 (a) was also independently challenged in that case and was set aside by that Court not on the ground that it was not issued within six months as prescribed by S. 110 (2), but on a totally different ground, namely, that the notice was materially vague. The question as to what would be the effect of non-issue of a notice under S. 124 (a) within six months on the proceedings for confiscation and imposition of penalty, was specifically considered by the Court. The Division Bench held:

"The next question is as to what is the effect of the second extension being invalidated. So far as Section 110 is concerned, it deals not with the issue of notice but with the seizure of the goods and the return thereof. In other words, if the provisions are not satisfied the goods seized have to be returned. Therefore, since the extension had not been properly granted the appellant is entitled to the return of the goods. That by itself may not invalidate the notice itself. For that purpose, we have to travel to the next point taken, namely the nature of the no-

tice which has been issued under Section 124 of the said Act."

Thus the Division Bench clearly took the view that an invalid extension of time for continuing the goods under seizure does not by itself or automatically invalidate the notice issued under S. 124 (a). The decision in Malhotra's case ultimately came up for consideration before the Supreme Court and the judgment of the Supreme Court is as pointed out above reported in AIR 1972 SC 689. In para. 5 of the judgment the Supreme Court specifically referred to the provisions of Ss. 110 and 124 of the Act and after referring to Section 124 observed:

"the section (Sec. 124) does not lay down any period within which the notice required by it has to be given. The period laid down in Section 110 (2) affects only the seizure of the goods and not the validity of the notice."

10. It was urged by Mr. Mehta on behalf of the petitioners that these are mere passing observations of the Supreme Court and cannot be even regarded as obiter dicta. We are unable to accept this contention. In para. 5 the Supreme Court has considered the provisions of Ss. 110 and 124 of the Act and also the effect thereof. These observations, on the contrary, reaffirm the view that has been taken by the Division Bench, namely, that S. 124 does not lay down any period within which a notice to show cause is required to be given and that the period laid down in S. 110 (2) has relation to the seizure of goods but has nothing to do with the validity of the notice under S. 124. Even if these observations are regarded as passing observations, upon a proper interpretation of Section 110 as well as S. 124 we take the same view as has been taken by the Division Bench of the Calcutta High Court and which view is reaffirmed by the above observations of the Supreme Court.

11. The provisions of S. 110 and S. 124 had come up for consideration before the various High Courts where contentions similar to those urged by Mr. Sen were advanced. Reference can be made to the Judgment

of the Division Bench of the Madras High Court in the case of Collector of Customs and Central Excise v. Amruthalakshmi reported in (1974) 2 Mad LJ 88: (AIR 1975 Mad 43). In that case no notice under Section 124 was given within six months from the date of seizure of the goods effected under S. 110. The Division Bench of the Madras High Court has taken the view that there is no connection between the exercise of power of confiscation of goods and imposing of penalty and the provisions in Section 110 of the Act which required the officer to hand over the goods to the owner after the period specified, if no notice under S. 124 (a) of the Act was given. Section 110 puts a limit to the power of seizure and retention of goods by the officer. When once action was taken under S. 124 before the expiry of the period in S. 110, he might continue to retain the goods. But the failure to give notice under S. 110, did not in any way affect the power of the authorities to proceed with the proceedings for confiscating the goods or imposing any penalty. It is further pointed out that Sections 110 and 124 are entirely independent. Section 110 dealt with the right of the officer to retain the seized goods for a specific period and his duty to return them to the possession of the owner from whom they were seized unless action under Section 124 had been taken. Section 124 prescribed the procedure under which the goods could be confiscated and penalty could be imposed. All that Section 124 required was fulfilling the conditions specified in subcls. (a), (b) and (c). It is further pointed out that there was no substance in the contention that if the notice under S. 110 was not in accordance with law, the authority under Section 124 would have no jurisdiction to proceed with the confiscation proceedings or with the imposition of penalty. The Division Bench took the view that the view taken by the trial Court that notice under Sec. 110 (2) and notice under Section 124 of the Act should be given within six months from the date of seizure of the goods was not correct. It also held that the view

that a vested right was created in favour of the owner of the goods when a show cause notice under Section 124 was not given within six months as provided for under S. 110 (2) was also not correct.

12. The same is the view taken by the Division Bench of the Gujarat High Court in the case of *J. K. Bardolia Mills v. M. L. Khunger, Dy. Collector of Central Excise and Customs*, reported in (1975) 16 Guj LR 119. It is reiterated that the provisions relating to the seizure of the goods and those relating to the confiscation of the goods or imposition of penalty stand on different footing. S. 124 of the Act does not lay down any period within which the notice required by it has to be given. The period laid down in S. 110 (2) of the Act relates only to the seizure of the goods and not the validity of the notice. Once the order of confiscation of the goods is passed under the provisions of S. 111 of the Act the question of return of goods after the expiry of the period mentioned in S. 110 of the Act cannot survive. The Division Bench also pointed out that if the intention of the legislature was to restrict confiscation of goods or imposition of penalty only in respect of the goods which are seized under S. 110 of the Act, the legislature would have used the language qualifying the word "goods" used in Sections 111, 112 and 124 of the Act. The words used in Sections 112 and 124 are "any goods" and "any person." These words are of widest import and they cannot be given a restricted meaning as is sought to be given by the petitioner. There is nothing in these provisions to indicate that the goods in respect of which an order of confiscation or penalty can be passed under Ss. 111 and 112 of the Act must be goods seized under the provisions of S. 110 of the Act. The period of six months mentioned in S. 110 relates only to the seizure of the goods and not to validity of the notice under S. 124 of the Act. Section 124 does not lay down any period within which the notice required by it has to be given.

13. A similar view is taken by a single Judge of the Punjab High

Court in the case of *Muni Lal v. Collector, Central Excise, Chandigarh*, AIR 1975 Punj and Har 130 and later on by a single Judge of the Calcutta High Court in the case of *All India General Transport Corporation v. Collector of Central Customs*, (1975) 79 Cal WN 663. Thus it is very clear that an invalid order to retain the goods under seizure passed under S. 110 (2) does not affect the validity of a show cause notice issued under S. 124 (a) of the Act.

14. Coming to the appeal preferred by the original respondents, Mr. Joshi has urged two submissions before us. First he submitted that the order passed by the learned Judge for return of the books of account and documents should be modified as the said books of account and documents are either tendered as exhibits in the proceedings before the learned Magistrate or in the proceedings for adjudication under S. 124 or may be required for the said purpose. Sub-s. (3) of S. 110 of the Act empowers a proper officer to seize any documents or things which in his opinion will be useful for or relevant to any proceeding under the Act. The books of account and documents which have been tendered as exhibits in the proceedings before the learned Magistrate or which are required to be tendered as such exhibits, can be retained by the Customs Authorities. The books of account and documents which are already tendered or likely to be tendered as exhibits in the proceedings for confiscation of goods and imposition of personal penalty can equally be retained by the appropriate authorities in view of the said proceedings. The rest of the books of account and documents which are not required to be tendered as exhibits in either of the two proceedings or are irrelevant to the proceedings, will have to be returned to the petitioners because such books of account and documents will not be of any useful purpose to the authorities for either of the proceedings.

15. Mr. Joshi has invited our attention to the events that have taken place after the petition was disposed of by the trial Court in re-

lation to silver, other pieces of bullion and other articles. The learned Judge by his order directed return of silver, station wagon, calculating machine etc. subject to the direction that the said property should not be returned to the petitioners in compliance with his judgment till two weeks from the date of delivery of the judgment so as to give to the original respondents an opportunity to apply for an order under Section 516A of the Code of Criminal Procedure to the learned Magistrate before whom the criminal proceedings were pending. Pursuant to such liberty an application was made on behalf of the prosecution under Section 516A of the Code of Criminal Procedure on July 27, 1972. In the said application, the partnership firm and the two of its partners filed an application before the learned Magistrate *inter alia* stating that they agreed not to transfer or alienate the seized items without the written permission of the Court. On the said application on August 22, 1972 the learned Magistrate passed the following order:—

"On the accused executing a bond in the sum of Rs. 5,52,000/- with two sureties of equal amount, the complainant shall deliver to them all the silver ingots and the silver pieces seized by him on 23/24-1-1969 and as mentioned in the panchanama and on usual conditions, except samples produced in Court."

"On the accused executing a bond with one surety in the sum of Rupees 15,000/- with one surety of the like amount, the complainant shall deliver to them the Willy's Station Wagon No. MRW-9690 which was seized from the accused and on usual conditions."

The accused shall not deal or dispose of the Station Wagon, silver ingots or silver pieces until the final disposal of this case."

Against the order passed by the learned Magistrate a Criminal revision application being Application No. 682 of 1972 was filed on behalf of the Customs Authorities. That application was disposed of by Bhole, J. by his judgment and order dated Oct. 9, 1972. In the course of his judgment he observed as under:—

"I do not, therefore, think that in the facts and circumstances of this case it is necessary to alter this order passed by the Additional Chief Presidency Magistrate. The order in my view will sufficiently take care of the silver and will not in any way jeopardise the criminal proceedings or the proceedings before the Customs Authorities. I will, however, add one more condition. The Customs Authorities shall be given an opportunity to inspect the silver which is in the custody of the respondents in the first week of every month and they shall notify the Customs Authorities as well as the Court below the place where the silver is stored".

By an order dated Oct. 27, 1972 the learned Magistrate directed the Customs Authorities in the criminal case to return the silver bars, silver pieces and ingots lying in the custody of the Department to accused Babubhai Mohanlal Choksey, partner of M/s. Mohanlal Devdanbhai Choksey. It was also confirmed that as per the order two sureties of Rs. 2,76,000/- each have been accepted by it and their bonds have been taken in Court. Pursuant to the said order dated Oct. 27, 1972 the seized silver, excepting samples, was returned to accused Babubhai Mohanlal Choksey, partner of M/s. Mohanlal Devdanbhai Choksey.

16. Apart from these criminal proceedings, proceedings for confiscation of the goods including silver ingots and silver pieces, station wagon and the calculating machine are also initiated by the authorities under the Act and the said proceedings are pending.

17-18. In this view of the matter, the writ of mandamus passed by this Court for return of silver and silver pieces, the station wagon, the calculating machine will have to be modified as per the following directions:—

So far as the bars of silver and silver pieces are concerned, which are already returned to the petitioners under the bond, the same will continue to remain with the petitioners subject to such final orders as may be passed by the Magistrate. In case before the criminal proceedings are over, the pro-

ceedings for confiscation of the goods before the Customs Authorities are completed and an order for confiscation is made, then the Customs Authorities will be at liberty to apply to the learned Magistrate to pass appropriate orders in respect of such items of goods or things which may be confiscated. Such compliance with the order of the Magistrate either upon dismissal of the criminal proceedings or upon disposal of the adjudication proceedings under the Act will be subject to the right of the aggrieved party to adopt such legal proceedings as may be available in accordance with law. So far as the calculating machine is concerned, Mr. Mehta on behalf of the petitioners states that the petitioners will produce the same as and when required in adjudication proceedings before the Customs Authorities without prejudice to the petitioners' rights and contentions. So far as the station wagon is concerned, the same continues to remain with the Customs Authorities as no bond contemplated by the order of the Magistrate has been executed by the petitioners. So far as books of account and documents are concerned, the Customs Authorities shall return all such books of account and documents except those which have been tendered as exhibits or which are likely to be tendered as exhibits in the criminal proceedings or in the adjudication before the Customs Authorities.

19. In the result, the Appeal No. 81 of 1972 filed by the Petitioners is dismissed with costs. So far as appeal No. 84 of 1972 filed by the Customs Authorities and Union of India is concerned, the order passed by the trial Court will stand modified as per the directions given above, and both the parties will bear their respective costs of this appeal. Liberty to the respondents' attorneys in appeal No. 81 of 1972 to withdraw the amount of Rs. 500/- deposited by the petitioners as security for costs. Liberty to the Customs Authorities and the Union of India to withdraw the sum of Rs. 500/- deposited by them in appeal No. 84/72 towards security for costs.

Order accordingly.

AIR 1977 BOMBAY 330

(AT NAGPUR)

FULL BENCH

**DESHPANDE, DHARMADHIKARI
AND DIGHE, JJ.**

Harikishan and others, Petitioners
v. Krishna Dhanaji Shelki and another, Respondents.

Spl. Civil Applns. Nos. 535, 540, 541, 544, 545, 549, 660 and 663 of 1968, D/- 25-9-1975.

Bombay Tenancy and Agricultural Lands (Vidarbha Region) Act (99 of 1958), Ss. 36, 38, 39 — Claim for possession by landlord under S. 38 (2) — Developments subsequent to institution of proceedings should be taken into account. (Civil P. C. (1908), O. 7, R. 7).

Where the petitioner landlord applied for possession for personal cultivation against his tenants under Section 36 read with Section 38 events happening subsequent to making of the application should be taken into account while deciding the claim for possession of the landlord.

(Paras 2, 30)

Changes in the circumstances between the date of notice under Section 38 and the date of application cannot have effect on the rights of the parties. Spl. Civil Appln. No. 3482 of 1958, D/- 14-7-1959 (Bom), Approved.

(Para 6)

Appeals and revisions being continuation of the trial, according to the procedural law in India, subsequent developments, even after the order, shall have to be taken into account. This doctrine is an exception to the ordinary general rule that rights of the litigants should be decided by reference to facts existing on the date of the institution of the proceedings. This doctrine is accepted as part of the procedural law which requires the Courts to take into account such events to mould the relief when the relief claimed becomes inappropriate and also to avoid the multiplicity of proceedings and perpetuation of injustice. AIR 1975 SC 1409, AIR 1974 SC 1178, AIR 1941 FC 5, Rel. on. (Para 14)

The language of Section 38 makes it unnecessary to invoke this doc-

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trine during the period of trial but invoking of this doctrine may become necessary if any such subsequent developments take place after the order but before the appeal or revision is finally disposed of. The Court, however, has to scrupulously guard against the danger of the Court's process being abused by making out a pretence of such developments to drag on the proceedings. The court would indeed be very slow to admit such pleas unless the developments are substantial in nature and prima facie evidence to that effect is cogent. AIR 1975 Bom 137, Approved. (Para 14)

The landlord's right to resume land is dependent on fulfilment of certain conditions. The conditions are in the nature of personal qualifications. Their continuous existence till the final disposal of the application is sine qua non for deflecting from the statutory course. Absence thereof on the date of the order deprives him of such right. That the right is not of a recurring nature is absolutely irrelevant. (Para 16)

Ordinary rule of rights getting crystallized on the date of application is inapplicable to proceedings under Section 38 in view of the scheme under which rights do not get crystallized till the date of the order. (Para 17)

The Act is meant avowedly for the protection of the tillers and the actual cultivators. Landlords intending to personally cultivate are intended to be benefited only if such intention is genuine and lasting. The situation as on the date of the order being reflective of such intention, becomes relevant. The landlord cannot claim equality as long as he does not happen to be a cultivator. This apart, whatever inequality exists is made even immune from constitutional attack under Art. 31A of the Constitution. (Para 19)

Preliminary decisions can also be assailed in appeal or in revision. If new facts come to light or some material developments take place subsequently, there is nothing provided in sub-s. (3) of S. 36 which can prevent consideration thereof or reconsideration of the issues so decided in the light of these facts.

Spl. C. A. No. 617 of 1970, D/- 30-8-1971 (Bom), Approved, AIR 1967 Bom 250, Disting; Case law discussed.

(Para 28)

Cases Referred: Chronological Paras

AIR 1975 SC 1409	14, 22, 27
AIR 1975 Bom 137: 1974 Mah LJ 823	15, 24
AIR 1974 SC 1178	14
(1971) Spl. C. A. No. 617 of 1970, D/- 30-8-1971 (Bom)	22
(1970) 72 Bom LR 287	26
AIR 1967 SC 92	29
AIR 1967 Bom 250: 1966 Mah LJ 827	22
(1967) Spl. C. A. No. 283 of 1966, D/- 11-10-1967 (Bom)	24
(1964) Spl. Civil Appln. No. 943 of 1960, D/- 9-1-1964 (Bom)	25
(1963) Spl. Civil Appln. No. 785 of 1962, D/- 12-2-1963 (Bom)	25
(1962) Spl. Civil Appln. No. 1263 of 1961, D/- 16-3-1962 (Bom)	25
(1959) Special Civil Appln. No. 3482 of 1958, D/- 14-7-1959 (Bom)	11, 22
AIR 1956 Bom 752: 57 Bom LR 1111	9
AIR 1941 FC 5	14

R. R. Deshpande and S. R. Deshpande (In S. C. As. Nos. 535, 540, 541, 544, 545 and 549 of 1968) and J. N. Chandurkar (In S. C. A. Nos. 660 and 663 of 1968), for Petitioners; J. N. Chandurkar (for No. 1) In S. C. As. Nos. 535, 540, 541, 544, 545 and 549 of 1968 and A. S. Deshpande (for No. 1) In S. C. A. No. 660 of 1968, for Respondents. R. N. Deshpande and S. N. Kherdekar as Interveners in all S. C. As.

DESHPANDE J.:— All these companion matters raise a common question of some importance. The question was referred to the Division Bench on 9-2-1972 and then to the Full Bench on 13-8-1974. In all these petitions, the petitioner is the same landlord. His application for possession dated 3-10-1961 after attaining majority on 4-10-1960 against his different tenants under S. 36 read with S. 38 of the Bombay Tenancy and Agricultural Lands (Vidarbha Region) Act, 1958 (hereinafter referred to as "the Act"), for personal cultivation were rejected by the Additional Tahsildar on 30-5-1964 and the order is confirmed in appeal and

revision. According to the concurrent orders, the petitioner failed to prove that the lands sought to be resumed constituted the principal source of his income. This finding, among others, is based on the fact that the petitioner acquired about 40 acres of land and sums of Rupees 20,000/-, Rs. 7,000/- and Rs. 2,000/- on different dates during the pendency of the proceeding. In spite of some contrary observations of the Revenue Tribunal, it is not disputed before us that this property was acquired by the petitioner after institution of proceeding. According to the petitioner, such subsequent developments cannot be taken into account. Opinion on this point was found to have been divided. Hence this reference to the Full Bench.

2. The question referred to the Full Bench may be quoted as follows:

"Whether events happening subsequent to either giving of the notice under S. 38 or making of the application under S. 36 read with S. 39 of the Bombay Tenancy and Agricultural Lands (Vidarbha Region) Act, 1958, should be taken into account while deciding the claim for possession of the landlord?"

3. Now, these are applications under S. 38 (2) of the Act. The respondents are not the occupancy tenants. The landlord can terminate the tenancy either under sub-sec. (1) or (2) by (a) serving notice and (b) making application for possession before the date or the period prescribed. But this can be done only if he (i) requires the land (ii) requires bona fide, and (iii) requires for personal cultivation. Mere requirement of land is not enough, nor even mere bona fide requirement, unless the same is for personal cultivation. Even if such requirement exists, such resumption still depends on a few additional conditions enumerated in S. 38 (3), namely, that (i) he does not have any land under his personal cultivation and if he has any, it is less than three family holdings, (ii) such land happens to be his principal source of income, (iii) he is shown to be the holder in the record-of-rights and on the specified date, (iv)

the tenants a liable to be affected are comparatively junior. All the conditions are cumulative. Sub-sections (4) to (6) deal with the area of land required to be left with the tenant, immunity from further resumption and apportionment of rent. Landlords owners of land after August 1953 are prevented from resuming the land if the tenant had already become a protected lessee before the date of his becoming owner.

4. Certain salient features of the Act shall have to be borne in mind to ascertain the true impact of these conditions. The right of the landlords to resume their lands under the ordinary law of the land is subjected to several limitations under the Act. This piece of legislation reflects the agrarian policy of the State formulated in compliance with the Directive Principles of the Constitution. Firstly, the underlying object is to eliminate the absentee landlord from the scene step by step and ensure transfer of the land to the tiller finally. Secondly, the rights of the persons personally cultivating the land are preferred and precedence is given to them in all respects till the ownership gets transferred to them. Thirdly some of the provisions of the Act are based on the hypothesis that an area of three family holdings satisfies the needs of an agriculturist family, absorbs its cultivating capacity, enables it to concentrate and improve the yield of the land and discourages it from exploiting the labour of others. This limit also appears to have been aimed at preventing the concentration of land in the same hands and facilitating distribution of such surplus land on lease to the needy under Section 84 of the Act. The Act itself does not provide directly for acquiring land in excess of three family holdings from the holders. However, acquisition of ownership by the tenant under Ss. 42, 46 and 49A or resumption of land from the tenant in addition to other restrictions is limited to such area as would, together with the land already under personal cultivation, not exceed the area of three family holdings. Even after surrender of land by the tenant, the landlord is not permitted

under S. 21 to retain area more than is necessary to make up the total of three family holdings for his personal cultivation, the remaining area being treated as surplus. Fourthly, after the Tillers' Day all lands excepting the categories covered by Chapters IV to VI are intended to be statutorily disposed of either by transferring the same to the tenants as owners to make up the total of three family holdings for their personal cultivation under S. 42 or 49A (4), or failing that, to restore to the landlord under S. 43 (14-A) read with Section 46 and Ss. 21 and 49A (5) read with Section 21, and failing that, to transfer to the pool of surplus land for disposal under Section 84 of the Act. The provisions of Ss. 38, 39, 39A, by way of exceptions, contemplate deflection of this statutory course for the benefit of the landlords, who used the land for their maintenance and can personally cultivate the same. On the existence of the above conditions and on compliance with the requirements of these provisions, depends the deprivation of the tenants of their rights in the land or deflecting of the statutory course. Chapter III-A provides for resumption by the members of the Armed Forces on more liberal terms. The true implications and dimensions of these conditions for resumption of the land under Section 38, or even of similar conditions under Ss. 39 and 39A can be better grasped if this legislative policy is borne in mind.

5. Acquisition of property including agricultural one subsequent to the date of application has its impact on bona fide requirement and extent of the resumable land as also on its being the principal source of income. That is why Shri R. R. Deshpande, the learned Advocate for the petitioner, strenuously urged that events subsequent to the institution of the proceedings cannot be taken into account as rights of the parties ought to be decided by reference to facts as in existence at the initiation thereof.

6. The situation as on the date of notice does not appear to be of any significance. There is no obligation to apply before the last date pre-

scribed for making applications, nor the section requires any period to be mentioned in the notice of termination. Theoretically, the landlord terminating the tenancy by notice on the day when the Act was brought into force in 1958 could have chosen not to apply till 31-3-1961. Even the termination of the tenancy does not become operative till, in addition to giving notice, an application for possession is made in terms of the language of this section. Changes in the circumstances, between the date of notice and the date of application thus cannot have effect on the rights of the parties.

7. The situation on the date of application, however, undoubtedly is material. Ordinarily rights of the litigants are determined at the trial by reference to the facts as they exist on the date of the institution of the lis. If the required conditions are found not to be existing on that date, the landlord would be disentitled to make any such application for possession and this will disable him from preventing the land being disposed of in terms of the provisions of Sections 41 to 50 of the Act. The remote possibility of the landlord getting the land under S. 49A (5) read with Section 21 due to tenant's disability to purchase is not relevant in this context. The landlord would not be able to defeat the statutory disposal of the land without possessing these qualifications on the date of the application. While considering whether these conditions exist or not, possession of precarious, casual or drying sources of income, shall have to be excluded from consideration and foreseeable circumstances, even though not in existence actually, but having a bearing on these conditions, shall have to be necessarily taken into account.

8. Would the existence of these conditions be necessary on the date of the order also? The date of the order has got to be equated with the date of the trial for practical purposes. The salient features of the Act discussed above, make it difficult to answer this question in the negative. Thus, the disability to personally cultivate, even in terms of the broad definition of "to cultivate personally"

in the Act or discontinuance of the requirement of the landlord or, such lands ceasing to be the principal source of income, or land more than three family holdings being already under personal cultivation of the landlord on the date of the order, is bound to disentitle him from claiming resumption. If the tenant cannot be deprived of his statutory rights in the land without all such personal qualifications, continuous existence thereof must be deemed to be indispensable till the date of the order. Section 36 (3) of the Act empowers the Tahsildar to pass such order on the application under Section 38, as he deems fit. It will not be possible for the Tahsildar to pass an order for resumption in favour of the landlord even when he finds that all or any of the conditions do not exist on the date of the order. He would ill afford to ignore that such restoring the land to the undeserving landlord would deprive the tenant of his rights in the land without the required statutory basis and defeat the legislative intent and the policy.

9. That the need of the landlord to personally cultivate land must exist even after the order of possession is made, can be gathered from the scheme of S. 52 of the Act. The tenant is enabled thereunder to claim back possession, if the landlord fails to personally cultivate the land after getting such possession. He is enabled even to claim damages from him from the date of such failure. Such failure is assumed by the legislation to indicate the absence of the landlord's need of the land. It is only when the doctrine of repose intervenes after the expiry of 12 years from the date of possession that the landlord is relieved of such obligations. As held in *Godavaribai Jayaram v. Kashiram*, 57 Bom LR 1111: (AIR 1956 Bom 752) the landlord gets the resumption order on the representation that all these conditions exist and he is so qualified to claim resumption. Failure to personally cultivate the land is considered to be the breach of such representation. This also indicates the legislative intent of the necessity of existence of these conditions, at any rate, till the order is made.

10. Section 38 (3) (a) permits the landlord to resume three family holdings if he does not happen to have any land under his personal cultivation at all on the date of notice or the expiry of the period thereof. We have already indicated how the situation as on the date of notice is irrelevant. The same is true of the position as on the date of expiry of the notice, as the section does not require mentioning of any period as such in the notice. This phraseology fitted with Section 38 as it stood before amendment and is out of tune with the amended section. Reference can, appropriately and harmoniously, in the present context, be construed as being intended to the date of the application. Clause (b) then enables the landlord to resume so much area as would make up the total area under his personal cultivation to three family holdings. This implies exclusion of the area already under personal cultivation from the permissible total of such three family holdings. Clause (b) does not specifically indicate if the reference to the land already under personal cultivation is intended to the one specified in Cl. (a) or to the land that may come under his personal cultivation subsequent to these dates but before the date of order. According to Shri R. R. Deshpande, reading of both the clauses would indicate that only the land on the dates mentioned in Cl. (a) is liable to be excluded while determining the resumable area and not the land that may come under his personal cultivation in any way otherwise subsequent to these dates. The contention is not doubt attractive and made plausible because of some ambiguity. The same, however is not acceptable to us. Firstly, all the clauses of S. 38 (3) are independent of each other. There is no reason why these two clauses alone could have been intended by the legislature to be so read together. Secondly, there does not appear to be any rational basis for distinction between the land already under personal cultivation on the dates in Cl. (a) and the land acquired thereafter, in the matter of exclusion from the limits of three family holdings. Thirdly, the contemplated ceiling

under these clauses is not so much on the area to be resumed as on the area to be possessed, though incidentally it goes to determine the area to be resumed. It is aimed at ensuring that resumption does not result in the landlord coming into possession of in all more than three family holdings including the land already under personal cultivation. This is just in keeping with the legislative intent as reflected in S. 21 of the Act. This would emphasise how consideration of the holdings of the landlord under personal cultivation as on the date of the order including the subsequently acquired land is imperative under these clauses. In fact, the limits imposed under these clauses as also under sub-sec. (4) can be worked out only on the date of the order and that too appropriately by reference to the position as it stands on that date.

11. The third condition, as to the land to be resumed, becoming the principal source of income, also must be in existence both on the date of the application as also on the date of the order for the same reasons. This condition further indicates the anxiety of the Legislature not to deprive the tenant of his rights in the land unless his landlord requires the land for his main and not subsidiary source of income. Though some estimate of such comparative income by reference to the time of application is inevitable, any comparison of income from the existing permanent sources of income with the income of the land to be resumed would become really unrealistic if it is not made with reference to the period as nearer to the date of order as possible. This is an additional reason why the time when the order comes to be passed becomes all the more relevant. This consideration also appears to have weighed with the Division Bench of Chainani C. J. and V. S. Desai J. while deciding Special Civil Appln. No. 3482 of 1958 decided on 14-7-1959 (Bom) (Kunjilal v. Bhivsan). The date for ascertaining the comparative incomes, in the opinion of the Division Bench, "cannot, therefore, be earlier than the date on which the Mamlatdar makes an order for possession of the land in

favour of the landlord." With respect, we find ourselves in agreement with this view. Our attention was not drawn to any contrary view on this point. The view seems to have stood the test of time. There is not much difference of substance in the phraseology of the repealed Section 34 (2) (c) and the substituted Section 31A (c) of the Bombay Enactment one saying "the income by the cultivation of such land will be the main source of the income of the landlord for his maintenance" and the other saying "the income by the cultivation of the land of which he is entitled to take possession is the principal source of his maintenance." The wording of S. 31A (c) of the Bombay Act is identical with Section 38 (3) (c) of this Act.

12. This rule cannot also be different with regard to even the small holders who are exempted from the conditions of this clause if they are shown to be earning their livelihood principally by agriculture or agricultural labour.

13. In the very nature of things, the conditions in Clauses (d) and (e) in sub-section (3) of Section 38 ought to exist on the date of the application as also on the date of the order. Thus, the conditions entitling the landlord to resume land from his tenant must be in existence both on the date of the application as also on the date of the order. That the conditions are relaxed when the tenant is found unable to exercise his statutory right of purchase under Ss. 43 (14-A) and 49A (5) read with S. 21 is not relevant. In that case, the land can also be resumed by the landlord for personal cultivation to make up the total area under his personal cultivation to three family holdings, without proof of other conditions. Where, however, there is a competition between his need and the statutory rights of the tenant, continuous existence of these conditions till the date of order is made inevitable. This appears to be so on the plain language of S. 38 when considered in the context of the salient features of the Act. Absence of these conditions has the effect of altering the rights of the landlord as

these existed on the date of the application, and the relief claimed in the application is liable to become inappropriate and, therefore, liable to be rejected. Granting such a relief would indeed result in perpetuation of injustice and also driving the tenant to the remedy under S. 52 of the Act and resulting in the multiplicity of proceedings.

14. Appeals and revisions being continuation of the trial, according to the procedural law in India, subsequent developments, even after the order, shall have to be taken into account. This doctrine is an exception to the ordinary general rule that rights of the litigants should be decided by reference to facts existing on the date of the institution of proceedings. This doctrine is accepted as part of the procedural law which requires the Courts to take into account such events to mould the relief when the relief claimed becomes inappropriate and also to avoid the multiplicity of proceedings and perpetuation of injustice. It will be enough to refer to the cases of *P. Venkateswarlu v. Motor & General Traders*, (AIR 1975 SC 1409), *Shikhar-chand v. D. J. P. Karini Sabha*, (AIR 1974 SC 1178), and *Lachmeshwar Prasad v. Keshwar Lal*, (AIR 1941 FC 5) in this context. The language of Section 38 makes it unnecessary to invoke this doctrine during the period of trial but invoking of this doctrine may become necessary if any such subsequent developments take place after the order but before the appeal or revision is finally disposed of. The Court, however, has to scrupulously guard against the danger of the Court's process being abused by making out a pretence of such developments to drag on the proceedings. The court would indeed be very slow to admit such pleas unless the developments are of substantial in nature and prima facie evidence to that effect is cogent.

15. This view is also in accord with the recent judgment of the Division Bench (Deshmukh and Shah JJ.) of our Court in *Hariba v. Motibai*, 1974 Mah LJ 823 : (AIR 1975 Bom 137). It is held therein that on the death of the landlord during the pendency of the proceedings under

Section 33B of the Bombay Act for resumption of land for personal cultivation, fresh inquiry into the entitlements of the heirs of the landlord is imperative and would become necessary. It is obvious that this could not have been done without invoking this doctrine, though no reference is made to it specifically.

16. Shri R. R. Deshpande, however, contends that the doctrine cannot be applicable to the cases under the Tenancy Act when the right conferred upon the landlord is not of a recurring nature. It is true that the landlord cannot make any application after the Tillers' Day if he was disqualified till the previous day but becomes so qualified after the expiry thereof. He should not be deprived of this right, contends Shri Deshpande if subsequent developments disqualify him when he was qualified on the date of application. It is difficult to accede to this contention. The landlord's right to resume land is dependent on fulfilment of certain conditions. The conditions are in the nature of personal qualifications. Their continuous existence till the final disposal of the application is sine qua non for deflecting the statutory course. Absence thereof on the date of the order deprives him of such right. That the right is not of a recurring nature is absolutely irrelevant.

17. Shri Deshpande also contends that the landlord's right to resume land gets crystallized on the date of the notice itself, and therefore, the subsequent developments cannot have the effect of unsettling such rights. The contention is thoroughly misconceived. In the first place, even in terms of Section 38, the termination of tenancy takes place on giving notice and making application and not on giving notice alone. Secondly, this only puts an end to contractual tenancy. The tenant still gets protection of the statute and such termination does not become effective till the date of order for possession. Termination even cannot be said to have become operative strictly. Ordinary rule of rights getting crystallized on the date of application is inapplicable to proceedings under Section 38 in view of the

scheme under which rights do not get crystallized till the date of the order.

18. His contention that the provision is intended for the benefit of the landlord is true to a certain extent. But benefit thereunder is intended for a needy landlord and is made dependent on continuous existence of certain conditions. The same cannot be relaxed without defeating the object of the statute.

19. Shri Deshpande contends that on our construction, the tenant alone stands to benefit from such subsequent events, while the landlord would invariably be the loser. Such an unreasonable construction of any statute contends Shri Deshpande, is impermissible. That our above interpretation operates harshly and even inequitably against the landlord is indisputable. But this is implied in the very scheme of the Act and is not the result of our interpretation. The Act is meant avowedly for the protection of the tillers and the actual cultivators. Landlords intending to personally cultivate are intended to be benefited only if such intention is genuine and lasting. The situation as on the date of the order being reflective of such intention, becomes relevant. The landlord cannot claim equality as long as he does not happen to be a cultivator. This apart, whatever inequality exists is made even immune from constitutional attack under Art. 31A. We should not, however, be assumed to have held that subsequent developments would in no case benefit the landlord. If he was not qualified to claim resumption on the date of application, subsequent developments so qualifying him cannot be of any avail to him and hence cannot be relevant. If, however, he is so qualified on the date of application, subsequent developments, even if favourable to him, shall have to be taken into account unless the same are shown to be the result of his own manipulations or wrongs. This indeed is implicit in holding that situation as on the date of the order also is relevant.

20. Shri Deshpande then contends that taking subsequent developments

into account at any stage may result in unfairness, as the landlord may not get any opportunity to explain the same. It is of course a factor which every Court or Authority taking the subsequent developments into account shall have to bear in mind. In fairness, every litigant must get an opportunity to explain every adverse subsequent development. Whenever any such development is brought to the notice of the Court, the issue arising out of the same shall have to be properly tried. And as indicated earlier, the Court trying the case would no doubt have to be very careful in guarding against frivolous pleas and furnishing this as a handle to prolong litigation. It shall have to be borne in mind that taking into account such subsequent developments is analogous to admitting additional evidence and pleas based thereon cannot be allowed as a matter of course.

21. Shri R. R. Deshpande also contends that in either case this principle cannot have any application to the cases covered by Ss. 39 and 39A of the Tenancy Act, the provisions thereunder being intended specifically for the benefit of small landholders. Under both these sections, landlords having only one, or one third of family holding and possessing certain other qualifications are enabled to make an application for resumption even after the Tillers' Day i.e. 1-4-1961, the Tiller's Day having been extended for their tenants. They are also enabled to resume up to one family holding without ensuring retention of any area for the tenants as under S. 38 (4) of the Act. The nature and the underlying object of the conditions on which such landlords can resume lands from their tenants, though different in details, are in essence the same as under S. 38 of the Act. There is nothing in any of these provisions militating against consideration of subsequent events which, as indicated earlier, is essential to comply with the legislative policy. It is true that in the event of acquisition of larger areas of lands by such landlords during the pendency of the proceedings, they may cease to be such small landholders. The ten-

ants of these landholders cannot be prevented from insisting on taking these subsequent developments into account for their protection. In that event, the Courts shall have to take them into account and, to dispose of those applications as if they were made under Section 38 of the Act. Acquisition of further land may at best prevent them from claiming relief as such small land-holders. This, however, will not by itself result in the rejection of the applications outright as apprehended by Shri Deshpande, even though the applications were made long after the date prescribed under S. 38. The applications being competent on the date when they were made and the authority having jurisdiction to entertain them at the relevant time, the landlord would not stand divested of his rights to resume merely because of his subsequent acquisition of more lands. Its only effect will be that the claims would be subjected to the limitations prescribed under S. 38 of the Act.

22. Shri R. R. Deshpande and Shri Chandurkar drew our attention to several cases supporting their respective contentions. In his exhaustive judgment in the case of Laxman v. Dadarao (Spl. C. A. No. 617 of 1970 decided on 30-8-1971 (Bom)) Chandurkar J. has referred to all these cases. It will be enough to refer to the judgment of Tarkunde and Gokhale JJ. in *Madhav Vithoba v. Dhondudas*, 1966 Mah LJ 827: (AIR 1967 Bom 250) which is extensively quoted by Chandurkar J. and mainly relied on by Shri Deshpande before us. In *Madhav Vithoba's* case a limited question was if the land acquired by the tenant subsequent to the institution of the proceeding can be taken into account for fixing the resumable area under S. 33B (5) of the Bombay Act. Ordinarily, holding of the tenant or his subsequent acquisition is never relevant under the Tenancy Act and the landlord cannot have any claim or interest over the tenant's land. However, S. 33B (5) (b) contemplates division of the land in dispute between landlord and tenant in such manner as to leave both of them in possession of equal holdings. Actual application of this

provision to a variety of setup of facts has always been found to be a very difficult problem and in spite of its reference to the Full Bench twice, it still eludes perfect solution. The construction placed on the peculiar wording of this clause necessitates taking into account other lands under personal cultivation of the landlord and the tenant. In order presumably to prevent further encroachment on the rights of the tenant under such construction the Division Bench held that any subsequent acquisition of land by the tenant and consequentially by the landlord cannot be taken into account u/s. 33B (5). This limited proposition on the construction of S. 33B (5) of the Bombay Act by itself does not admit of any dispute. But holding that the doctrine of taking subsequent events into account to mould relief according to the altered rights is inapplicable to the tenancy cases, appears to us to be wide of the mark and beyond the requirements of the limited question arising therein. In application of the above doctrine is sought to be justified on three grounds, namely, that (i) right is not of recurring nature, (ii) notice of termination becomes operative on the required conditions from the date of its issue, and (iii) statutory rights under the Special Tenancy Act are different in nature from the rights under general law. Shri Deshpande adopted the same reasoning and we have already indicated why the first two of the three reasons are unacceptable to us. We have not been able to trace any reason in the judgment why the cases under the Tenancy Act can be excluded from the above doctrine. Such a view is contrary to the ratio of the Supreme Court judgment in the case of *P. Venkateswarlu*, (AIR 1975 SC 1409) (supra) in which this doctrine is applied to the case arising out of Rent Control legislation. With respect, the view adopted in *Madhav Vithoba's* case on this larger question must be held to be incorrect, though its interpretation of S. 33B (5) (b) is unexceptionable. This apart, the Division Bench distinguished the ratio in *Kunjilal v. Bhivsan*, Spl. Civil Appln. No. 3482 of 1958, D/- 14-7-1959 (Bom) (supra)

on the ground that it was based on the working of S. 34 (2) (c) of the Bombay Act. We have already indicated how the ratio of Kunjilal's case Spl. Civil Appln. No. 3482 of 1958, D/- 14-7-1959 (Bom) has relevance to the point arising in this case. Madhav Vithoba's case is thus distinguishable.

23. Chandurkar J. also relied on the reference made in S. 39 (2) (a) to the holding of the landlord on the date of his application, which has to be taken into account, to determine the area to be resumed. Reference to the dates, in this clause cannot have different incidence from such reference to the dates under Section 38 (3) (a). We have already discussed its effect. Such reference to the dates, in our opinion, does not make any difference to the point under consideration.

24. There is no doubt that a few of the observations made by Deshmukh J. in Ramkrishna v. Laxmibai (Spl. C. A. No. 283 of 1966 decided on 10/11th Oct. 1967 (Bom)) support the contention of Shri Deshpande. The case with which Deshmukh J. was dealing however, is distinguishable on facts. The landlord therein had filed an application for possession against several tenants. Some of the tenants gave up the fight and the landlord got possession of the land with them, while others pursued their remedies up to the High Court. The tenants contended before Deshmukh J. that the income of the lands so already resumed by the landlord also ought to be taken into account to determine if lands still sought to be resumed, happened to be the principal source of income or not. The learned Judge held—and in our opinion, rightly—that it was in effect a trial of one application by the landlord against all his tenants and ordinarily all the applications should have been consolidated for trial. The income from all the sources of the landlord at the relevant time required comparison with the income of all the lands sought to be resumed. The question of comparing the income afresh of the lands, still remaining unresumed due to pendency of proceedings, with the added income of these very lands acci-

dentally resumed earlier in almost the same proceedings could never have arisen. Apart from this not being a new or un contemplated subsequent development in the true sense of the term, any such process involves an element of incongruity and inconsistency. Such acquisition of land is distinctly different from the one by surrender under Section 21 or in wholly different and unconnected proceedings or by inheritance, or otherwise. However, the learned Judge also sought to fortify his conclusion by observing that subsequent events cannot be taken into account under any circumstances. With respect, this does not appear to be correct. Now, it is true that mostly the trial gets protracted due to the defects in the machinery of the Court and sins thereof should not ordinarily be allowed to visit the litigants. Such contingencies would never arise if the trial is concluded on the very date of application. Unfortunately, however, the trial does get prolonged and where relief depends on the continuous existence of the conditions under the terms of the statute, absence thereof on the date of order cannot be just winked at. Such inevitable delay rather results in revealing the true character of the claim which speedy trial perhaps prevents. The case of Hariba v. Motibai, (AIR 1975 Bom 137) (supra) is illustrative of how consideration of subsequent events becomes indispensable to effectuate the legislative intent.

25. The Division Bench decision in Special Civil Applns. Nos. 1263 of 1961; 943 of 1960 and 785 of 1962, decided respectively on 16-3-1962, 9-1-1964 and 12-2-1963 (Bom) stand slightly on different footing. Subsequent developments in the above cases were being relied on to clothe the landlords with the right of resumption which they did not possess on the dates of applications according to the facts then existing. As indicated, the tenant's rights in the land cannot be allowed to be impaired by any such subsequent developments, clothing the landlord with entitlements which he lacked on the crucial date.

26. Reliance also was placed on the judgment in the case of *Atma-ram Onkar v. Ananda*, (1970) 72 Bom LR 287 (decided by one of us, i.e. Deshpande J.). Two subsequent events were sought to be relied on in the case, one being the order of the Commissioner passed under S. 88D of the Bombay Act cancelling 88C certificate, and other being increase in the income of the landlord. The order of the Commissioner was found to be without jurisdiction and hence was excluded from consideration. Reference to the above doctrine is only a part of the reasoning to support such exclusion. It was, however, held that the increase in income could be taken into account. The ratio of the case thus does not help the petitioner.

27. We allowed *Shri R. N. Deshpande and Shri S. N. Kherdekar*, on their request, to intervene as the point arising in this reference appeared to us to be of some importance. The main contention of *Shri R. N. Deshpande* is that the doctrine of taking subsequent events into account is based on the provisions of O. 7, R. 7 of the Code of Civil Procedure and can have no application whatsoever to the statutory rights created under the Tenancy Act. The contention appears to us to be ill-founded. It would be enough to refer to the observations of *Krishna Iyer J.* made in a case arising out of Rent Act proceedings i.e. in *P. Venkateswarlu v. Motor & General Traders* (AIR 1975 SC 1409):

"It is basic to our processual jurisprudence that the right to relief must be judged to exist as on the date a suitor institutes the legal proceeding. Equally clear is the principle that procedure is the handmaid and not the mistress of the judicial process. If a fact, arising after the lis has come to court and has a fundamental impact on the right to relief or the manner of moulding it, is brought diligently to the notice of the tribunal, it cannot blink at it or be blind to events which stultify or render inept the decretal remedy. Equity justifies bending the rules of procedure, where no specific provision or fairplay is violated, with a view to promote substantial justice —

subject of course, to the absence of other disentitling factors or just circumstances."

A little later the learned Judge observed:

"If the litigation pends, the power exists, absent other special circumstances repelling resort to that course in law or justice..... We affirm the proposition that for making the right or remedy claimed by the party, just and meaningful, as also legally and factually in accord with the current realities, the court can, and in many cases must, take cautious cognisance of events and developments subsequent to the institution of the proceeding provided the rules of fairness to both sides are scrupulously obeyed."

We must, however, hasten to repeat that taking into account the subsequent developments in the present case during the pendency of the trial does not depend so much on this doctrine of processual jurisprudence as on the plain language of the statute itself. *Shri R. N. Deshpande* also is right in contending that while construing the provisions it matters little whether the construction benefits the landlord or the tenant. We have already discussed what the true impact of the phraseology used in this context is.

28. *Shri Kherdekar* drew our attention to the definitions in Sections 2 (21), 2 (16), 2 (13) and 2 (12) of the words "person", "joint family", "family holding", and "personal cultivation" and contended that if these definitions are taken into account properly, consideration of subsequent developments in the manner which we are suggesting would be rendered improper. We have not been able to see what really turns on these definitions. He particularly drew our attention to sub-s. (3) of S. 36 which requires the Tahsildar in all applications under S. 38 to frame preliminary issues with regard to the matters mentioned in Cls. (c) and (d) of sub-s. (3) and Cls. (b), (c) and (d) of sub-sec. (4) of S. 38. We are unable to see how this can make any difference to the legal position. Such preliminary decisions can also be assailed in appeal or in revision. If new facts

come to light or some material developments take place subsequently, it is difficult to see how anything provided in sub-sec. (3) of S. 36 can prevent consideration thereof or reconsideration of the issues so decided in the light of these facts. Shri Kherdekar could not dispute that facts not brought to light for some reason or other can also be taken into account by the trial or the appellate Court if a case for that is properly made out. We are unable to see on what footing the evidence with regard to subsequent developments can be shut out.

29. Shri R. R. Deshpande wanted to rely on the judgment of the Supreme Court in *Nathia Agarwalla v. Jahanara Begum* (AIR 1967 SC 92) in support of his contention that interpretation of words and phrases in one Act would not necessarily be a guide for interpreting words and phrases in different Acts. The proposition appears to us to be unexceptionable, though it does not have any relevance to the point discussed above.

30. The answer to the question referred to us is thus in the affirmative. The cases will now be placed before a single Judge for disposal according to law.

Answered in the affirmative.

AIR 1977 BOMBAY 341

KANTAWALA, C. J.

Yasin Dadu Patil, Appellant v. Kasim Babalal Patil, Respondent.

Second Appeal No. 1434 of 1969, D/- 9-12-1976.*

Civil P. C. (1908), O. 34, R. 8, S. 11 — Second suit for redemption — Payment not made in accordance with decree passed in earlier redemption suit — Mortgagor not debarred in earlier proceedings from right to redeem — Second suit is not barred. (T. P. Act (1882), S. 60) — (Dekkhan Agriculturists' Relief Act (1879), Section 15-B).

*(Against decision of N. B. Naik Dist. J. at Sangli in Civil Appeal No. 394 of 1968).

If the mortgagor obtains a decree for redemption and the decree does not provide that in default of payment by the mortgagor he shall be debarred of all right to redeem, the right to redeem is not extinguished and the mortgagor can file another suit for redemption. AIR 1934 PC 205, Rel. on. (Para 5)

Unless a specific order as contemplated by O. 34, R. 8 (3) is passed, a mortgagor or his successor-in-interest is never debarred from his right to redeem simply because a decree in an earlier suit for redemption was passed with the terms whereof he did not comply. Unless a decree as contemplated by R. 8 (3) is passed debarring the mortgagor from the right to redeem, the right to redeem will always subsist unless it is extinguished by acts of parties. (Para 5)

Section 15-B of the Dekkhan Agriculturists' Relief Act, 1879, does not contain any provision overriding the provisions of O. 34, R. 8 or the right to redeem defined in S. 60 of the T. P. Act. On the contrary S. 15-B is enacted for the facility of a debtor rather than for depriving him of a right which otherwise is available to him in law. It cannot be interpreted to mean that it curtails the right which is normally available to a mortgagor. (Para 6)

When the earlier suit for redemption was instituted by the mortgagor what was in issue then was whether the mortgagor was not entitled to redeem and when the subsequent suit for redemption was filed the issue was whether the mortgagor was at the relevant time entitled to redeem. These issues being separate, until the right to redeem is extinguished as contemplated by Section 60 of the T. P. Act or O. 34, R. 8 the right to redeem will continue to subsist notwithstanding the institution of an earlier suit for redemption and passing of a decree therein. (Para 6)

Cases Referred: Chronological Paras AIR 1934 PC 205 : 61 Ind App 362 5

S. C. Pratap, for Appellant; M. A. Rane, for Respondent.

JUDGMENT:— The plaintiff has filed this appeal against a concurrent decree passed by both the Courts

dismissing his suit on a preliminary ground that the present suit was not maintainable in view of a decree passed in an earlier suit for redemption being Civil Suit No. 235 of 1945. One Shekan Kasim Patil was the owner of survey No. 16/6 admeasuring 39 gunthas situate at village Kundalwadi, Taluka Walva, District Sangli. By a usufructuary mortgage dated June 6, 1927 Shekan Kasim Patil mortgaged this property to one Aba Farid Bargir to secure repayment of Rs. 150/- borrowed by him. Aba Farid Bargir, the mortgagee, by a registered deed of assignment dated May 25, 1938 assigned his interest in the mortgage in favour of defendant Kashim Patil. The plaintiff purchased the equity of redemption from Shekan Kasim Patil by a registered deed dated 26-10-1956. The plaintiff filed a suit in the year 1967 for redemption of this mortgage. It was inter alia contended by the defendant in the written statement that the original mortgagor Shekan Kasim Patil had filed a suit for redemption against the defendant being suit No. 235 of 1945. In that suit on November 22, 1946 a decree to the following effect was passed:—

"The plaintiff do pay to the defendants Nos. 2 to 7 Rs. 140/- together with interest thereon at 6 per cent per annum from the date of the decree till satisfaction by two equal annual instalments. The first instalment to be paid in the month of April 1947 and the second in April 1948.

In default of payment of any instalment as aforesaid the said defendants shall realise the same by sale of a sufficient portion of the mortgaged property under Sec. 15-B of the Dekkhan Agriculturists' Relief Act (hereinafter referred to as "the Act")

The plaintiff do recover possession of the suit land from the defendants forthwith. The plaintiff do pay the costs of defendant No. 3 and bear his own. The costs to be paid along with the aforesaid instalments." The payment in accordance with this decree was not made.

2. Before the trial Court a preliminary issue was raised whether the present suit was competent in view

of the decision in Civil Suit No. 235 of 1945. The trial Court took the view that the suit was not maintainable and that finding of the trial Court was confirmed in appeal by the learned District Judge, Sangli. It is against this concurrent decree passed by both the Courts on the preliminary issue that the present appeal is filed by the plaintiff.

3. Mr. Pratap on behalf of the plaintiff submitted that both the Courts were in error in taking the view that by reason of the decree passed in the earlier Civil Suit No. 235 of 1945 and the payment not being made in accordance therewith, the present suit was not maintainable. His submission is that having regard to the provisions of S. 60 of the T. P. Act unless the equity of redemption is extinguished by act of parties or by the decree of a Court the right to redeem will survive and the fact of mere institution of an earlier suit for redemption will not come in the way of the mortgagor or his successor-in-title filing a fresh suit for redemption. He submitted that the right to redeem in the present case has not been extinguished either by act of the parties or as a result of the decree passed in the earlier suit and therefore a second suit for redemption is not barred. Mr. Rane, on the other hand, on behalf of the defendant submitted that in view of the provisions of Section 15-B of the Act when the decree was passed on November 22, 1946 in Civil Suit No. 235 of 1945 a final decree was passed debarring the mortgagor from the right to redeem the mortgaged property and therefore a subsequent suit for redemption could not be instituted. He, therefore, submitted that both the Courts were right in taking the view that the present suit instituted by the plaintiff was not maintainable in view of the earlier decree passed in Civil Suit No. 235 of 1945.

4. Section 60 of the T. P. Act provides for right of mortgagor to redeem. That section inter alia provides that the right of a mortgagor to redeem will subsist unless the right conferred by this section has been extinguished by act of parties or by the decree of a Court. It is not the case of either party that the

right of redemption has been extinguished by act of parties. The only question that arises for consideration is, is the right to redeem the mortgage extinguished by reason of the decree passed in Civil Suit No. 235 of 1945? Order 34 Rule 8 of the Code of Civil Procedure provides for a final decree in a redemption suit. Rule 8 provides that:

"8. (1) Where, before a final decree debarring the plaintiff from all right to redeem the mortgaged property has been passed or before the confirmation of a sale held in pursuance of a final decree passed under sub-rule (3) of this rule, the plaintiff makes payment into Court of all amounts due from him under sub-rule (1) of Rule 7, the Court shall, on application made by the plaintiff in this behalf, pass a final decree or, if such decree has been passed, an order—

(a) ordering the defendant to deliver up the documents referred to in the preliminary decree,

and, if necessary,—

(b) ordering him to re-transfer at the cost of the plaintiff the mortgaged property as directed in the said decree.

"and, also, if necessary,—

(c) ordering him to put the plaintiff in possession of the property.

(2) Where the mortgaged property or a part thereof has been sold in pursuance of a decree passed under sub-rule (3) of this rule, the Court shall not pass an order under sub-rule (1) of this rule, unless the plaintiff, in addition to the amount mentioned in sub-rule (1), deposits in Court for payment to the purchaser a sum equal to five per cent of the amount of the purchase-money paid into Court by the purchaser.

Where, such deposit has been made, the purchaser shall be entitled to an order for repayment of the amount of the purchase-money paid into Court by him, together with a sum equal to five per cent thereof.

(3) Where payment in accordance with sub-rule (1) had not been made, the Court shall, on application made by the defendant in this behalf,—

(a) in the case of a mortgage by conditional sale or of such an

anomalous mortgage as is hereinbefore referred to in Rule 7, pass a final decree declaring that the plaintiff and all persons claiming under him are debarred from all right to redeem the mortgaged property and, also, if necessary, ordering the plaintiff to put the defendant in possession of the mortgaged property; or

(b) in the case of any other mortgage, not being a usufructuary mortgage, pass a final decree that the mortgaged property or a sufficient part thereof be sold and the proceeds of the sale (after deduction therefrom of the expenses of the sale) be paid into Court and applied in payment of what is found due to the defendant, and the balance, if any be paid to the plaintiff or other persons entitled to receive the same."

There is no order or decree passed at any time by the Court in the earlier proceedings debarring the mortgagor from all right to redeem the mortgaged property. If that is so, the right to redeem is not extinguished.

5. It is well settled that if the mortgagor obtains a decree for redemption and the decree does not provide that in default of payment by the mortgagor he shall be debarred of all right to redeem, the right to redeem is not extinguished and the mortgagor can file another suit for redemption. This view has now been settled by the Privy Council in *Raghunath Singh v. Hansraj Kunwar*, (1934) 61 Ind App 362: (AIR 1934 PC 205). See Mulla's Transfer of Property Act, 6th edition page 434. What has to be considered is, is the mortgagor debarred from all right to redeem by reason of the decree that was passed in the earlier suit No. 235 of 1945. It is urged by Mr. Rane that as the earlier decree inter alia provided that the plaintiff do recover possession of the suit land from the defendant forthwith it is quite apparent that subsequently the mortgagor or his successor-in-interest is debarred from all right to redeem. It is not possible for me to accept this contention. Unless a specific order as contemplated by Rule 8 (3) of O. 34 is passed a mortgagor or his successor-in-interest is never debarred from his right to redeem simply because a decree in an earlier suit

for redemption was passed with the terms whereof he did not comply. Unless a decree as contemplated by Rule 8 (3) of O. 34 is passed debarring the mortgagor from the right to redeem, the right to redeem will always subsist unless it is extinguished by acts of parties. In the present case, it is nobody's case that the right to redeem is extinguished by acts of parties nor is it extinguished by the decree of the Court in the earlier suit, because, the earlier decree does not contain any provision debarring the mortgagor from his right to redeem in default of payment in accordance with the provisions thereof.

6. Reliance was placed by Mr. Rane upon the provisions of Section 15B of the Act. That section confers power upon the Court to order payment by instalments in case of decree for redemption, foreclosure or sale. There is nothing in the provisions of Section 15-B which will support the contention of Mr. Rane. It does not contain any provision overriding the provisions of O. 34, R. 8 or the right to redeem defined in Section 60 of the Transfer of Property Act. On the contrary Sec. 15-B is enacted for the facility of a debtor rather than for depriving him of a right which otherwise is available to him in law. It cannot be interpreted to mean that it curtails the right which is normally available to a mortgagor. As in the present case the right to redeem was not barred by decree or order of the Court it subsisted even when the present suit was filed. It is well settled that a second suit for redemption is not barred by res judicata or principles analogous thereto. When the earlier suit for redemption was instituted by the mortgagor what was in issue then was whether the mortgagor was not entitled to redeem and when the subsequent suit for redemption is filed the issue is whether the mortgagor is now entitled to redeem. These issues being separate, until the right to redeem is extinguished as contemplated by S. 60 of the Transfer of Property Act or R. 8 of O. 34 of the Code of Civil Procedure, the right to redeem will continue to subsist notwithstanding the institution of an earlier suit

for redemption and passing of a decree therein. Thus, in my opinion, both the Courts were in error in taking the view that the present suit was not maintainable in view of the decree passed in the earlier suit No. 235 of 1945.

7. In the result, the appeal is allowed. The order passed by both the Courts is set aside and it is held that the present suit is maintainable notwithstanding the decree passed in Civil Suit No. 235 of 1945. The suit is remanded back to the trial Court for determination in accordance with law. The orders as to costs passed by both the Courts are set aside and the defendant will pay the costs throughout. As this is a suit of the year 1967 the trial Court is directed to dispose of it within a period of three months from the date the papers are received by the trial Court.

Appeal allowed.

AIR 1977 BOMBAY 344

AGGARWAL, J.

Ganpat, Petitioner v. Motilal Champalal Lunawat and another, Opponents.

Special Civil Appln. No. 1745 of 1972, D/- 26-11-1976*

Bombay Rents, Hotel and Lodging House Rates Control Act (1947), Section 12 (2) — Notice of demand — Mistakes in.

The construction of a notice of demand of arrears of rent and permitted increases issued under Sec. 12 (2) must not be liberal. It is vital that a landlord should make a correct demand unless he chooses not to specify the amount. He can simply demand arrears of rent. In such a case, it would be left to the tenant to make the payment on the basis of his calculation. A landlord cannot sit on the fence whereby the rigour of protection secured to the tenant is rendered illusory. (Para 17)

A landlord should not be penalised for innocent or harmless mistakes. A demand which is fictitious or unten-

*(To set aside order passed by Asst. Judge at Solapur, D/- 22-3-1972).

DU/DU/B374/77/RSK

able cannot be excused on the ground of mistake or oversight. Such serious infirmities will invalidate the notice. A demand for rent and permitted increases must be honest and accurate.

Held, in the present case there was no misunderstanding or inadvertence on the part of the landlord in making a demand for permitted increases and municipal taxes to the extent claimed. If demands were allowed to be inflated and the notices were to be held as good under Section 12 (2), such an approach would defeat the protection afforded by the special enactment. (Para 16)

Cases Referred: Chronological Paras
AIR 1972 Bom 373:74 Bom LR 241

(1966) Civil Appeal No. 387 of 1964,
D/- 5-4-1966 (SC)

K. Y. Mandlik, for Petitioner; V.
V. Karmarkar, for Opponent No. 1.

ORDER:— The present writ petition under Art. 227 of the Constitution is filed by the petitioner-landlord who has lost in the trial Court as well as in the appellate Court. The suit for eviction was filed on the grounds of arrears of rent and reasonable and bona fide personal requirement under the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (hereinafter referred to as "the Bombay Rent Act"). The respondent is the tenant. In order to understand the nature of the controversy between the parties, it is necessary to refer to some details.

2. The respondent has been a tenant of the suit premises for several years. Prior to December 1958 he was paying monthly rent of Rupees 50/- to the then owner. Between December 1958 and April 1964, the owner was different. The present petitioner purchased the suit property in April 1964. The petitioner's predecessor-in-title had filed Regular Civil Suit No. 245 of 1962 against the respondent, in which the standard rent was fixed at Rs. 16/- per month. A sum of Rs. 1475/- was paid on account of rent in that suit. That suit came to be dismissed on 28th December 1963. The petitioner's predecessor-in-title preferred an appeal being

Civil Appeal No. 407 of 1964. That appeal was prosecuted by the petitioner, but it came to be dismissed, on 28th September 1965.

3. The petitioner then proceeded to issue a notice dated 7th December 1967 (Ex. 66) for determining the contractual tenancy and for demanding the arrears of rent from 1st April 1962 to 17th January 1968 at the rate of Rs. 16/- per month aggregating to Rs. 920/-, Rs. 69/- by way of permitted increases for the said period and Rs. 412.91 by way of municipal taxes and thus in all Rs. 1401.91. The said notice was served on 15th December 1967. On 8th January 1968, a sum of Rupees 989/- was remitted by the respondent by Money Order, but the petitioner refused to accept the same. This was followed by a reply dated 13th January 1968 (Ex. 67) from the respondent recording the fact that the money order was refused and that the petitioner was not entitled in law to recover Rs. 412.91 by way of municipal taxes. The petitioner did not choose to send a reply to the said letter.

4. There was a lull till the petitioner once again issued a notice dated 22nd November 1968 (Ex. 48) terminating the tenancy of the respondent and making a demand for arrears of rent. The present demand consisted of Rs. 1288/- by way of arrears of rent from 1st April 1962 to 17th December 1968 at the rate of Rs. 16/- per month, Rs. 96.60 by way of permitted increases and Rs. 495.49 by way of municipal taxes, and thus in all for Rs. 1880.09. The notice was served on 29th November 1968. The respondent remitted a sum of Rupees 1900/- by two money orders, one of Rs. 900/- and the other of Rupees 1000/-. Both these money orders were refused by the petitioner. The coupon in respect of money order of Rs. 900/- is Ex. 58 and the other coupon relating to the money order of Rs. 1000/- is Ex. 59. The contents of both the coupons are in these words:—

Ex. 58.

"Saprem Namaskar to Shri Ganpat-rao alias Gajanan Sambhuappa Ghongade residing at Latur from Motilal Kachrual Lunawat on behalf of

Motilal Champalal. Your notice dated 22-11-68 is received on 29-11-68. As demanded in your notice, a total sum of Rupees Nineteen Hundred in two Money Orders respectively for Rupees Nine Hundred and Rupees One thousand is sent herewith. You are requested to accept the same and acknowledge the receipt thereof.

Yours

Sd/-

Motilal Kachrual Lunawat

26-12-68."

The respondent by letter dated 1st March 1969 (Ex. 68) placed on record the fact of refusal of the said two money orders. On 3rd March 1969, the petitioner filed the present suit for ejectment.

5. The trial Court calculated the arrears from 18th December 1959 to 22nd December 1968 at the rate of Rs. 16/- per month and arrived at the figure of Rs. 1712/-. The Court gave credit for Rs. 1475/- paid by the respondent in the former suit No. 245 of 1962. After taking into consideration the further arrears till 3rd March 1969, the trial Court found that the arrears due were to the tune of Rs. 290.80. The trial Court found that the petitioner failed to prove that he had in fact incurred liability in respect of permitted increases and municipal taxes. The petitioner failed to produce receipts showing that he was required to pay the tax at increased rates as demanded by him from the respondent. Therefore, the trial Court held that the petitioner was not entitled to increase in rent, much less to recover the amount claimed in suit. As regards the remittance of Rs. 1900/- within one month from the service of the notice, the trial Court held that the petitioner refused to accept the money orders and observed that he did so in order to allow the respondent to remain in arrears of rent for a period of more than six months and to take advantage of that fact. In these circumstances, the trial Court passed a decree for a sum of Rs. 290.80 only and dismissed the suit as regards recovery of possession.

6. The appellate Court took the view that if the respondent wanted to adjust the payment of Rs. 1475/-

made by him to the previous landlord before the present suit, he could have done so only within six months from the date of the payment in view of the provisions contained in Sec. 20 of the Bombay Rent Act and, therefore, the respondent was not entitled to get credit for the payment of Rs. 1475/-. As regards the demand for municipal taxes, the appellate Court referred to the evidence of the petitioner and pointed out his admission showing that the municipal tax was reduced on the basis of his application, though he did not know the extent of reduction. It appears that in these circumstances the Advocate for the petitioner did not argue that the petitioner was entitled to claim any increase in rent over and above Rs. 16/- per month on any ground. Regarding the remittance of Rs. 1900/-, the appellate Court in para. 9 of the judgment considered various aspects of the matter and believed the respondent's case that he had sent the two money orders in question which covered the entire demand of the petitioner and that the said amount was remitted within one month as required by law. The Court also considered the various payments made after the filing of the suit and came to the conclusion that the respondent was not a defaulter and, therefore, the petitioner could not evict him on that ground. In the result, the appeal was dismissed.

7. The validity and correctness of the order dated 22nd March 1972 dismissing the petitioner's Civil Appeal No. 86 of 1971 is under challenge.

8. Two points are raised by Mr. Mandlik, the learned counsel for the petitioner. Firstly, the present case is governed by S. 12 (3) (a) of the Bombay Rent Act because the respondent neglected to make payment within one month from the date of the service of the notice dated 22-11-1968 served on 29-11-1968. Secondly, the respondent is not entitled to relief against forfeiture of tenancy as there is no compliance with the provisions of S. 12 (3) (b). According to Mr. Mandlik, the respondent did not make the payment on the day when the issues were framed and there-

after he continued to be irregular in making the payment into Court.

9. Mr. Karmarkar, learned Counsel for the respondent, on the other hand, submitted that the respondent did not neglect to pay the arrears. The entire amount of arrears as demanded was remitted by money-orders, but the petitioner refused to accept the same. The notice contained a false demand. It was to the knowledge of the petitioner that the respondent had paid Rs. 1475/- towards the arrears of rent for the period 18-12-1959 to 22-11-1968 and the balance due was only Rs. 237/-. It was further contended that in the notice of demand the petitioner knowingly made a false demand in respect of permitted increases to the extent of Rs. 96.60 and municipal taxes to the extent of Rs. 495.49. Even as regards the arrears of rent, the petitioner falsely demanded the arrears with effect from 1-4-1962, whereas actually the amount could be claimable from 2-6-1962 and, therefore, the demand for Rs. 1288/- towards the arrears was deliberately inflated and the actual amount could have worked out to Rs. 1240/- for the period 2nd June 1962 to 17th December 1968. In these circumstances, the notice of demand is not valid. The petitioner, therefore, could not bring the present suit for ejectment on the ground of arrears of rent.

10. In support of the first contention, it was argued by Mr. Mandlik that the two coupons, Exs. 58 and 59, do not show when the money-orders were sent and on what date they were refused. The arrears of Rs. 1880.09 were sent in part. Therefore, the petitioner was entitled not to accept part payment. There is no evidence that the postman went with the two money orders at the same time or that the two money orders reached the petitioner at the same time and through the same postman. Assuming they were sent on 26-12-1968, there is no evidence that the two money orders were tendered on or before 28th December 1968. These contentions have no merit in view of the contents of Exs. 58 and 59 and the finding of fact arrived at by the Courts below.

11. In this connection, Mr. Mandlik next urged that it was the duty of the respondent to examine the postman as the petitioner had denied that he had refused to accept the money orders. Mr. Karmarkar pointed out that this point was neither taken in the memo of appeal nor raised before the appellate Court, nor is it made a ground of attack of the impugned order in the present petition. He submitted that both the Courts have come to a concurrent finding that the two money orders were sent to the petitioner on 26-12-1968 and they were refused.

12. I think that the petitioner ought not to be allowed to raise this contention at this stage. From the discussion of the evidence by the appellate Court, it appears that the petitioner went out of Latur without making arrangements for receiving the rent or for accepting money orders during his absence. The Court also considered the previous conduct of the petitioner in persistently refusing the money orders. Both the Courts have believed the say of the respondent in this behalf. It appears that the respondent had been vigilant and careful in remitting not only the whole amount of Rs. 1880.09 as demanded but rounded off the figure at Rs. 1900/-. This was done by him despite the fact that a year before the petitioner had sought to make a demand for arrears of rent as well as for permitted increases and municipal taxes, out of which he had remitted Rs. 989/- by money order and had challenged the demand for permitted increases and municipal taxes by his letter dated 13-1-1968. The present demand also contained a demand for permitted increases and municipal taxes to the extent of Rs. 502.09. But nevertheless the respondent chose to square up the demand and did not enter into any controversy about the same. Having regard to the fact that this point was not raised by the petitioner in the lower appellate Court and the two Courts have given a concurrent finding, he cannot be allowed to raise it at this stage.

13. It is convenient now to examine the question of the validity of

the demand made by the petitioner under Section 12 (2) of the Bombay Rent Act, on the basis of which he has laid down the foundation for ejection on the ground of arrears of rent. We have noticed that the demand notice is excessive to the extent of Rs. 592.09 being the aggregate amount of permitted increases and municipal taxes. The trial Court has held that the petitioner had failed to produce any receipt of payment and, therefore, he is not entitled to claim the same. The appellate Court relied upon the petitioner's admission which disclosed that instead of the municipal taxes being enhanced, they were reduced on his application. All these facts were to the special knowledge of the petitioner. Notwithstanding this position, he chose to make a demand of Rupees 592.09 which he could not sustain — not because he failed to prove but he had no case. The demand was, therefore, patently mala fide and dishonest. The demand was also inflated with regard to the arrears of rent because the actual dues ought to have been Rs. 1240/- as found by the appellate Court and not Rs. 1288/- as demanded by the petitioner.

14. Mr. Mandlik submitted that the notice of demand is to be construed liberally and a mistake like making a demand for a larger amount would not render the notice invalid. In support of his submission, he placed reliance on an unreported decision of the Supreme Court in the case of Raghunath Ravji Dandekar v. Anant Narayan Apte, Civil Appeal No. 387 of 1964 decided on 5-4-1966 (SC). Before I go to the relevant observations of Their Lordships of the Supreme Court relied upon by Mr. Mandlik, it is necessary to bear in mind the circumstances in which the plaintiff in that case had made a mistake. In that case, there was a demand of Rs. 7050/- in the notice though actually as found by the Courts below only Rs. 6900/- were due and therefore the notice under Section 12 (2) of the Bombay Rent Act demanding Rupees 7050/- as arrears of rent was held bad. The mistake might have arisen in that case because three years according to the British Calendar would have 37 months according to the

Hindu Calendar because there was an intercalary month in the Hindu Calendar once in three years of the British Calendar. The following observations were quoted by Mr. Mandlik:—

"We have not been able to understand how the notice to quit under the Transfer of Property Act would be bad because by mistake or oversight more was demanded in the notice under S. 12 (2) of the Act than was due. All that S. 12 (2) requires is notice by the lessor for payment of arrears of rent. It is true that such a notice generally contains the amount due as arrears of rent. But if there is a mistake in the amount specified in the notice, that does not in our opinion make the notice under S. 12 (2) bad or because of that make the notice to quit under the Transfer of Property Act bad."

15. Reliance was also placed on a decision of this Court in Lalshankar Mulji v. Kantilal, 74 Bom LR 241: (AIR 1972 Bom 373). It is held in that case that a notice under Section 12 (2) of the Bombay Rent Act is not invalid simply because by mistake or oversight the landlord has demanded the rent for the month for which it was not due. It is also observed in that case that a liberal construction should be put upon a notice to quit in order that it should not be defeated by inaccuracies either in the description of the premises or the name of the tenant or the date of the expiry of the notice and that the test of its sufficiency is not what its contents would mean to a stranger ignorant of all the facts and circumstances touching the premises to which the notice purports to refer but what they would mean to tenants presumably conversant with all those facts and circumstances, and the mistakes, if any, should not be construed with a desire to find faults, but they should be construed liberally. In that case, the landlord was under a mistaken belief while asking for rent for the period from 15-8-1965 to 15-9-65 because he thought that he could demand such rent since he was terminating the tenancy on and from 15-9-1965. Thus in that case, the demand for rent of one month could be said to have

been made on account of a genuine mistake.

16. The view expressed in these two cases seems to be that having regard to the facts of a particular case, if there is an error in calculations which can be connected with circumstances in which a mistake can genuinely creep in, then such a mistake would not invalidate the notice so as to non-suit the plaintiff-landlord. The view seems to be that the Court should look out for substantial accuracy and discourage technical objections. A landlord should not be penalised for innocent or harmless mistakes. For our purposes, the angle from which the validity or invalidity of the notice is to be examined is "the demand of arrears of standard rent and permitted increases" and not matters like name and address of the tenant, description of property, date of expiry of the notice, etc. I do not think that these two authorities are for the benefit of a landlord who makes a false demand or makes a demand of a part of rent and permitted increases to which he is not entitled. A demand which is fictitious or untenable cannot be excused on the ground of mistake or oversight. Such serious infirmities will invalidate the notice. In my judgment, the demand for rent and permitted increases must be honest and accurate. In the present case, there was no misunderstanding or inadvertence on the part of the petitioner in making a demand for permitted increases and municipal taxes to the extent of Rs. 592.09 and rent of Rs. 48.00 for the period 1-4-1962 to 2-6-1962. If demands were allowed to be inflated in this manner and the notices are to be held as good under S. 12 (2), I think such an approach would defeat the protection afforded by this special enactment. It is one thing that in the present case the respondent had means to pay even the 30 per cent inflated demand, but take a case where a tenant is poor and has limited means. If he does not comply with the notice within a period of one month from the date of service, he cannot enjoy the protection and safeguard which the Legislature has been giving from time to time for nearly

one third of a century by extending the life of the Act.

17. In my view, the construction on a notice of demand of arrears of rent and permitted increases issued under S. 12 (2) must not be liberal. It is vital that a landlord should make a correct demand unless he chooses not to specify the amount. He can simply demand arrears of rent as suggested by the Supreme Court in Raghunath's case. In such a case, it would be left to the tenant to make the payment on the basis of his calculation. A landlord cannot sit on the fence whereby the rigour of protection secured to the tenant is rendered illusory. The rigour of the law under the Bombay Rent Act is that a tenant must pay up within one month from the date of service of the notice of demand or otherwise face eviction. It is true that a tenant can still file an application for fixation of standard rent within one month from the receipt of the notice of demand and avert the course of ejectment proceedings. But that would be in a case where the standard rent or permitted increases is in dispute. In a case of the present type where the standard rent has already been fixed in a previous proceeding and the respondent had no means to verify about his liability for permitted increases and municipal taxes, he had no other alternative but to make the payment in order to save his home. Had he omitted to remit the amount as demanded, he could have been a victim of "neglect" under S. 12 (3) (a) or accused of not being "ready and willing" to pay up under S. 12 (1) assuming that concept can be introduced under S. 12 (3) (a).

18. Having regard to the facts and circumstances of the present case, the mistakes in the notice dated 22nd November 1968, Ex. 48, relating to the demand under Section 12 (2), are fatal and that notice could not be the basis of a decree for possession on the ground of arrears of rent as contemplated under S. 12.

19. In my opinion, the present case is not governed by S. 12 (3) (a) as urged by Mr. Mandlik as there was no "neglect" on the part of

the respondent in making the payment of arrears of rent within one month from the date of service of the notice. The two Courts below have accepted the respondent's case that they had in fact remitted the entire amount of arrears within one month from the date of service of the notice, but it was the petitioner who refused to accept the money-orders.

20. Coming to the second contention that the respondent is not entitled to relief against forfeiture of tenancy on account of non-compliance with the provisions of S. 12 (3) (b) of the Bombay Rent Act, it is to be noted that the respondent had deposited Rs. 1600/- as against Rupees 1648/- which were found due. The lower appellate Court had given an opportunity to the respondent to pay the remaining amount. I do not propose to interfere with the order of the appellate Court in the exercise of my supervisory jurisdiction under Art. 227 of the Constitution on the peculiar facts of this case. As pointed out above, the respondent had paid Rs. 1475/- in Civil Suit No. 245 of 1962. The trial Court in the present suit had given them credit for that amount, but the appellate Court chose to differ. The appellate Court overlooked the fact that the petitioner had been made a party in Civil Appeal No. 407 of 1964 since he purchased the property on 7-4-1964. The respondent ought to have been given credit for the amount paid by them in that suit. In these litigations, the respondent had to pay the amount of Rs. 1475/- twice for the same period. The conduct of the petitioner seems to be to eject the respondent from the suit premises anyhow.

21. In the result, the petition fails. The rule is discharged. As regards costs, the petitioner to pay to the respondent the costs of Civil Appeal No. 86 of 1971 and the costs of this petition.

Petition dismissed.

AIR 1977 BOMBAY 350

FULL BENCH

KANTAWALA, C. J., TULZAPURKAR
AND KANIA, JJ.

Laxmibai Sadashiv Date and others, Appellants v. Ganesh Shankar Date and others, Respondents.

A. F. O. D. No. 372 of 1968, D/- 8-4-1976*.

Bombay Merged Territories Miscellaneous Alienations Abolition Act (22 of 1955), Section 4 — Service inam — Grant to family in name of senior member — Abolition — Effect on rights of members of family under personal law. (1976) 78 Bom LR 720, Overruled.

The non-obstante clause is contained at the inception of S. 4 and the sole object of S. 4 is to abolish alienations and rights and incidents in respect thereof. The right of a member of a joint Hindu family to ask for partition of a joint family property cannot be regarded as a right relating to grant of land as service inam or as an incident in respect thereof. The sole object underlying S. 4 is to abolish all alienations defined in the statute and to extinguish all rights legally subsisting on the appointed date in respect of such alienations and all other incidents thereof. This provision does not affect the normal rights of a member of a Hindu family under the personal law applicable to Hindus. Hence where the service inam was a grant to the joint Hindu family in the name of the senior member and the same was abolished it could not be contended that the right of the other members of the family relating to partition of joint family property was extinguished nor could it be contended that when the regnant was made under S. 7 the other members had no right to ask for a share therein by way of partition, AIR 1973 Bom 323, Approved; (1976) 78 Bom LR 720, Overruled.

(Paras 1, 10 and 13)

Cases Referred:	Chronological	Paras
(1976) 78 Bom LR 720		6, 12
AIR 1973 Bom 323 : 75 Bom LR 290		6,
		11, 12
AIR 1970 SC 1795		7
AIR 1932 PC 216		7

M. V. Paranjpe with V. N. Damle, for Appellants Nos. 1 and 2; M. L. Pendse with N. D. Hombalkar, (for Nos. 1 to 4) and G. B. Sathe, (for No. 5), for Respondents.

* (Against decision of V. T. Kakade, Civil Judge Sr. Division at Kolhapur in Spl. Civil Suit No. 48 of 1965.)

KANTAWALA, C. J.— The Division Bench consisting of Deshmukh and Sapre, JJ. by its judgment and order dated 14th/15th July 1975 has referred the following question for determination by the Full Bench:—

“When an alienation like the service inam in this case was a grant to a family in the name of senior member and the same is abolished, whether the provisions of S. 4 of the Bombay Merged Territories Miscellaneous Alienations Abolition Act, 1955, extinguish the ordinary rights and incidents in respect of such alienation under the personal law of the parties?”

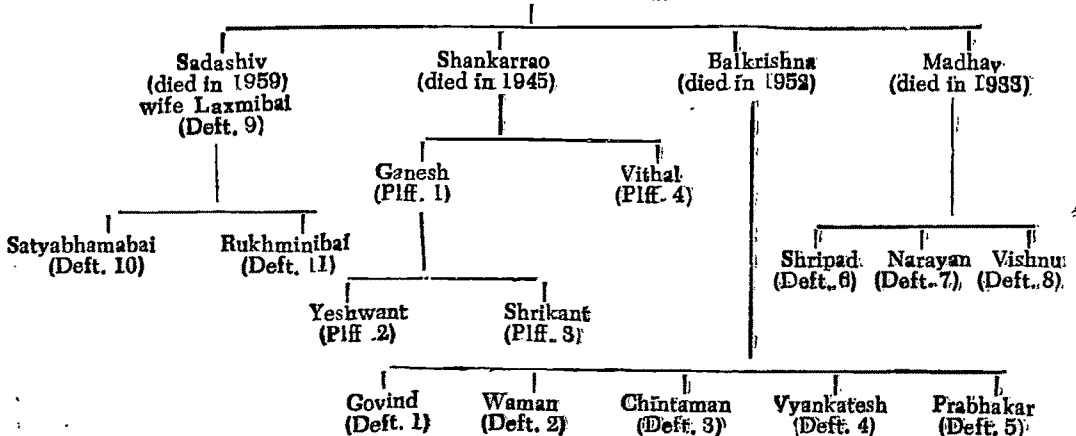
2. The dispute in this appeal relates to lands pertaining to service inam. Originally the grant was to one Gangadhar and after his death an heirship enquiry was started in the year 1889. As a result thereof, the name of Narhari, his son, was entered as Navawala in respect of service inam by an order dated May 10, 1889. The genealogy of Narhar Gangadhar is as under:—

(For Table see below)

After the death of Narhari in the year 1919 the proceedings initiated at the instance of the Chief Sahab of Ichalkaranji showed that he was dissatisfied with the services rendered by the existing members of Date family i. e. Narhari's and Gangadhar's family. It was also found that there was no able person in the family who could render service. In view thereof the inam was resumed and the lands were cultivated through the State. On or about Jan. 5, 1928, Sadashiv the eldest son of Narhari, made an application to the Chief Sahab that the inam may be revived and services may be accepted from Date family. Sadashiv himself was unable to render service and offered that his younger brother Balkrishna was able and competent as well as willing to render such

service. After reviving the Vatan in the name of Sadashiv the services of Balkrishna were accepted. Balkrishna also gave a writing to the effect that he was willing to render service on behalf of his brother. This arrangement continued till 1943 when the rendering of services was cancelled. Thereafter it was not necessary to render such service. There were two pieces of land pertaining to this inam, one being survey No. 28/1, situate at Ichalkaranji and the other being survey No. 661/5 situate at village Lat. As Balkrishna was put into possession of these lands upon revival of Vatan, his possession continued till the Bombay Merged Territories Miscellaneous Alienations Abolition Act, 1955 (hereinafter referred to as “the Act”) was passed whereby alienation was abolished altogether. Balkrishna died in the year 1952 and after his death the two inam lands continued to be in possession of his heirs who are defendants Nos. 11 to 5. The plaintiffs who are the sons and grand-sons of Shankarrao, one of the sons of Narhari filed a suit for partition and possession of their one-fourth share in the two inam lands and for past and future mesne profits. They pointed out that orders were already passed in respect of regnant of one of the pieces of land, namely, survey No. 28/1 from Ichalkaranji and the regnant in the case of survey No. 661/5 of village Lat was kept pending by the Revenue Authorities as the disputes raised by defendants Nos. 9 to 11 were pending. The plaintiffs alleged that upon payment of occupancy price on behalf of the family during the time stipulated in the Act Government was bound to regnant the land and these two survey numbers were treated as family lands. According to the plaintiffs the four branches of Date family representing the four sons of Narhari were each entitled to one-fourth share in these two survey numbers. The plaintiffs accordingly

NARHAR GANGADHAR



asked for a declaration of their one-fourth share in these two lands which were then in possession of Balkrishna's heirs, the defendants Nos. 1 to 5, and they sought a direction of the Court to effect a partition and for delivery of possession of their one-fourth share therein, Defendants Nos. 6 to 8 who represented the branch of Madhav the youngest son of Narhari admitted the claim of the plaintiffs and were agreeable to a decree being passed. Defendants Nos. 1 to 5 representing the branch of Balkrishna, the third son of Narhari contended that in the year 1928 when the inam was revived it was a grant in favour of Balkrishna alone and both the pieces of land represented the personal acquisition of Balkrishna. After the abolition of the inam under the Act both the pieces of land became the private property of Balkrishna's branch and defendants Nos. 1 to 5 were solely entitled to the said two pieces of land as they alone paid the occupancy price in respect thereof.

3. The plea of defendants Nos. 9 to 11 who represented the branch of Sadashiv the eldest son of Narhari, was that in the year 1928 the inam was revived in the name of Sadashiv alone; that it was personal grant to Sadshiv; that while Sadashiv was the holder of the inam the Act came into force and the alienation was abolished; that Sadashiv was alive at the time when the Act came into force and that having regard to the provisions of S. 7 of the Act Sadashiv alone was entitled to the regrant of these two pieces of land.

4. The trial Court took the view that the inam in respect of these two pieces of land was a service inam in favour of Date family; that it came down from generation to generation and the last holder thereof was Sadashiv in whose name the inam was revived by the then Chief Saheb of Ichalkaranji. According to the trial Court the revival of the inam in the name of Sadashiv was a grant to Date family as such and not individual to Sadashiv; that such grants of service inam constituted impartible estate with consequential rights of succession by the rule of primogeniture; that in respect of such grant the junior members of the family who otherwise formed a coparcenary had only right of succession to the property by survivorship if and when an appropriate occasion arose. As a result of the regrant under S. 7 of the Act the property became the private property of the entire Date family. Thus the trial Court rejected the contentions of the members of the branches of Balkrishna as well as Sadashiv and gave a declaration that each of the four branches was entitled to a

one-fourth share therein and partition should be effected by the Collector in the normal manner.

5. An appeal was preferred by the defendants Nos. 9 to 11 who are the heirs of Sadashiv. This appeal came up for hearing before the Division Bench consisting of Deshmukh and Sapre, JJ. The Division Bench in the referring judgment gave a clear finding that the inam in dispute was a service inam granted to Date family, but it was always recorded in the name of the seniormost member of the seniormost branch which was also the customary manner of recording the rights under the inam. The Division Bench further held that Narhari was the grantee of the inam as representing Date family and Sadashiv became the grantee in the year 1928 as representative of the family consisting of himself and his three brothers. This clear finding of the Division Bench has been reaffirmed at the later stage in para. 37 of the judgment where it is observed:

"Prima facie, according to us, it is the prior holder who must be restored the land. Who that holder is, is a question, which we have already answered in our earlier discussion. That holder of the inam was the family of Dates, though it was represented in Government records by Nawawala who was the seniormost member. Since the holder is thus the family, the regrant under S. 7, though in the name of the former Nawawala, must be deemed to be regrant to the family of Dates."

In view of the said clear finding, according to the Division Bench, the legitimate conclusion to be arrived at was that the property in the regrant was a Raytwa land and since Date family was a Hindu family governed by the Mitakshara law as administered in the Bombay area, the property must be now treated as a joint Hindu family property with the normal incidents accompanying the Mitakshara joint family property.

6. It was, however, urged by Mr. Gadgil who appeared for the appellants before the Division Bench that the above conclusion was not possible in view of the express language of S. 4 of the Act. He contended that all rights legally subsisting and all incidents of alienations were extinguished by the provisions of S. 4 of the Act and that as such it must be treated to be a grant to Sadashiv and his branch alone without any rights in favour of the other members of Date family; that in other words, to the regranted land the normal personal law of the party would not apply, but it must be deemed to be a

grant to the individual alone as a separate property. Before the Division Bench the judgment of Malvankar, J. in the case of Dhondi Vithoba v. Mahadeo Dagdu (1973) 75 Bom LR 290 : (AIR 1973 Bom 323) and the judgment of the Division Bench (consisting of Vaidya and Lentin, JJ.) in First Appeal No. 111 of 1966 with First Appeals Nos. 176 and 204 of 1966 decided on 12-3-1975* were cited. The view taken by Malvankar, J. was the one which supported the claim of the plaintiffs while that view was dissented from by the Division Bench. When the appeal came up for hearing before Deshmukh and Sapre, JJ. they felt that the view taken by Malvankar, J. was preferable to the one taken by Vaidya and Lentin, JJ. and, therefore, referred the above question for determination by the Full Bench.

7. Mr. Paranjpe on behalf of the appellants (Defendants Nos. 9, 10 and 11) contended that the finding of the Division Bench that the service inam was granted to Date family, that Narhari as grantee of the inam represented Date family and Sadashiv became the grantee in the year 1928 as representative of the family consisting of himself and his three brothers, is not justified if regard be had to the special features of an impartible estate and he wanted to challenge the correctness of the said finding. As this finding was given by the Division Bench after considering the decision of the Privy Council in the case of Shiba Prasad v. Rani Prayag Kumari, AIR 1932 P. C. 216 and the decision of the Supreme Court in the case of Krishna v. Sarvagna Kumara Krishna, AIR 1970 SC 1795, we have not permitted Mr. Paranjpe to go behind this finding as it is a considered finding of the Division Bench upon appreciation of evidence and the position in law. The reference had to be made to the Full Bench because it was contended before the Division Bench by Mr. Gadgil that in view of the non obstante clause used in S. 4 of the Act all rights legally subsisting in respect of alienations like inam and all other incidents of such alienations were deemed to be extinguished. Even the incidents qua partition in respect of joint Hindu family property were also extinguished and, therefore, when after resumption of the inam a regrant was made it was a regrant only to the senior-most member of the branch, who was in possession of the land and enjoyment of the income therefrom at the time when the Act came into force. The submission of Mr. Paranjpe is that S. 4 whereby alienations and rights and incidents

in respect thereof are abolished starts with the non obstante clause to the effect "Notwithstanding anything contained in any usage, settlement, grant, agreement, sanad, order, rule, notification or Vat Hukum or any decree or order of a Court or any law for the time being applicable to any alienation in the merged territories" which is very comprehensive in its nature, and thereby not only all rights and incidents in relation to alienations of the lands are extinguished, but even the rights of the holder under the personal law like Hindu Law, to ask for partition, are taken away. In support of this contention, reliance was placed by him upon the decision of the Division Bench of Vaidya and Lentin, JJ., above referred to and he submitted that in view of this non obstante clause as the right of a member of a joint Hindu family in respect of an impartible estate is taken away it is only the senior-most member of the senior-most branch who will be entitled to the regrant and the other members of the joint family will not be entitled to claim any share by demanding a partition of the land on the footing that it is a joint family property.

8. The Act was amended with a view to abolish some of the alienations of miscellaneous character prevailing in the merged territories and to provide for matters consequential and incidental thereto. The word 'alienation' in the Act meant a grant or recognition as a grant (I) of a village, portion of a village or land to any person, whether such grant be of soil with or without exemption from payment of land revenue or of assignment of the whole or a share of land revenue thereof, (II) of total or partial exemption from payment of land revenue to a person in respect of any land held by him, or (III) of cash allowance or allowance in kind to any person by whatever name called, by the ruling authority for the time before merger or by the State Government after merger. Chapter II of the Act deals with abolition of alienation and conferment of occupancy rights. S. 4 of the Act deals with abolition of alienations and rights and incidents in respect thereof. Its provisions are as under:—

"4. Notwithstanding anything contained in any usage, settlement, grant, agreement, sanad, order, rule, notification or Vat Hukum or any decree or order of a Court or any law for the time being applicable to any alienation in the merged territories with effect from and on the appointed date.

(i) all alienations shall be deemed to have been abolished;

* (reported in (1976) 78 Bom LR 720.)

(ii) Save as expressly provided by or under this Act all rights legally subsisting on the said date in respect of such alienations and all other incidents of such alienations shall be deemed to have been extinguished."

9. Under S. 5 all alienated lands are made liable for payment of land revenue in accordance with the provisions of the Code and the rules made thereunder and the provisions of the Code and the rules relating to unalienated lands shall apply to such lands. The provisions as regards regrant of such lands are contained in Ss. 6 and 7. We are concerned in the present case with S. 7 (2) and its provisions are as under:—

"7. All land held under a watan is hereby resumed and shall be regranted to the holder in accordance with the following provisions, namely:—

(1) x x x x

(2) in the case of a watan to which cl. (1) does not apply the land appertaining to the watan shall be regranted to the holder on payment of the occupancy price equal to twelve times the amount of the full assessment of such land within the prescribed period.

x x x x"

10. In the referring judgment a clear and unequivocal finding is given by the Division Bench that so far as the holder prior to the abolition of the alienation was concerned, it was Date family; that Narhari was grantee of the inam as representing Date family and Sadashiv became the grantee in the year 1928 as representative of the family consisting of himself and his three brothers. The short question that was canvassed before the Division Bench was that in view of the non obstante clause in S. 4 the ordinary incident under the personal law of Hindus relating to partition of joint family property was extinguished and therefore, when a regrant was made under S. 7 it was Sadashiv alone who was entitled thereto and the other members of the family had no right to ask for a share therein by way of partition. It is undoubtedly true that S. 4 starts with a non obstante clause, but it is a well recognised canon of construction to give effect to a non obstante clause having regard to the object with which it is enacted in a statute. The non obstante clause is contained at the inception of S. 4 and the sole object of S. 4 is to abolish alienations and rights and incidents in respect thereof. The right of a member of a joint Hindu family to ask for partition of a joint family property cannot be regarded as a right relating to grant of land as service

inam or as an incident in respect thereof. The sole object underlying S. 4 is to abolish all alienations defined in the statute and to extinguish all rights legally subsisting on the appointed date in respect of such alienations and all other incidents thereof. These provisions have nothing to do with the normal rights of a member of a Hindu family under the personal law applicable to Hindus.

11. Provisions similar to those in the Act, contained in the Bombay Inferior Village Watans Abolition Act (Act 1 of 1959) came up for consideration before Malvankar, J. in *Dhondi Vithoba v. Mahadeo Dagdu* reported in (1973) 75 Bom LR 290 : (AIR 1973 Bom 323). He held that after the abolition of a Watan, held as joint family property or held by tenants in common, under the Bombay Inferior Village Watans Abolition Act, 1958, the resumption and regrant of the land to the Watandar of the Watan, does not take away the character of the land as joint family property or as held by tenants in common. He has further taken the view that even though the Watan is abolished and its incidents are extinguished under the Act and the lands are resumed under S. 4 of the Act, the Act maintains the continuity of the interest in the lands of the persons before and after the coming into force of the Act, provided the holder pays occupancy price. What the Act does is only to effect a change in the nature of the tenure or in the nature of the holding, in that before the abolition of the Watan the land was being held by the Watandar in consideration of rendering service and non-payment of assessment, but after the abolition of the Watan and its incidents he holds it in consideration of the payment of occupancy price and the land revenue. It does not effect any other change in any other rights of the holders in such lands. At page 293 (of Bom LR) : (at p. 325 of AIR) after summarising the provisions of the Bombay Inferior Village Watans Abolition Act, 1958 Malvankar, J. points out:—

"It seems to me, therefore, that what S. 4 sub-ss. (1) and (2) seek to abolish and extinguish is the inferior village hereditary office together with the tenure of watan property held, acquired or assigned under the watan law for providing remuneration for the performance of the duty appertaining to an inferior village hereditary office and all the incidents thereto including the right to hold office or to levy customary fees or perquisites in money or in kind, and the liability to render service. It does not affect the ordinary incidences of the property under personal law. In other words, if such property is joint family property or the property held by ten-

ants in-common, its incidences are not extinguished by the abolition of the watan and extinction of its incidents."

12. The decision of Malvankar, J. was cited before Vaidya and Lentin, JJ. while disposing of First Appeal No. 111 of 1966 with First Appeals Nos. 176 and 204 of 1966 by their judgment dated 12-3-1975*. The learned Judges disagreed with the conclusion arrived at by Malvankar, J. It may be observed that before Vaidya and Lentin, JJ. Mr. Paranjpe who appeared for the appellants in that appeal made submissions totally inconsistent with the submissions made before us. Actually his submissions were in consonance with the view which has been expressed by Deshmukh and Sapre, JJ. in the referring judgment in the present case. The question that came up for consideration before Vaidya and Lentin, JJ. related to interpretation of the provisions of S. 4 of the Watans Abolition Act. The learned Judges pointed out that on a plain reading of the section along with the definition of the words "existing watan law" and "inferior village watan" contained in S. 2, they found no difficulty in coming to the conclusion that by the section the Legislature intended to extinguish all rights and incidents in Sanadi Inam lands in suit with effect from Feb. 1, 1959 on which date the Act was brought into force in Kolhapur State by a Gazette Notification, R. D. No. PKA 1058-IX/205276-L, dated January 21, 1959, published in the Government Gazette, Part IV-B, page 160, in exercise of the powers conferred by sub-s. (4) of S. 1 of the Watans Abolition Act and that the words "all incidents appertaining to the said watans shall be and are hereby extinguished" must include every kind of incident including the so-called incident of a right to partition as claimed by the plaintiff in that case, even if such right existed. With respect, we are unable to concur with the conclusion arrived at by the learned Judges. The object of S. 4 was not to affect in any manner rights created under the personal law relating to the parties and if the property belonged to joint Hindu family, then the normal rights of the members of the family to ask for partition were not in any way affected by reason of the non obstante clause contained in S. 4. In our opinion, the view that has been taken by Malvankar J., in Dhondi Vithoba's case (AIR 1973 Bom 323) is the correct view and the resumption and regrant of the land to the watandar of the watan does not take away the character of the land as joint family property or as held by tenants-in-common.

13. Accordingly, the question referred to us is answered in the negative.

14. In para 52 of the referring judgment it is made clear that if the question referred to is answered in the negative, then the decree for declaration of rights and partition as awarded by the trial Court will have to be confirmed with a rider that the decree for partition be subject to the permission of the Collector. In case such permission is not granted, all the parties will be entitled to joint possession each of the branches having one-fourth share in the property.

15. The appeal is accordingly dismissed with costs, subject to the aforesaid rider.

Appeal dismissed.

AIR 1977 BOMBAY 355

CHANDURKAR AND LENTIN, JJ.

Sadashiv Karu Jamdade and others, Petitioners v. The State of Maharashtra and others, Opponents.

Special Civil Appln. No. 650 of 1971, D/-26-3-1976.

(A) Land Acquisition Act (1894), Ss. 3 (f), 4, 6 — "Public purpose" — Acquisition of land for resettlement of project-affected persons — Acquisition is for public purpose and not for benefit of any particular individual. AIR 1956 Punj 83 and AIR 1966 Pat 420, Relied on. (Para 8)

(B) Constitution of India, Art. 359 — Suspension of proceedings — Enforcement of right under Art. 14 suspended — Proceedings challenged on ground of violation of Art. 14 — Proceedings cannot be suspended without ascertaining as to whether a case of violation is made out. AIR 1976 Cal 17, Dissented from.

With regard to the question as to what is the effect of the Presidential Proclamation under Art. 359 on certain pending matters in which a challenge to the proceedings is raised on the ground of violation of Art. 14, it is the substance of the matter which must be ascertained and the ascertainment of the substance of the matter will necessarily involve some argument and some discussion. This would mean that the proceedings cannot be mechanically suspended because they merely refer to a violation of Art. 14. A proceeding will fall within the sweep of Art. 359 (1) "when it is shown that the said claims cannot be effectively adjudicated upon without examining the question as to whether the citizen is in substance, seeking to enforce

* (Reported in (1976) 78 Bom LR 720.)

any of the said specified fundamental rights." Effective adjudication would mean that a decision in favour of the petitioner is necessary which would have the effect of enforcement of the fundamental right claimed by the petitioner. The word 'enforcement' used in Art. 359 (1) contemplates an order or a proceeding which compels obedience in accordance with the constitutional imperative in Art. 14 so far as that Article is concerned. If the object of the Presidential Proclamation is that the Court cannot compel the State to give effect to the mandate contained in Article 14, how that object would in any way be frustrated if in a given case, it is found on facts that the petitioner has not made out any case of violation of Art. 14. The dismissal of a petition on a finding that no violation of Art. 14 has been proved will not amount to any breach of the terms of the Presidential Proclamation. On the other hand, if an enquiry is made to find out whether a breach has been established and the Court stays its hands in a case where the petitioner has been able to establish its breach and further to deal with the proceedings, it will then amount to suspension of the proceedings. The state of the proceeding when the Court refuses to go ahead and issue a mandamus enforcing the fundamental right under Art. 14 even after it is found that the petitioner has made out a case in his favour for enforcement of that right will still be a state of suspension inasmuch as the proceedings have not concluded definitely. Therefore, it cannot be said that merely because averments alleging a breach of Art. 14 are made in the petition the court suspends the proceedings during the subsistence of emergency without even ascertaining as to whether the petitioner is able to make out a case of the violation of the provisions of Art. 14. AIR 1964 SC 381 and Misc. Petn. No. 344 of 1974 Dt. 25-2-1976 (Bom), Relied on. AIR 1976 Cal 17, Dissented from. (Para 17)

(C) Constitution of India, Art. 14 — Compulsory acquisition of property — Acquisition of land for resettlement of project-affected persons — Acquisition on basis of total holding but without taking into account number of members in family of holder — Not discriminatory.

The acquisition of land was for the purpose of resettlement of project-affected persons and the classes of the holders were determined on the basis of their total holding. All persons having a holding equal to the area contemplated by the slab system were treated similarly. The slab system was based on certain considerations, namely, that a person should not become landless and the mini-

mum land which must remain with him after acquisition must be equal to an economic holding. The slab system varying from 10 acres to 30 acres was clearly based on the footing that where a holder had more land, more land could also be acquired from him.

In the circumstances, the classification on the basis of total holding cannot be said to be an arbitrary one even if another basis was possible. This classification has a rational relationship with the object to be achieved, viz., to build up a pool of land available without creating a new class of landless people. Classification on basis of number of members in a family would be almost impossible task and Art. 14 does not contemplate any mini classification. The mere fact that holders of the same extent of land may have a larger or smaller number of members in their families cannot enable the petitioner to challenge the acquisition on the ground that differently situated persons have been similarly treated. AIR 1974 SC 1631, Relied on.

(Paras 22, 24)

Cases Referred:	Chronological	Paras
(1976) Misc. Petn. No. 344 of 1974, D/-		
25-2-1976 (Bom)		18
AIR 1976 Cal 17		19
AIR 1974 SC 1631 : 1974 Lab IC 1103		22
AIR 1969 SC 378		23
AIR 1966 SC 1788 : 1966 Cri LJ 1495		8
AIR 1966 Pat 420		8
AIR 1964 SC 381 : (1964) 4 SCR 797		12,
		16, 17
AIR 1956 Punj 83		8
AIR 1914 PC 20		8

Raghvendra A. Jahagirdar, for Petitioners; R. W. Adik, Advocate General with C. J. Sawant, Addl. Govt. Pleader; D. R. Dhanuka and D. P. Hegde, Asstt. Govt. Pleaders, for Opponents.

CHANDURKAR, J.:— This petition by the three petitioners, out of whom petitioner No. 1 is the father and petitioners Nos. 2 and 3 are his sons, is directed against a notification issued by the Commissioner, Poona Division, Poona, under S. 6 of the Land Acquisition Act, and a Government Resolution No. RPA-1069-R. I. dated 31st October 1969.

2. Field survey No. 534/4 area 3 acres 6 gunthas is owned by petitioner No. 2 and field survey No. 579/48 stands in the name of the petitioner No. 3, though both these fields originally stood in the name of petitioner No. 1. A notification came to be issued by the Commissioner, Poona Division, under S. 6 of the Land Acquisition Act acquiring a part of the area of survey No. 534/4 and the entire survey No. 579/4B. This notification refers to several other fields which,

according to the notification, were needed for a public purpose which was stated as for "re-settlement of the persons likely to be affected due to Krishna Dhom Project". The Krishna Dhom Project is a project undertaken by the State of Maharashtra for construction of a dam at Dhom. According to the plan, this dam is to have canals for irrigation both on the left and the right banks of Krishna river and the total irrigable area which will be irrigated through these canals including the canals from the dam at Arphal is estimated to be 1,59,200 acres. The proposed expenditure for the Krishna Dhom Project is stated by the State Government to be Rupees 2550.92. The work on this project, according to the State Government, will affect 32 villages in the western part of Taluka Wai, and a village by name Vyahalis out of these 32 villages will be fully submerged. The Gaothans of 12 of the 32 villages are expected to be fully submerged and the remaining villages will be partially submerged. As a result of this submergence the total number of persons affected will be 17,867 and, according to the Revenue Records, the Khatedars whose lands will be affected will be 2967 in number. The total land which will be submerged as a result of the Dhom Dam is expected to be 6433 acres.

3. Now, the case of the State Government is that until lands are acquired for re-settlement of the persons whose land will be affected by the construction of the dam, possession of their lands cannot be taken. This, therefore, first necessitated acquisition of land for the purposes of settlement of the persons whose lands would be submerged as a result of the construction of the dam and as a matter of policy, the Government has decided to acquire, for the purposes of resettlement, lands from the Khatedars from the benefited zone, that is, the area falling within the command area of the said project. This decision was taken by a meeting of the senior officers of the Government including the Commissioner of Poona, the Director of Settlement and Secretary to the General Administration Department, the Chief Engineer in charge of the Project, the Collectors of Satara and Sangli and other senior officials held on 13th July 1968. They had originally made out a schedule for guidance in the matter of acquisition of the land and their decision was approved by the Government. This decision came to be formulated in the form of a Government Resolution which is also impugned in this petition.

4. Since this Government Resolution has been vehemently attacked we may briefly

refer to the salient features of this Government Resolution dated 31st Oct. 1969. This Resolution referred to the fact that since a separate machinery for speedy resettlement of the project-affected persons was necessary, a Directorate of Resettlement was created in September 1965. The functions of the Director of Resettlement were stated as follows:—

- (1) Allotment of alternative lands.
 - (2) Development of alternative lands referred to in (1) above.
 - (3) Provision of drinking water supply in new village sites.
 - (4) Provision of primary schools in village sites.
 - (5) Offering employment opportunities to the displaced persons in State as well as private sector enterprises.
 - (6) Grant of loan facilities for village housing in new sites.
 - (7) Payment of compensation (a) in cash (equivalent to the difference between the value of the lands acquired from the people and the value of alternative lands provided to them and (b) in full where no such alternative lands are given.
 - (8) Wherewithals for good agriculture.
 - (9) Provision of approach and internal roads in the new sites.
 - (10) Supply of electricity for domestic as well as agricultural purposes.
 - (11) Provision of community works.
- These functions indicate that the task of resettlement was to be handled by the Director in all its aspects and it was not restricted only to making available of agricultural land for cultivation to those whose lands were submerged as a result of the Dhom Project. The task of resettlement included the re-establishment of new villages altogether with all the necessary facilities incidental to the location of Abadi or village sites. Indeed this was made further clear in paragraph 6 of the impugned Government Resolution which created an Advisory Committee at the District level and the essential items of resettlement were stated in paragraph 6 to be involving the following items:—
- (1) Selection of Gaothan sites,
 - (2) Selection of alternative, agricultural land,
 - (3) Providing civic amenities in new Gaothan, and
 - (4) Such other concessions as are necessary for the resettlement of the affected families.

The selection of Gaothan sites had to be made in consultation with the project-affected persons. With regard to the alternative

agricultural land, the following guidelines were stated:—

"It has been decided to grant alternative agricultural land to Project Affected Persons as far as possible. This mainly depends on the availability of land in the vicinity of the Project. The land that is to be granted is procured from the following sources:—

- (1) Government waste land.
- (2) Government forest and land either Revenue or Reserved.
- (3) Surplus land available under the Land Ceiling Act.
- (4) Galper lands.

If the land referred to above is either not adequate to meet the demand of the Project Affected persons or is not available at all then the land is acquired from the benefited zone and distributed to those whose lands are acquired for the projects. However, care is taken to see that the persons are left with economic unit or holding. In order to acquire lands in this way from benefited zone, Government has laid down the slab system, which is as follows:—

10 acres or less than	Nil.
10 acres	Nil.
10 to 15 acres	2 acres.
15 to 30 acres	5 acres.
More than 30 acres	5 acres plus the entire land which is more than 30 acres".

So far as distribution of land is concerned, the Government Resolution referred to the fact that it was not always possible to grant lands equivalent to what the project-affected persons have lost, but it was stated that efforts were made "to grant to displaced Khatedars at least 4 acres of dry land or two acres of seasonally irrigated land or one acre of irrigated land wherever feasible". The civic amenities which were to be provided were basic civic amenities, that is, drinking water wells, school buildings, temples, Samaj Mandirs, internal and approach roads, etc. in the new Gaothan from project funds.

5. The Government has estimated that 4902 acres and 23 gunthas of land is required for rehabilitating project-affected persons of Krishna Dhom Project. According to the Government, the petitioners held an area of 14 acres and 35½ gunthas out of which only 2 acres and 35 gunthas were perennial Bagayat lands and the land that was being acquired was only 3 acres of Jirayat land.

6. Now, when originally a notification under S. 4 of the Land Acquisition Act was issued in respect of the petitioners' land, an

enquiry under S. 5-A of the Land Acquisition Act was made and after the Land Acquisition Officer had made his report to the Commissioner, the impugned notification came to be issued. The petitioners' case before the Land Acquisition Officer, when objections were submitted under S. 5-A of the Land Acquisition Act, appeared to be that there was already a partition on 4th February 1964 as a result of which joint family land was divided between the petitioner No. 1 and his four sons and the lands which had been notified for the purposes of acquisition had gone to the share of petitioners Nos. 2 and 3. Thus according to the petitioners, the holding of each of the sons did not exceed three acres and, therefore, no part of the land could be acquired. In other words, in the enquiry under S. 5-A of the Land Acquisition Act, a partition was set up with a view to show that the holding of each of the petitioners was less than 8 or 10 acres and, therefore, their land should not be acquired. Petitioner No. 1 specifically stated that he had nothing more to add which meant that he did not want to raise any other objection to the acquisition. This objection was rejected by the Land Acquisition Officer and one of the contentions raised in the petition by the petitioners is that the Land Acquisition Officer had mechanically given effect to the Government policy Resolution without applying his mind to the facts of each case. When a notification under S. 6 of the Land Acquisition Act came to be issued on 17th December 1970, the petitioners filed this objection on 25th February 1971 challenging the acquisition proceedings.

7. So far as the present petitioners are concerned, the challenge before us mainly turned on the ground of discrimination resulting from the slab system incorporated in the Government Resolution as a criterion for acquisition of land. But before we take up the challenge on the ground of Art. 14 of the Constitution of India, we will dispose of two other challenges which have been raised by the learned Counsel for the petitioners in this petition.

8. It was contended at the outset that since under the provisions of the Land Acquisition Act land could be acquired only for a public purpose, the purpose for which the land in question is being acquired cannot be said to be a public purpose because the only object of the State Government is to take land from the petitioners and hand it over to some other person who may be one of the project-affected persons. Thus, according to the learned Counsel, the acqui-

sition of land is for the benefit of one single individual and cannot, therefore, be said to be for public purpose. The learned Counsel for the petitioners placed reliance on the decision of Privy Council in *Hamabai Framjee Petit v. Secretary of State*, AIR 1914 PC 20. Now, it is well established that no exhaustive definition of the expression "public purpose" is possible. The definition of public purpose in S. 3 (f) of the Land Acquisition Act is an inclusive definition. It will, therefore, have to be decided on the facts and circumstances of each case whether the purpose for which acquisition is sought to be made is a public purpose. It is also well established that a public purpose must include the welfare of a large section of the community as opposed to the private comfort or advantage of the members of the public (See *Arnold Rodricks v. State of Maharashtra*, AIR 1966 SC 1788). The purposes for which land is being acquired have been elaborately set out in the impugned Government Resolution and there is no doubt that the land which is being acquired by the impugned notification is acquired for the purposes of resettlement of project-affected persons. What would be the scope and extent of resettlement is also made clear in the Government Resolution. In a welfare State it was eminently proper for the Government to see that the project-affected persons, who are uprooted from the land which would be submerged under the dam, are resettled by the creation of new village sites where proper civic amenities will have to be made available to such resettled persons. What would be the nature of the basic civic amenities which the Government intends to make available to the resettled persons is also made clear in the Government Resolution. Now, in our view, it is too late in the day to even urge that when land is required for the establishment of a new village site, such a purpose cannot be called a public purpose. The whole argument of the learned Counsel on behalf of the petitioners is based on the assumption that their land is being acquired for the benefit of any particular individual. In fairness to the learned Counsel for the petitioners, it must, however, be stated that he conceded that it was not possible for the petitioners to name any particular individual for whose benefit the land was going to be acquired. That the land was being acquired for the benefit of the community as such—the community consisting of the project-affected persons—is now beyond dispute. The decision of the Government as contained in the impugned resolution shows that it has arrived at a certain figure

with regard to the requirement of land in order to resettle the project-affected persons. Obviously, the acquisition is intended to build up a land pool out of which land would be made available for different uses such as allocation of building sites to individuals, reservation of land for communal purposes, land over which buildings will be constructed and wells will be dug and it is difficult to entertain an argument that when land is acquired for building up such a pool of land, the land is being acquired from the petitioners for the benefit of any particular individual. We have, therefore, no doubt in this case that resettlement of project-affected persons was clearly a public purpose for which a notification for acquisition of land under the provisions of the Land Acquisition Act could validly be taken. If any authority is needed for the proposition that acquisition of land for the purposes of village sites is a public purpose, it can be found in the decisions of the Punjab and the Patna High Courts relied upon by the learned Advocate General in *Tilak Ram v. State of Punjab*, AIR 1956 Punj 83, and *Muhammad Oamar v. State of Bihar*, AIR 1966 Pat 420. In *Tilak Ram v. State of Punjab*, a Division Bench of the Punjab High Court took the view that there was nothing illegal or unjust in the Government taking steps to rehabilitate thousands of persons who had been displaced as a result of acquisition of their land for a public purpose by acquiring land for them in the near vicinity of their original homes and resettle them on that land and such an object was a public purpose and it could not be placed on the same footing as a transfer of land from one individual to another. A Division Bench of the Patna High Court in *Muhammad Oamar v. State of Bihar* has also taken a similar view. The acquisition in that case was for rehabilitation and resettlement of those villagers whose lands were taken away for what was known there as Hatia Project which was started for the construction of the factories and other buildings of Heavy Engineering Corporation at Hatia near Ranchi town and the question was whether acquisition for the rehabilitation and resettlement of the villagers whose lands had been taken away for the project was acquisition for public purpose. The Division Bench took the view that the rehabilitation of persons displaced by the acquisition made for the Corporation was a public purpose and land could be validly acquired.

9. The second contention raised by the learned Counsel for the petitioners was that the notification under S. 6 of the Land Acquisition Act was vitiated because what pur-

ported to be an enquiry under S. 5-A of the Land Acquisition Act was in effect a farce of an enquiry because the Land Acquisition Officer was obliged to give effect to the scheme contained in the Government Resolution and the provisions of S. 5-A of the Land Acquisition Act cannot, therefore, be said to have been complied with.

10. Now, S. 5-A of the Land Acquisition Act requires a person interested in any land which has been notified under S. 4 to submit his objection to the acquisition to the Collector or the Land Acquisition Officer in writing. It is then obligatory on the Land Acquisition Officer to give the objector an opportunity of being heard either in person or by pleader and after making such enquiry as the Land Acquisition Officer thinks necessary, he has to make a report in respect of the land which has been notified under S. 4 (1) to the Commissioner. The State Government has produced the entire record of the land acquisition proceedings. The proceedings show that the only objection to the acquisition made by petitioner No. 1, whose name alone appeared to be recorded in the Revenue Records as the owner of the land, was that he had orally partitioned the lands five years back and each of his sons was cultivating three acres of land. The obvious object of this objection was to show that in view of the impugned Government Resolution, since the second and the third petitioners had land less than 10 acres, their lands should not be acquired. The record shows that the petitioner No. 1 who on the entries in the Revenue Records, was the only person interested, was heard. He had produced before the Land Acquisition Officer a copy of the partition deed said to have been executed in 1964 on a general stamp paper of Rs. 3/-. The Land Acquisition Officer found that the partition deed was not a registered document, that the partition had not been given effect to in the Record of Rights and he, therefore, rejected the story of partition as not genuine. Now, when on facts the Land Acquisition Officer has held that the story of partition has not been proved, it is difficult to see how this report is open to challenge on the ground that the Land Acquisition Officer was mechanically giving effect to the impugned Government Resolution. Indeed it appears that if it could have been successfully shown to the Land Acquisition Officer that petitioners Nos. 2 and 3 have been separately holding land as a result of a valid partition, it may be that the acquisition proceedings would have been dropped in view of the policy of the Government as contained in the impugned Govern-

ment Resolution. It is, therefore, difficult for us to accept the argument that the enquiry under S. 5-A of the Land Acquisition Act was mere farce and, therefore, the notification under S. 6 was vitiated.

11. We now come to the main debate which took place at the bar on the question as to whether any final orders could be passed in this petition in view of the fact that the impugned Government Resolution has been challenged on the ground of violation of the equal protection clause contained in Art. 14 of the Constitution of India. The argument runs thus: The impugned Government Resolution contains a decision to acquire land only on the basis of the total holding of the Khatedar irrespective of the size of the family of each Khatedar and thus whatever may be the size of the family of the Khatedar, they are all treated in the same manner with regard to the extent of the liability of their lands to acquisition. Thus equal treatment is meted out to persons who are differently situated and there is, therefore, a violation of Article 14. Further, the President of India has issued a Proclamation under Art. 359 (1) of the Constitution of India which requires all proceedings pending in any Court for the enforcement of a right under Art. 14 of the Constitution to be suspended for the period during which the Proclamations of Emergency made under cl. (1) of Article 359 of the Constitution on 3rd December 1971 and on 27th June 1975 were both in force. Therefore, as long as any one of the two proclamations of Emergency continues to be in force, the proceedings must stand suspended in the same state as they were on 27th June 1975, that is, the date of the Proclamation under Art. 359 (1) of the Constitution of India. It is, therefore, argued that this Court must stay its hands and must not deal any further with the petition of the petitioners during the subsistence of the Proclamation of Emergency.

12. Now, the question as to what was the effect of the Presidential Proclamation on certain pending matters in which a challenge to the land acquisition proceedings was raised on the ground of violation of Article 14 was involved in a large number of cases. We have therefore heard the learned Counsel for the petitioners at considerable length and we have also heard Mr. Rane who is appearing as Counsel for the petitioner in Special Civil Application No. 2908 of 1974. Counsel for petitioners heavily relied on the decision of the Supreme Court in *Makhan Singh v. State of Punjab*, (1964) 4 SCR 797 : (AIR 1964 SC 381), a decision on

which the learned Advocate General appearing for the State of Maharashtra also heavily relies for the proposition that a mere mention of Article 14 in a petition could not have the effect of keeping the proceedings suspended and that the Court was entitled to go into the question as to whether a decision on the alleged violation of Art. 14 of the Constitution was necessary for effectively determining the right, the violation of which has been complained of by the petitioner.

13. Since much turns on the construction that we shall place on the Presidential Proclamation of 27th June 1975, we propose to reproduce the provisions of Art. 359 as also the Presidential Proclamation. Art. 359 of the Constitution reads as follows:—

“359. (1) Where a Proclamation of Emergency is in operation, the President may by order declare that the right to move any court for the enforcement of such of the rights conferred by Part III as may be mentioned in the order and all proceedings pending in any court for the enforcement of the rights so mentioned shall remain suspended for the period during which the Proclamation is in force or for such shorter period as may be specified in the order.

(1A) While an order made under cl. (1) mentioning any of the rights conferred by Part III is in operation, nothing in that Part conferring those rights shall restrict the power of the State as defined in the said part to make any law or to take any executive action which the State would but for the provisions contained in that Part be competent to make or to take, but any law so made shall, to the extent of the incompetency, cease to have effect as soon as the order aforesaid ceases to operate, except as respects things done or omitted to be done before the law so ceases to have effect.

(2) An order made as aforesaid may extend to the whole or any part of the territory of India.

(3) Every order made under cl. (1) shall, as soon as may be after it is made, be laid before each House of Parliament.”

It may be stated that clause (1A) above was added by the Constitution Thirty-eighth Amendment Act, 1975. The words “enforcement of rights” are to be found also in Article 226 of the Constitution of India as also in Article 32 of the Constitution of India. Article 226 (1) of the Constitution provides:

“226. (1) Notwithstanding anything in Art. 32, every High Court shall have power, throughout the territories in relation to which it exercises jurisdiction, to issue to any person or authority, including in appro-

priate cases any Government, within those territories directions, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, or any of them, for the enforcement of any of the rights conferred by Part III and for any other purpose.”

The Proclamation issued by the President of India on 27th June 1975 reads as follows:—

“In exercise of the powers conferred by cl. (1) of Art. 359 of the Constitution, the President hereby declares that the rights of any person (including a foreigner) to move any court for the enforcement of the rights conferred by Art. 14, Art. 21 and Art. 22 of the Constitution and all proceedings pending in any Court for the enforcement of the abovementioned rights shall remain suspended, for the period during which the proclamation of emergency made under cl. (1) of Art. 352 of the Constitution on the 3rd December 1971 and on the 25th June, 1975 are both in force.

This order shall extend to the whole of the territory of India except the State of Jammu and Kashmir.

This order shall be in addition to and not in derogation of any order made before the date of this order under cl. (1) of Art. 359 of the Constitution.”

The main contention on behalf of the petitioners as well as the one advanced by Mr. Rane is that the suspension of proceedings referred to in the latter part of the Presidential Declaration must be construed with regard to the State of the proceedings pending in a Court for the enforcement of a fundamental right either under Art. 14, Article 21 or Article 22 with reference to 27th June 1975 on which day the Presidential Proclamation was issued. It is contended that the only criterion for finding out whether a proceeding falls within the latter part of the Presidential Proclamation is the nature of the relief asked for in the petition. It is urged that if the Court proceeds to hear the petition and disposes of the petition even by dismissing it, there will be no suspension of the proceeding, but there will be a termination of the proceeding which is not permissible in view of the express words in the latter part of the Proclamation. However, when it was put to the learned Counsel as to whether or not even an interim order could be passed in a proceeding, an alternative argument was advanced that it may be possible for the Court to ascertain whether Art. 14 is involved in the case, but once it is found that the petitioner wants to urge for a relief based on the alleged violation of the right

under Art. 14, the proceedings must then be stayed whatever may be the consequences. Indeed, the learned Counsel went to the extent of contending that once a petition is admitted, notwithstanding the fact that a challenge on the ground of Art. 14 is not even possible on the facts alleged in the petition, no final orders in that petition could be made and the consequences of any particular injunction or a stay order issued in the proceedings may continue to the prejudice of the State or for the matter of that to the prejudice of any party whatsoever and such a consequence, if it results from the terms of the Presidential Proclamation, must necessarily follow.

14. On the other hand, it was contended by the learned Advocate General that before an order for suspension of the proceedings is passed, the Court is duty bound to see that the petitioner proves that he has a right, that there is a violation of such a right in the sense that he has a cause of action and that the proceeding is really a proceeding for enforcement of such a right. In other words, it is contended that before an order for suspension of the proceeding till the revocation of the Proclamation is made, the Court will have to decide whether the proceeding is for enforcement of a fundamental right.

15. Now, so far as a citizen is concerned, there can be no doubt that the fundamental right under Article 14 of the Constitution vests in him by the very provisions of the Constitution. The question, however, is whether when in a given proceeding a petitioner contends or alleges that his fundamental right under Art. 14 has been violated and, therefore, the proceedings should remain suspended, the Court is bound to accept ipse dixit of a petitioner or whether it is open to the Court to go further into the matter and find out whether there is in fact any violation of a fundamental right and it is unable to give any relief to the petitioner because of the amended Presidential Proclamation in the matter of enforcement of the rights enumerated in the Presidential Declaration.

16. It is difficult for us to hold that merely a label given by a petitioner to the petition would be conclusive of the question as to whether the proceedings must stand suspended under the terms of the Presidential Proclamation of 27th June 1975. There can be no doubt that in a proceeding like the instant one, the petitioner seeks to enforce his alleged right under Art. 14 against the State. What then is the effect when the Presidential Proclamation makes it imperative for the pro-

ceeding for enforcement of such a right to be suspended? The object of the Proclamation, which it does not seem possible to dispute, is that immunity is granted to the State during the Emergency against any challenge to the action of the State on the ground of violation of Article 14 of the Constitution. There can be no doubt that the effect of the Presidential Proclamation is that in a pending proceeding the Court will not be able to make any order or issue any writ in order to enforce a fundamental right referred to in the Presidential Proclamation. That appears to us to be the object of suspension of these proceedings contemplated by the Presidential Proclamation. But it cannot be the object of the Presidential Proclamation that where a pending proceeding can be terminated without giving a relief amounting to enforcement of a fundamental right, the proceeding must still stand suspended. If the State is not going to be affected in any manner whatsoever by an order in a pending proceeding in the matter of enforcement of a fundamental right the violation of which is alleged by a petitioner, we fail to see why such a proceeding should remain suspended merely because it falls within the description of a proceeding for enforcement of a right referred to in the Proclamation. The scope of a declaration under Art. 352 (1) of the Constitution was considered at length by the Supreme Court in *Makhan Singh's case* cited supra (AIR 1964 SC 381). The Supreme Court dealt with the scope of Art. 359 (1) in that case and it was observed as follows:—

“Since the object of Art. 359 (1) is to suspend the rights of the citizens to move any court, the consequence of the Presidential Order may be that any proceeding which may be pending at the date of the Order remains suspended during the time that the Order is in operation and may be revived when the said Order ceases to be operative; and fresh proceedings cannot be taken by a citizen after the order has been issued, because the Order takes away the right to move any court and during the operation of the Order, the said right cannot be exercised by instituting a fresh proceeding contrary to the Order. If a fresh proceeding falling within the mischief of Art. 359 (1) and the Presidential Order issued under it is instituted after Order has been issued, it will have to be dismissed as being incompetent. In other words, Art. 359 (1) and the Presidential Order issued under it may constitute a sort of moratorium or a blanket ban against the institution or continuance of any legal action subject to two

important conditions. The first condition relates to the character of the legal action and requires that the said action must seek to obtain a relief on the ground that the claimant's fundamental rights specified in the Presidential Order have been contravened, and the second condition relates to the period during which this ban is to operate. The ban operates either for the period of the Proclamation or for such shorter period as may be specified in the Order."

It is on these observations that the learned Counsel for the petitioners relied and, according to him, the first condition is clearly satisfied in the instant case inasmuch as the action in the instant case is one which seeks to obtain a relief on the ground that the claimant's fundamental rights specified in the Presidential Order had been contravened. It is vehemently urged that both the conditions laid down by the Supreme Court are satisfied in the instant case and during the time the Presidential Proclamation of 27th June 1975 remains in force, the present proceedings must stand suspended.

17. The observations of the Supreme Court quoted earlier must, however, be read along with the other observations made later in the same judgment. It may be remembered that in *Makhan Singh's case* (AIR 1964 SC 381) the constitutional validity of S. 3 (2) (15) (i) and S. 40 of the Defence of India Act, 1962, and R. 30 (1) (b) of the Defence of India Rules was challenged before the Supreme Court on the ground that they contravened the fundamental rights of the petitioners under Arts. 14, 21, 22 (4), (5) and (7) of the Constitution. Later in the decision, the Supreme Court dealt with the question as to what was the nature of the proceedings which were barred by the Presidential Order issued under Art. 359 (1) and dealing with this question, it was observed as follows:—

"The next question to consider is, what is the nature of the proceedings which are barred by the Presidential Order issued under Art. 359 (1)? They are proceedings taken by citizens for the enforcement of such of the rights conferred by Part III as may be mentioned in the order. If a citizen moves any court to obtain a relief on the ground that his fundamental rights specified in the Order have been contravened, that proceeding is barred. In determining the question as to whether a particular proceeding falls within the mischief of the Presidential Order or not, what has to be examined is not so much the form which the proceeding has taken, or the words in which the relief is claimed, as the substance of the

matter and consider whether before granting the relief claimed by the citizen, it would be necessary for the Court to enquire into the question whether any of his specified fundamental rights have been contravened. If any relief cannot be granted to the citizen without determining the question of the alleged infringement of the said specified fundamental rights, that is a proceeding which falls under Art. 359 (1) and would, therefore, be hit by the Presidential Order issued under the said Article. The sweep of Article 359 (1) and the Presidential Order issued under it is thus wide enough to include all claims made by citizens in any court of competent jurisdiction when it is shown that the said claims cannot be effectively adjudicated upon without examining the question as to whether the citizen is in substance, seeking to enforce any of the said specified fundamental rights."

When it was contended before the Supreme Court that the proceeding under S. 491 (1) (b), Criminal Procedure Code, would not fall within the sweep of the Presidential Order, the Supreme Court rejected the contention with these observations:

"In this connection, it is hardly necessary to emphasise that in deciding the present question, we must take into account the substance of the matter and not attach undue or exaggerated importance to the form of the proceedings. If the form which the proceedings take is held to be decisive in the matter, it would lead to this irrational position that an application containing the requisite averments in support of a plea for the release of the detenu would be thrown out by the High Court if in form it purports to be made under Art. 226, whereas it would be entertained and may indeed succeed if it purports to be made under S. 491 (1) (b)... Thus the true legal position, in substance, is that the clause "the right to move any court" used in Art. 359 (1) and the Presidential Order takes in all legal actions intended to be filed, or filed, in which the specified rights are sought to be enforced, and it covers all relevant categories of jurisdictions of competent courts under which the said actions would otherwise normally have been entertained and tried."

The above quoted observations of the Supreme Court are, in our view, a complete answer to the contention raised on behalf of the petitioners that the moment the petition is merely framed as one to enforce the right under Art. 14 of the Constitution, it must be deemed to be covered by the Presidential Proclamation and the proceedings must be

stayed. As pointed out by the Supreme Court, it is the substance of the matter which must be ascertained and the ascertainment of the substance of the matter will necessarily involve some argument and some discussion. This would mean that the proceedings cannot be mechanically stayed or suspended because they merely refer to a violation of Article 14 of the Constitution. It is important to note that the observations of the Supreme Court indicate that a proceeding will fall within the sweep of Art. 359 (1) "when it is shown that the said claims cannot be effectively adjudicated upon without examining the question as to whether the citizen is in substance, seeking to enforce any of the said specified fundamental rights." It appears to us that the use of the words "cannot be effectively adjudicated upon" is of some significance. It appears to us that effective adjudication would mean that a decision in favour of the petitioner was necessary which would have the effect of enforcement of the fundamental right claimed by the petitioner. The word 'enforce' means, as per the Random House Dictionary, amongst other things, "compel obedience to". Thus the word 'enforcement' used in Art. 359 (1) or in Article 226 of the Constitution, contemplates an order or a proceeding which compels obedience in accordance with the constitutional imperative in Art. 14 so far as that Article is concerned. The effect of the Presidential Proclamation under Article 359 is that the Court cannot compel the State to give effect to the mandate contained in Article 14. If that was the object of the Proclamation and the provisions of Art. 359 (1), we fail to see how that object would in any way be frustrated if in a given case, it is found on facts that the petitioner has not made out any case of violation of Art. 14. The dismissal of a petition consequent on a finding that no breach or violation of the fundamental right under Art. 14 has been proved will not amount to any breach of the terms of the Presidential Proclamation. On the other hand, if an enquiry is made to find out whether a breach has been established and the Court stays its hands in a case where the petitioner has been able to establish its breach and further to deal with the proceedings, it will then amount to suspension of the proceedings in compliance with the Presidential Proclamation. The meaning of the word 'suspend' as given in the Random House Dictionary is "to hold or keep undetermined; refrain from forming or concluding definitely". The state of the proceeding when the Court refuses to go ahead and issue a mandamus or a direc-

tion enforcing the fundamental right under Art. 14 even after it is found that the petitioner has made out a case in his favour for enforcement of that right will still be a state of suspension inasmuch as the proceedings have not concluded definitely. We are, therefore, unable to accept the contention of the learned Counsel for the petitioners as also of Mr. Rane that merely because averments alleging a breach of Art. 14 of the Constitution are made in the petition, we must adjourn the proceedings sine die and allow the proceedings to pend indefinitely without even ascertaining as to whether the petitioner is able to make out a case of the violation of the provisions of Article 14 of the Constitution.

18. We may in passing refer to a decision of Deshmukh J. dated 25-2-1976 relied upon by the learned Advocate General in Misc. Petn. No. 344 of 1974 (Bom), *Bharat Barrel and Drum Mfg. Co. Pvt. Ltd. v. The State of Maharashtra*, in which a contention identical to the one which is advanced before us was rejected by the learned Judge. A notification of acquisition was challenged in that case on the ground of violation of Article 14 of the Constitution and it was contended that the proceedings could not be proceeded with in view of the Presidential Proclamation of 27th June 1975 and of January 8, 1976 suspending the right to approach a court for enforcement of fundamental rights under the Constitution. The notification related to acquisition for a public purpose and an interim order was issued after the petition was admitted and the consequence was that if the petition was not heard during the pendency of the Emergency, the acquisition would be postponed. The learned Judge having heard the parties at considerable length came to the conclusion that the petitioners' alleged challenge under Art. 14 of the Constitution was no challenge at all, but that the application was a frivolous one merely to prolong the acquisition by the State for the purpose of the Municipal Corporation. On merits the learned Judge took the view that the petitioners in that case had no valid right at all to oppose the acquisition and an attempt to resort to provisions of Art. 14 of the Constitution was a mere pretext to somehow gain time and put off the evil day of acquisition.

19. The learned Counsel for the petitioners has placed reliance on the decision of the Calcutta High Court in *Jagdish v. Union of India*, AIR 1976 Cal 17. That was a case in which the petitioner had challenged notice under S. 269 (1) of the Income-tax Act, 1961, and in the petition the provisions

of Section 269-C to Section 269-I and Section 269-R were challenged as ultra vires of Article 19 (1) (f), Article 14 and Article 31 of the Constitution. An injunction was granted and it was contended before the learned Judge that in view of the Presidential Proclamation, the proceeding should be suspended and in the premises, the interim order must necessarily continue. The learned Judge dealing with this contention observed:

"The position seems to be rather unfortunate because in this case there was an interim order and the effect would be that the interim order would continue so long as the emergency continues or until the proclamation is revoked, though the examination of the question which was possible because the matter is ready for hearing, might have revealed that the proceedings under the notice were valid. In numerous cases (sic) under Art. 14 are involved and while new applications or cases where Article 14 is resorted to are no longer possible during the continuance of the emergency, the persons who have obtained Rules or orders of injunction prior to the 27th of June, 1975 would continue to enjoy those injunctions without the Courts having the opportunity to examine the validity or the propriety of the said orders simply because the questions under Article 14 are involved in those applications."

The learned Judge, therefore, adjourned the hearing of the petition sine die. There is no doubt that this decision wholly supports the contention raised on behalf of the learned Counsel for the petitioners, but having regard to the discussion made earlier, we are unable to agree with the view taken by the learned Judge of the Calcutta High Court.

20. We have, therefore, heard Mr. Jaha-girdar on the merits and the only contention raised is that the Government Resolution is bad because it treats differently situated persons in the same manner. As already pointed out, the argument is that while laying down the extent of lands to be acquired from each Khatedar, no account is taken of the number of members of the Khatedar's family and that is why the impugned Government Resolution amounts to infringement of the guarantee of equality under Article 14 of the Constitution.

21. Now, it is difficult for us to even entertain such a challenge to the Government Resolution. It cannot be disputed that the petitioner No. 1's lands are not being acquired by the Government Resolution. The acquisition of the petitioner No. 1's

lands is made under the provisions of the Land Acquisition Act. Those provisions are not challenged. Neither, it must be said in fairness to the petitioner's counsel, was it urged that acquisition of land under the provisions of the Land Acquisition Act was in any way infirm or defective. The acquisition of petitioner No. 1's land is not directly the result of the impugned Government Resolution. The impugned Government Resolution merely provides for certain guidelines. It cannot be disputed that the petitioner No. 1 could not have posed any challenge successfully to a notification under the Land Acquisition Act even if his entire holding was validly acquired as a result of a notification under S. 6 of the Land Acquisition Act. Such an acquisition of the entire holding was clearly permissible under law. His grievance appears to be that while his entire land could have been taken validly under the provisions of the Land Acquisition Act, land to a lesser extent has been taken in consequence of a Government Resolution and this acquisition is bad because the extent of the land was so fixed that the size of the family of other Khatedars in the same slab has not been taken into account. It is difficult for us to see how such a challenge could be entertained even prima facie. As the Resolution indicates, various modes have been set out therein in order to build up the pool of land necessary for the resettlement of project-affected persons. Government would use its own land; it would use the land which came as surplus land under the provisions of the Maharashtra Agricultural Lands (Ceiling on Holdings) Act, 1961; if possible, it would use Galper lands and if even then the requirements of land were not met, land would be acquired from private Khatedars. It is there that for the guidance of the Land Acquisition Officer, it has been laid down that he must see that at least an economic holding, which means about 8 acres, is left with the Khatedar. In other words, care was taken to see that another class of landless people is not created as a result of the Land Acquisition proceedings. Now, these were merely guidelines for determining as to how much of land should be taken from each Khatedar though, if necessary, the entire land of the Khatedar was liable to be acquired validly under the statutory provisions of the Land Acquisition Act.

22. Even otherwise it appears to us that the challenge to acquisition of land on the ground of violation of Article 14 of the Constitution is entirely misconceived. It is

now well established that Article 14 does not prohibit classification, but the classification must be founded on an intelligible differentia and the differentia must have a rational relation with the object to be achieved. In other words, a reasonable classification is always permissible. The object of the resettlement scheme is to obtain land. A classification based on the total holding cannot be said to be arbitrary or unreasonable. The slab system which has been laid down in the Government Resolution is thus based on certain considerations, namely, that a person should not become landless and the minimum land which must remain with him after acquisition must be equal to an economic holding. The slab system varying from 10 acres to 30 acres is clearly based on the footing that where a Khatedar has more land, more land can also be acquired from him. Therefore, it cannot be said that the classification is arbitrary and there is no doubt that this classification has a rational relationship with the object to be achieved, namely, to build up a pool of land available without creating a new class of landless people. Not much need be said to point out that the kind of criterion which is suggested by the learned Counsel for the petitioners is almost an impossibility. To determine as to how much land should be acquired on the basis of the number of members in the family would be an almost impossible task and Article 14 does not contemplate any mini classification. There can be no rigid formula of a reasonable classification and whether a classification is reasonable or not will have to be decided on the facts of each case. As long as a classification includes all persons and things similarly situated, the classification could be held to be valid and reasonable. The classes of Khatedars referred to in the impugned Government Resolution are determined on the basis of their total holding. The content of the words "similarly situated" was discussed by the Supreme Court in *Mohammad Shujat Ali v. Union of India*, AIR 1974 SC 1631 in paragraph 25 as follows:—

"But the question is: what does this ambiguous and crucial phrase, "similarly situated" mean? Where are we to look for the test of similarity of situation which determines the reasonableness of a classification? The inescapable answer is that we must look beyond the classification to the purpose of the law. A reasonable classification is one which includes all persons or things similarly situated with respect to the purpose of the law. There should be no discrimination between one person or thing

and another, if as regards the subject-matter of the legislation their position is 'substantially the same. This is sometimes epigrammatically described by saying that what the constitutional code of equality and equal opportunity requires is that among equals, the law should be equal and that like should be treated alike. But the basic principle underlying the doctrine is that the legislature should have the right to classify and impose special burdens upon or grant special benefits to persons or things grouped together under the classification, so long as the classification is of persons or things similarly situated with respect to the purpose of the legislation, so that all persons or things similarly situated are treated alike by law."

The Government Resolution deals with the question of the extent of land to be acquired from the Khatedars on the basis of the extent of the land held by the Khatedar and all Khatedars having a holding equal to the area contemplated by the slab system laid down in the said resolution are treated similarly. If this basis cannot be said to be in any way arbitrary, even if another basis was possible, that would be no ground for striking down the guidelines on the ground of infraction of Article 14 of the Constitution.

23. The learned Counsel for the petitioners heavily relied on the decision of the Supreme Court in *State of Kerala v. Haji K. Kutty*, AIR 1969 SC 378. That was a case in which the provisions of the Kerala Buildings Tax Act, 1961, were challenged because for determining the quantum of tax, the sole test made was the area of the floor of the building and it was found that the Act applied to the entire State of Kerala and whether the building was situated in a large industrial town or in an insignificant village, the rate of tax was determined by the floor area; it did not depend upon the purpose for which the building was used, the nature of the structure, the town and locality in which the building is situated, the economic rent which may be obtained from the building, the cost of the building and other related circumstances which may appropriately be taken into consideration in any rational system of taxation of building. Striking down the provisions of that Act, the Supreme Court observed as follows:—

"But in enacting the Kerala Buildings Tax Act no attempt at any rational classification is made by the legislature. As already observed, the Legislature has not taken into consideration in imposing tax the class to which a building belongs, the nature of

construction, the purpose for which it is used, its situation, its capacity for profitable user and other relevant circumstances which have a bearing on matters of taxation. They have adopted merely the floor area of the building as the basis of tax irrespective of all other considerations. Where objects, persons or transactions essentially dissimilar are treated by the imposition of a uniform tax, discrimination may result, for, in our view, refusal to make a rational classification may itself in some cases operate as denial of equality."

Now, those observations were particularly made in the context of imposition of a uniform tax only on the basis of floor area irrespective of all other considerations and where no attempt was made to make any rational classification. The failure to make any rational classification was itself held to amount to a denial of equality. In the instant case distinct and clear guidelines in the matter of extent of land to be acquired have been laid down with reference to the total holding of the Khatedars. The observations of the Supreme Court relied upon cannot, therefore, be of any assistance to the petitioners.

24. We have already pointed out that a classification on the basis of total holding cannot be said to be an arbitrary classification. The mere fact that holders of the same extent of the land may have a larger or smaller number of members in their families cannot enable the petitioners to challenge the decision to acquire land on the ground that differently situated persons have been similarly treated because it was perfectly permissible to make a classification on the basis of the total holding of the Khatedars. Therefore, even assuming that it was permissible to consider the challenge to the guidelines contained in the Government Resolution, we find that there is a clear and a distinct basis for the classification and there was no question of any violation of the provisions of Article 14 of the Constitution.

25. In the view which we have taken, we are unable to hold in favour of the petitioner No. 1 that the proceedings for acquisition of his land were in any way infirm on the ground of violation of the provisions of Article 14 of the Constitution. This cannot, therefore, be treated as a case in which an effective determination in favour of the petitioner No. 1 of the challenge on the ground of alleged violation of Article 14 becomes necessary.

26. In this view of the matter, we must reject the petition. Rule discharged. How-

ever, there will be no order as to costs of the petition.

Petition dismissed.

AIR 1977 BOMBAY 367

NAIK AND SAWANT, JJ.

Ramabai Balkrishna Nene and others, Petitioners v. The Secretary Urban Development Public Health and Housing Deptt. and others, Opponents.

Special Civil Appln. No. 1087 of 1971, D/- 12-10-1976.

(A) Bombay Town Planning Act (1954), S. 10 — Section does not contemplate individual notices. (Para 20)

(B) Constitution of India, Arts. 359 (1) and 226 — Order under Art. 359 made by President — Effect on pending proceedings and interim orders passed in those proceedings. AIR 1976 Cal 17 Dissented from. Order in Misc. Petn. No. 501 of 1975 D/- 13-8-1976 (Bom) Overruled.

When order is made by the President under Art. 359 (1) what remains suspended is the pending proceeding which in truth and substance is for the enforcement of the right mentioned in the Presidential Order and not the enquiry about the existence or otherwise of such right. It could never have been intended that the proceedings which are liable to be dismissed in limine on the ground of laches as being hopelessly barred by time with no reasonable explanation for the delay, or on the ground of suggestio falsi and suppressio veri, or on the ground of res judicata should also be kept pending with the interim orders of stays and injunctions granted therein, with full force during the period mentioned in the President's order merely because there is an allegation in the petition about the infringement of any of the fundamental rights mentioned in the Presidential Order. The State may also prove that the so-called infringement of a fundamental right is only a frivolous allegation and that in fact there is no such violation. In such a case no injustice would be done if the petition is disposed of and the rule is discharged. It is only such proceedings where the petitioner in fact at the time of enquiry proves that there is an infringement of a fundamental right and that he cannot hope to get the rule made absolute except on that ground alone which are intended to be attracted by the Presidential Order suspending the pending proceedings.

EU/EU/B615/77/RSK

AIR 1977 Bom 355 held is not inconsistent with AIR 1964 SC 381, or with AIR 1976 SC 1207. Order in Misc. Petn. No. 501 of 1975, D/- 13-8-1976 (Bom) Overruled.

(Paras 44, 46, 47).

It is inconceivable that when the main proceedings for enforcement of the fundamental rights mentioned in the Presidential Order is itself kept suspended any interlocutory order issued in that proceeding could still continue to be operative. That would make the very object of the proclamation of the President and the provisions under Art. 359 of the Constitution nugatory. AIR 1976 Pat 248 Relied on; AIR 1976 Cal 17 Dissented from; Order in Misc. Petn. No. 501 of 1975 D/- 13-8-1976 (Bom) Overruled.

(Para 77)

Cases Referred:	Chronological	Paras
AIR 1977 Bom 355	9, 50, 54, 76, 82, 84	
AIR 1976 SC 1207 : 1976 Cri LJ 945		
	33, 48, 64, 74, 76, 84	
(1976) Misc Petn No. 344 of 1974, D/- 25-2-1976 (Bom)		52
(1976) Misc. Petn. No. 501 of 1975 D/- 13-8-1976 (Bom)		53
AIR 1976 Cal 17		79, 81
AIR 1976 Pat, 248		78, 81
AIR 1971 SC 530		74, 75
AIR 1968 SC 303		20
AIR 1968 SC 647		75
AIR 1967 SC 1373		20
AIR 1964 SC 173 : (1964) 1 Cri LJ 132	28, 29, 33, 35, 63, 66, 68, 73, 76	
AIR 1964 SC 381 : (1964) 1 Cri LJ 269	8, 29, 33, 35, 36, 48, 49, 50, 55, 57, 59, 63, 68, 73, 74, 76, 81	
(1959) 3 All ER 656		21
1901 A. C. 495		75

M. V. Paranjape with P. M. Pradhan for V. N. Ganpule, for Petitioners; C. J. Sawant, Addl. Govt. Pleader with A. M. Salik, Asstt. Govt. Pleader, (for Nos. 1, 2 and 4) and N. B. Shetye for Y. S. Chitale (for No. 3) for Opponents.

NAIK, J.:— The petitioners have filed this petition under Arts. 226 and 227 of the Constitution of India, for quashing the notification issued by the Government on 7th July 1966 and 26th November 1970 under S. 10 of the Bombay Town Planning Act, 1954 modifying the development plan which was proposed by the Poona Municipal Corporation.

2. The petitioners are owners of old city survey No. 906/1 situate in Poona, which is to the north of Laxmi Road. It appears that on 28th Nov. 1958, the Municipal Corporation of Poona made a declaration of its intention of making a develop-

ment plan under S. 4 (1) of the Bombay Town Planning Act, 1954 and the plan was actually published as required by S. 3 (1) of that Act in the Bombay Government Gazette dated 26th Feb. 1959. On 30th Sept. 1964, the Corporation submitted a modified plan to the Government after following the requisite procedure. In the modified plan the Corporation had reserved the property comprised in city survey No. 437/C which is to the north of the petitioner's city survey No. 906, for the purpose of a play-ground. But then the Government modified that plan by its order dated 7th July 1966 whereby the Government directed that the city survey No. 437 which is to the north of petitioners' city survey No. 906 should be used as a car parking space instead of a play ground. It was further provided that with a view to have access to that car parking space from Laxmi road which goes from east to west, the petitioner's property should be reserved as access to that parking space. This modified plan as modified by the Government under S. 10 of the Act, was in fact published in the Government Gazette on 8th July 1966.

3. On 11th Jan. 1967, the Maharashtra Regional and Town Planning Act, 1966 came into force. The Standing Committee of the Poona Municipal Corporation, therefore, passed a resolution dated 22nd Feb. 1969 for acquisition of the petitioners' land as provided by the sanctioned modified plan. The said proposal was sent to the Commissioner of Poona Division on 28th Mar. 1969. The Commissioner, therefore, issued a notification under S. 126 (2) of the Maharashtra Regional and Town Planning Act, 1966 on 26th Nov. 1970 wherein the petitioners' property which was proposed to be acquired was described as city survey No. 906 admeasuring 145.5 sq. metres. That notification was published in the Maharashtra Government Gazette on 17th Dec. 1970.

4. The 2nd respondent who is a Land Acquisition Officer thereafter issued a notice to the petitioners under S. 9 (4) of the Land Acquisition Act, on 23rd Dec. 1970. The petitioners' statement was recorded on 11th Jan. 1971 and the petitioners pointed out that their property was not properly described and that the area described was also incorrect. That is why a corrigendum dated 5th Feb. 1971 was published in the Maharashtra Government Gazette describing the petitioners' property as city survey No. 906/1 of Sadashiv Peth, admeasuring 352.8 sq. metres and city survey No. 906/2 admeasuring 556.9 sq. metres. This notifica-

tion was published in the Maharashtra Government Gazette on 20th Feb. 1971.

5. The petitioners therefore approached this Court on 3rd May 1971 challenging the order of the Government passed under S. 10 of the Bombay Town Planning Act on 7th July 1966 and published in the Government Gazette on 8th July 1966. The vires of the Bombay Town Planning Act is challenged on the ground that it does not provide for individual notices and therefore it being an unreasonable restriction on the petitioners' right to own property, it is void under Art. 19 of the Constitution of India. The vires of S. 10 of the Town Planning Act is also challenged on the ground that the Government is authorised to make a modification of the plan without giving any opportunity to the concerned holders to make a representation against the proposed modification. There is also an allegation that there is discrimination practised against the petitioners in singling out their property for reservation and that amounts to violation of the petitioners' fundamental rights under Art. 14 of the Constitution. There is also another allegation that since permission was given by the Corporation from time to time to carry on construction on the rear portion of their property after the declaration of the intention under S. 4, the Corporation is estopped from acquiring the property. Lastly, it is alleged that the reservation and acquisition is mala fide.

6. As often happens, immediately after filing the petition, the petitioners moved for interim stay in terms of prayer (d) of the petition and the same was granted while issuing the rule.

7. Both the State and the Corporation have filed their returns and it is enough to state that both of them have contended that the petition is liable to be dismissed in limine because of the inordinate delay in moving the Court.

8. When the petition was called on for hearing, evidently having realised the force of the respondents' contention that the petition is liable to be dismissed on the ground of inordinate delay, Mr. Paranjpe, learned counsel for the petitioners after stating the facts submitted that since among other contentions, the petition raises the question of the infringement of the fundamental rights under articles 14 and 19 of the Constitution, having regard to the order of the President dated 26th June 1975 under Cl. (1) of Art. 359 and the subsequent order dated 8th Jan. 1976, the entire proceeding being suspended the Court cannot proceed with

the matter nor suspend the stay order and it should be left as it is during the period provided in the orders of the President. In support of his submission that the Court cannot proceed to make any enquiry in the matter or suspend the stay order, Mr. Paranjpe relied upon certain passages in the judgment of the Supreme Court reported in *Makhan Singh v. State of Punjab*, AIR 1964 SC 381 and in particular he strongly relied upon a judgment of the learned single Judge of this Court to which we will have occasion to refer in the course of this judgment.

9. Mr. Sawant, Counsel for the State submitted that notwithstanding the orders of the President dated 27th June 1975, and 8th Jan. 1976, the Court can proceed to enquire into the matter and find out whether in fact there is a violation of any of the fundamental rights mentioned in the orders of the President. It is only if it is found that there is such an infringement, submitted Mr. Sawant, that the Court may keep the matter pending during the period provided for in the order of the President but in that event the interim stay also shall have to be suspended. In support of his submission, Mr. Sawant has relied upon a Division Bench decision of this Court in Special Civil Application No. 650 of 1971, decided by Chandurkar and Lentin JJ. on 26th Mar. 1976 : (reported in AIR 1977 Bom 355).

10. At the outset we may mention that the petition on the face of it is hopelessly delayed and no attempt is made to give any reasonable explanation for the inordinate delay of nearly five years. It is alleged in para 39 of the petition that the notification under S. 10 of the Bombay Town Planning Act was published on 8th July 1966 and that the petitioners in the absence of any individual notices to them were not aware that their property was being acquired for the purpose of parking space in the Development plan. It is further alleged that the petitioners came to know about acquisition of their property only when the Land Acquisition Officer issued notice under S. 9 of the Land Acquisition Act to the petitioners by which the petitioners were called upon to file their objections on 11th Jan. 1971. It is further alleged that the said notice did not give correct area of the petitioners' property, and that it is only after the statement of the petitioners was recorded that the Government by notification dated 15th Feb. 1971 carried out the necessary corrections in the area of the petitioners' property which was sought to be acquired and after the necessary corrections were made, the petitioners

have been called upon to submit their objections. Therefore, conclude the petitioners that there is no delay or laches on the part of the petitioners to approach this Hon'ble Court.

11. Now the averments in this para. themselves make it clear that there is no dispute that the notifications under S. 10 of the Bombay Town Planning Act was in fact published in the Government Gazette on 8th July 1966.

12. S. 10 (1) of the Bombay Town Planning Act, 1954 reads as under:—

"The State Government may, after consulting the Consulting Surveyor, by notification in the Official Gazette sanction the development plan submitted to it for the whole of the area, or sanction it separately in parts, either without modification or subject to such modification as it considers expedient within the time prescribed where the development plan is sanctioned separately in parts, then each part so sanctioned shall be deemed to be the final development plan for the purposes of the succeeding provisions of this Act, and those provisions shall apply in relation to such part as they apply in relation to a development plan relating to the whole of the area."

13. Sub-s. (2) of Sec. 10 provides:

"The State Government shall fix in such notification a date not earlier than one month after the publication of such notification on which the final development plan shall come into force."

14. It would, therefore, appear that when the State Government sanctions the development plan submitted to it under S. 9, all that is required to be done is to publish the same by a notification in the official Gazette.

15. S. 4 of the Bombay Town Planning Act, 1954 provides that the local authority has to make a declaration of its intention to prepare a development plan and despatch a copy thereof to the State Government for publication in the official Gazette and shall publish it in the prescribed manner for inviting suggestions from the public within a period of two months.

16. The development plan is to be prepared under S. 3 and published in the prescribed manner and must be submitted to the State Government for sanction.

17. S. 7 lays down the contents of the development plan.

18. S. 8 provides the particulars to be published and submitted to the State Government along with the development plan.

19. Under S. 9, if within two months from the date of publication of the de-

velopment plan any member of the public communicates in writing to the local authority any suggestion relating to such plan, the local authority shall consider such suggestion and may, at any time before submitting the development plan to the State Government, modify such plan as it thinks fit.

20. When the development plan thus goes to the State Government for its consideration and sanction, under S. 10, the State Government has the power to sanction the same with or without modification and all that is required to be done, to give effect to it is to publish the same by a notification in the official Gazette. There is, therefore, no provision in S. 10 of the Act for giving individual notices to the owners of the property who may be affected by this modified plan. In fact it is too late in the day to challenge the vires of the Bombay Town Planning Act inasmuch as the validity of the same has been upheld by the Supreme Court in *Maneklal Chhotalal v. M. G. Makwana*, AIR 1967 SC 1873 and *K. L. Gupta v. Municipal Corporation of Greater Bombay*, AIR 1968 SC 303.

21. After all the publication of a notification in the official Gazette is the only mode provided. The notification which is challenged included the plan and schedule annexed to it. That plan which could have been available for inspection only if the petitioners had bothered to do so, would have clearly shown to them that their property was included in the modified plan for the purpose of access to the car park which is to the rear side of their property which abuts on the Laxmi Road. What is, however, argued by Mr. Paranjpe is that publication in the official Gazette cannot be equated with knowledge. In support of his submission reliance was placed on the case reported in *Cresta Holding Ltd. v. Karlian* (1959) 3 All ER 656.

22. That was a case where the plaintiffs had sued twelve defendants alleging fraud against the first two named defendants, whereby the plaintiffs had been defrauded of a sum of £300,000. The eleventh defendants were bankers against whom the plaintiffs alleged in the statement of claim that as a result of the fraud the bankers received a cheque and the proceeds thereof and "did not receive the same as purchasers for value without notice" viz. without notice that that property had been dealt with as previously alleged without the authority of the plaintiffs. On the application of the bankers particulars of this allegation concerning notice were

ordered to be given after discovery. On appeal by the plaintiffs held—

“(i) ‘notice’ was not a synonym for ‘knowledge’ and the allegation was not an allegation of a condition of mind within R. S. C., Ord. 19, R. 22, which accordingly had no application.

(ii) the bankers were entitled to particulars after discovery showing how they were alleged to have received notice that the cheque or proceeds thereof had been dealt with without the plaintiffs’ authority, since the present case was one where ‘the form or the precise terms of such notice, or the circumstances from which such notice was to be inferred’, were material within R. S. C., Ord. 19, R. 23.”

23. This authority therefore has absolutely no application to the facts of our case. As we have pointed out it is alleged in Para 39 of the petition that a modified plan was in fact published in the Gazette on the 8th July 1966, which was the only mode of publication which is provided by the Act in respect of plans which are sanctioned by the Government with or without modification. Clearly, therefore, this petition, which was filed in 1971 is hopelessly delayed and since no reason or explanation is offered, having regard to the preliminary objection raised by the respondents, it has got to be dismissed in limine on that ground alone without going into the merits of the petition, unless as contended by Mr. Paranjpe we cannot proceed with the matter in view of the Presidential Orders dated the 27th June 1975 and 8th January 1976, issued under Art. 359 (1) of the Constitution. It is, therefore, necessary to consider the submissions made in that connection,

24. Art. 359 (1) of the Constitution provides:—

“359 (1): Where a Proclamation of Emergency is in operation, the President may by order declare that the right to move any court for the enforcement of such of the rights conferred by Part III as may be mentioned in the order and all proceedings pending in any Court for the enforcement of the rights so mentioned shall remain suspended for the period during which the Proclamation is in force or for such shorter period as may be specified in the order.”

25. On June 27, 1975, the President of India passed the following order:—

“In exercise of the powers conferred by Cl. (1) of Art. 359 of the Constitution the President hereby declares that the right of any person (including a foreigner) to move any court for the enforcement of the rights

conferred by Arts. 14, 21 and 22 of the Constitution and all proceedings pending in any Court for the enforcement of the above mentioned rights shall remain suspended for the period during which the proclamations of emergency made under Cl. (1) of Article 352 of the Constitution on the 3rd December 1971 and on the 25th June, 1975 are both in force.

This order shall extend to the whole of the territory of India except the State of Jammu and Kashmir.

This order shall be in addition to and not in derogation of any order made before the date of this order under Cl. (1) of Article 359 of the Constitution.

26. On 8th Jan, 1976, the President of India issued another notification which is to this effect:—

“In exercise of the powers conferred by Cl. (1) of Art. 359 of the Constitution, the President hereby declares that the right of any person to move any Court for the enforcement of the rights conferred by Art. 19 of the Constitution and all proceedings pending in any Court for the enforcement of the above mentioned rights shall remain suspended for the period during which the proclamations of emergency made under Cl. (1) of Art. 352 of the Constitution on the 3rd Dec, 1971 and on the 25th June, 1975 are both in force. This order shall extend to the whole of the territory of India except the State of Jammu and Kashmir.”

27. It would appear that both Art. 359 (1) and the above mentioned two orders of the President are in two parts. The first part provides that the right of any person to move any Court for the enforcement of any of the rights conferred by Arts. 14, 21 and 22 or 19 as the case may be shall remain suspended for the period during which the proclamation of emergency made under Cl. (1) of Art. 352 of the Constitution on the 3rd Dec. 1971 and 25th June 1975 are both in force. The second part of the order provides that all proceedings pending in any court for the enforcement of the above mentioned rights shall remain suspended for the period during which the proclamation of emergency made under Cl. (1) of Art. 352 of the Constitution on the 3rd Dec. 1971 and on the 25th June 1975 are both in force,

28. The first part of Art. 359 (1) and the orders of the President of India dated 3rd Nov. 1962 which dealt only with the first part of Art. 359 (1). came to be considered by the Supreme Court in the case of Mohan Choudhary v. Chief Commr., Union Territory of Tripura AIR 1964 SC 173. The Supreme

Court held that by reason of that order the petitioners had no locus standi to enforce their right under Arts. 21 and 22. It was observed by the Supreme Court at the end of Para. 7 of the judgment as under:

"Unquestionably, the Court's power to issue a writ in the nature of Habeas Corpus has not been touched by the President's Order, but the petitioner's right to move this Court for a writ of that kind has been suspended by the order of the President passed under Art. 359 (1). The President's Order does not suspend all the rights vested in a citizen to move this Court but only his right to enforce the provisions of Arts. 21 and 22. Thus, as a result of the President's Order aforesaid, the petitioner's right to move this Court, but not this Court's power under Art. 32, has been suspended during the operation of the Emergency, with the result that the petitioner has no locus standi to enforce his right, if any, during the Emergency."

29. Once again in the case of *Makhan Singh v. State of Punjab*, AIR 1964 SC 381, the Supreme Court was concerned only with the interpretation of an order covering the first part suspending the right to move any Court for the enforcement of the fundamental rights mentioned in that order. Evidently following its earlier decision in *Mohan Choudhary's case*, (AIR 1964 SC 173) the Supreme Court held that the petitioners had no right to move the Court during the period the order of the President was in force.

30. In the course of this judgment however, certain observations were made by Gajendragadkar J. in Paras. 13 and 19 of the judgment on which considerable reliance is placed by both the sides. In Para. 13, it is observed as under:—

"Since the object of Art. 359 (1) is to suspend the rights of the citizens to move any Court, the consequence of the Presidential Order may be that any proceeding which may be pending at the date of the Order remains suspended during the time that the Order is in operation and may be revived when the said Order ceases to be operative; and fresh proceedings cannot be taken by a citizen after the order has been issued, because the Order takes away the right to move any Court and during the operation of the Order, the said right cannot be exercised by instituting a fresh proceeding contrary to the Order. If a fresh proceeding falling within the mischief of Art. 359 (1) and the Presidential Order issued under it is instituted after the Order has been issued, it will have to be dismissed as being

incompetent. In other words, Art. 359 (1) and the Presidential Order issued under it may constitute a sort of moratorium or a blanket ban against the institution or continuance of any legal action subject to two important conditions. The first condition relates to the character of the legal action and requires that the said action must seek to obtain a relief on the ground that the claimant's fundamental rights specified in the Presidential Order have been contravened and the second condition relates to the period during which this ban is to operate. The ban operates either for the period of the Proclamation or for such shorter period as may be specified in the Order."

31. Para 19 of this judgment on which also reliance is placed is as under:—

"The next question to consider is, what is the nature of the proceedings which are barred by the Presidential Order issued under Art. 359 (1)? They are proceedings taken by citizens for the enforcement of such of the rights conferred by Part III as may be mentioned in the order. If a citizen moves any Court to obtain a relief on the ground that his fundamental rights specified in the Order have been contravened, that proceeding is barred. In determining the question as to whether a particular proceeding falls within the mischief of the Presidential Order or not, what has to be examined is not so much the form which the proceeding has taken, or the words in which the relief is claimed as the substance of the matter and consider whether before granting the relief claimed by the citizen, it would be necessary for the Court to enquire into the question whether any of his specified fundamental rights have been contravened. If any relief cannot be granted to the citizen without determining the question of the alleged infringement of the said specified fundamental rights, that is a proceeding which falls under Art. 359 (1) and would, therefore, be hit by the Presidential Order issued under the said article. The sweep of Art. 359 (1) and the Presidential Order issued under it is thus wide enough to include all claims made by citizens in any Court of competent jurisdiction when it is shown that the said claims cannot be effectively adjudicated upon without examining the question as to whether the citizen is in substance seeking to enforce any of the said specified fundamental rights. We have al-

ready seen that the operation of Art. 359 (1) and the Presidential Order issued under it is limited to the period during which the proclamation of emergency is in force, or for such shorter period as may be specified in the Order. That being so, we feel no difficulty in holding that proceedings taken by a citizen either under Art. 32 (1) or under Article 226 (1) are hit by Art. 359 (1) and the Presidential Order issued under it. In this connection it would be legitimate to add that the contention of the appellants which seeks to confine the operation of Art. 359 (1) only to the right to move the Supreme Court, would make the said provision almost meaningless. There would be no point in preventing the citizen from moving this Court, while leaving it open to him to move the High Courts for the same relief and then to come to this Court in appeal, if necessary." (emphasis supplied).

32. Again certain observations in Para. 30 which were relied upon are to this effect:—

"In our opinion, therefore, once it is shown that the proceedings under S. 491 (1) (b) cannot make a substantial progress unless the validity of the impugned law is examined on the ground of the contravention of the specified fundamental rights, it must follow that the bar created by the Presidential Order operates against them as much as it operates against proceedings taken under Art. 226 (1) or Art. 32 (1). Thus, the true legal position, in substance, is that the clause "the right to move any Court" used in Art. 359 (1) and the Presidential Order takes in all legal actions intended to be filed, or filed, in which the specified rights are sought to be enforced, and it covers all relevant categories of jurisdictions of competent courts under which the said actions would otherwise normally have been entertained and tried." (emphasis supplied)

33. Thereafter very recently also in the Habeas Corpus case reported in Additional District Magistrate, Jabalpur v. Shivakant Shukla, AIR 1976 SC 1207, while considering the first part of the Presidential Order, which provides that the right to move the Court for the enforcement of the fundamental rights mentioned therein shall remain suspended, the Supreme Court by majority judgment of 4 to 1 has interpreted it to mean, that the petitioner has no locus standi to move the Court for enforcement of the fundamental rights mentioned in the Order of the President, approving the view of the Supreme Court about the interpretation of that Clause in Mohan Choudhary's case (AIR 1964 SC 173) and also in Makhan Singh's case (AIR

1964 SC 381). It is therefore settled law that so far as the first part of the order of the President is concerned, as interpreted by the Supreme Court, no person has a locus standi to move the Court for enforcement of the fundamental rights mentioned in the President's Order.

34. In fact the final order of the Court in Para. 574, of the judgment is to this effect:—

"In view of the Presidential Order dated 17th June 1975 no person has any locus standi to move any writ petition under Article 226 before a High Court for habeas corpus or any other writ or order or direction to challenge the legality of an order of detention on the ground that the order is not under or in compliance with the Act or is illegal or is vitiated by mala fides factual or legal or is based on extraneous considerations."

35. Therefore, what is held by the Supreme Court in Mohan Choudhary's case (AIR 1964 SC 173) and Makhan Singh's case (AIR 1964 SC 381) and also in the latest Habeas Corpus case is that having regard to the first part of the order of the President issued under Art. 359 (1), no person has any locus standi to move the Court for the enforcement of the rights conferred by Arts. 14, 21, 22 or 19 as the case may be. In none of these cases which went up to the Supreme Court, the question as to what is to be done in respect of the proceedings pending in any Court for the enforcement of the above mentioned rights on the date of the order of the President made under Art. 359 (1) had directly come up for decision so far as we are aware. It is, therefore, necessary to consider the effect of the second part of the order of the President which provides: "The President hereby declares that all proceedings pending in any Court for the enforcement of the above mentioned fundamental rights shall remain suspended for the period during which the proclamation of emergency made under Cl. (1) of Art. 352 of the Constitution on the 3rd Dec. 1971 and on the 25th June 1975 are both in force."

36. What is argued by Mr. Paranjpe before us by laying emphasis on certain observations in Paras 13 and 30 of the judgment in Makhan Singh's case (AIR 1964 SC 381) is that the moment there is a mention in a petition of the infringement of any of the fundamental rights mentioned in Arts. 14, 21, 22 or 19 in a proceeding which was pending when the order of the President under Article 359 (1) was passed, notwithstanding the fact whether an injunction or stay has been issued against the State, the matter remains

suspended and the Court has no jurisdiction to look into it and it must necessarily send such proceedings to the record room till the expiry of the period mentioned in the order of the President without disturbing the interlocutory orders of stay or injunction.

37. As against that it is contended by Mr. Sawant, Counsel for the State that that interpretation which is sought to be put by Mr. Paranjpe is not correct and there is nothing in the order of the President to prevent the State from showing that the petition is liable to be dismissed in limine without even considering the question of the fundamental rights involved, say on the ground of inordinate delay as in the instant case. He further submits that even in proceedings which remain suspended the interlocutory order or injunction must also remain suspended.

38. Now it is important to bear in mind that what stands suspended is a pending proceeding for the enforcement of the fundamental rights mentioned in the Presidential Order. The question of enforcement of the relevant fundamental rights would only arise if in fact it is established that there is a violation of any of the said fundamental rights.

39. In this connection it is worthwhile to note that under Art. 226 of the Constitution, notwithstanding anything in Art. 32, every High Court shall have power, throughout the territories in relation to which it exercises jurisdiction, to issue to any person or authority, including in appropriate cases any Government, within these territories directions, orders or writs including writs in the nature of habeas corpus, mandamus, prohibition, quo warrant and certiorari, or any of them, for the enforcement of any of the rights conferred by part III and for any other purpose.

40. This Art. provides that the High Court has power to issue writs for the enforcement of all the rights conferred by Part III and for any other purpose. It is needless to say this power of the High Court to issue the Writs is nowhere sought to be taken away by the order of the President. What is taken away by the first part of the order as has been held by the Supreme Court is the locus standi of a person to move the Court for enforcement of his fundamental rights mentioned in the order of the President. So also pending proceedings which are sought to be suspended are the proceedings for the enforcement of the fundamental rights mentioned in the order of the President. In other words, what is suspended is the enforcement of the fundamental rights mentioned in the order even in respect of the pending pro-

ceedings. The stage of enforcement would only arise if after an inquiry it is found out that the petitioner has in fact proved the violation of his fundamental right, and it may be said at that stage only that having regard to the fact that the proceeding is for the enforcement of the fundamental right which stands suspended the court could not issue a writ which it could have otherwise issued.

41. Now, while interpreting the order of the President one should not ignore the object with which the order is passed. Art. 352 provides that if the President is satisfied that a grave emergency exists whereby the security of India or of any part of the territory thereof is threatened whether by war or external aggression or internal disturbance, he may by Proclamation, make a declaration to that effect,

42. Art. 359 provides for the suspension of the enforcement of the rights conferred by Part III during emergencies, as the marginal note shows.

43. The first part of the article and the order of the President which is drafted in terms of this Article, declares that no person shall have a right to move any Court for the enforcement of the fundamental rights mentioned in the order. The object evidently is that having regard to the grave emergency which threatens the security of India or any part thereof, it was thought necessary that the State should be free to carry on its activities without the impediment of the citizens enforcing their fundamental rights by approaching the High Court under Art. 226 or the Supreme Court under Art. 32 of the Constitution. Surely the Constituent Assembly could not have been unaware of the fact that when the emergency is proclaimed and the President issues an order in exercise of the powers mentioned in Art. 359 (1), several writ petitions would be pending in the High Courts and the Supreme Court and interim stay orders and injunctions would have been issued in most of these cases. It is not unlikely that as a result of the stay orders and injunctions issued in those pending proceedings, many important projects like the construction of roads, railways or bridges which are so essential for the safety and security of the nation or the nation-building projects like construction of dams and canals and town planning etc. have been held up. Could it have been the intention of Constituent Assembly that while pending the emergency nobody should have a right to move the Court for the enforcement of the fundamental rights mentioned in the order of the President but during that very emergency the

State should be helpless to proceed with the projects of national importance involving national safety and progress because of the injunctions and stay orders which might have been issued in the proceedings which were already pending when the order of the President was passed? After all we have to consider the provisions of a Constitution. This is not a document which could be interpreted like a text book with the help of a dictionary. It is always essential to bear in mind the object with which the Constituent Assembly enacted the provisions of Art. 359 (1) and the President issued the orders acting under the said Article. If the interpretation which is sought to be put by Mr. Paranjpe on pending proceedings is to be accepted it would make the very purpose of Art. 359 (1) nugatory.

44. Again we are also unable to agree that merely because there is an allegation in the petition about the infringement of any of the fundamental rights mentioned in the Presidential Order, the Court has to accept that ipse dixit as an automaton and stay its hands. It would be too much to hold that the Constituent Assembly intended that notwithstanding the fact that the allegation may be frivolous, or that the petition is liable to be dismissed in limine on the ground of laches as being hopelessly barred by time with no reasonable explanation for the delay, or on the ground of suggestio falsi and suppressio veri, or on the ground of res judicata, it should be kept pending with the interim orders of stays and injunctions granted therein, with full force during the period mentioned in the President's order. It therefore appears to us that what shall remain suspended is the pending proceeding which in truth and substance is for the enforcement of the rights mentioned in the Presidential Order and not the enquiry about the existence or otherwise of such rights. It further appears to us that it could never have been intended that the proceedings which are liable to be dismissed in limine on one or the other grounds just mentioned by us or as may be urged by the State should also be kept pending during the period mentioned in the Presidential Order.

45. Now there are two likely interpretations of the Presidential Order as far as pending proceedings are concerned. One interpretation is that the moment there is a mention of a breach of fundamental right mentioned in the Presidential Order, the petition must be kept pending untouched, and the stay and interim orders which might have been passed must remain in force, as is contended by Mr. Paranjpe. There is no doubt in our mind that the Parliament could never have intend-

ed that even while the pending proceeding is kept suspended, the interim orders and stays secured by the petitioners in the said proceedings should remain alive and in full force.

46. The other possible interpretation of the order in our opinion and a better interpretation would be that what was intended to be suspended was not the inquiry into or adjudication of the alleged infringement of the fundamental rights mentioned in the President's order but the actual enforcement of that right by issuing a writ. This interpretation which we are trying to put would not cause any hardship either to the citizen or to the State. For instance, once it is held as we do, that what is barred is the order enforcing the fundamental right but not the adjudication, it should be easy to see that the Court can proceed to hear the petition on merits and find out if in truth and substance it is a proceeding for enforcement of a fundamental right. If as happens in many cases, the petitioner has a good case even otherwise than on his claim based on the violation of fundamental right, he may as well give up his contention founded on fundamental right and prosecute that application to a conclusion. Similarly it should be equally possible for the respondents as we have pointed out earlier, to show that in fact the petition is liable to be dismissed in limine either on the ground of laches or res judicata or on the ground of suggestio falsi and suppressio veri or on any other ground. The State may also prove that the so-called infringement of a fundamental right is only a frivolous allegation and that in fact there is no such violation. In such a case no injustice would be done if the petition is disposed of and the rule is discharged.

47. We may take up another instance where the petitioner in fact at the time of the enquiry proves that there is an infringement of a fundamental right and that he cannot hope to get the rule made absolute except on that ground alone. In our opinion it is only such proceedings which are intended to be attracted by the second part of the Presidential Order suspending the pending proceedings.

48. When we mentioned this approach of ours to the interpretation of the Presidential order concerning the pending proceedings and invited Mr. Paranjpe to point out the drawbacks in the view we are taking he submitted firstly that the view we are taking would be inconsistent with the observations of the Supreme Court in paragraph 13 of Makhan Singh's case, (AIR 1964 SC 381)

that the consequences of the Presidential order may be that any proceedings which may be pending at the date of the order remain suspended during the time the order is in force and may be reviewed when the order ceases to be operative. He also submitted that our view would be inconsistent with the observations in paragraph 30 of Makhan Singh's case to the effect "It covers all relevant categories of jurisdictions of competent courts under which the said actions would otherwise normally have been entertained and tried." He also submitted that the expression "enforcement" which occurs both in the first part and in the second part of Art. 359 (1) must receive the same meaning. He also drew our attention to the following observations in para 257 at page 1285 of his Lordship Beg J. in the Habeas Corpus case, (AIR 1976 SC 1207) to the effect: "Indeed, the clear object of such a suspension seems to me to be that Courts should not undertake inquiries into the violations of the alleged right." He further submitted that the view we are taking might affect the right of a petitioner to appeal to the Supreme Court.

49. We are not impressed by any of these submissions. The observations in Makhan Singh's case, (AIR 1964 SC 381) must be read in the context in which they were made, and in particular they must be read in the light of the observations in Para 19 of that very judgment. There is no doubt that the expression "enforcement" which occurs twice in Art. 359 (1) must receive the same meaning. But it is significant to note that by the first part it is clear that the right of a citizen to move any court for the enforcement of his right itself is suspended. Therefore his right to approach the Court with a grievance of the infringement of the fundamental rights is barred at the threshold and there is no need to consider whether the allegation is frivolous or otherwise. As we shall presently show it is not the jurisdiction of the Court to entertain such a petition which is barred but it is the right of a citizen to make a grievance about the infringement of the fundamental rights which is barred at the threshold, and it is that locus standi itself which is taken away. As against that in a pending proceeding what is suspended is the enforcement of that right, and that stage would only come when it is found on enquiry that in truth and substance there is an infringement of that right. See the observations in Makhan Singh's case in para 19. If there is no infringement of the right the question of enforcement does not arise. Therefore, as we stated earlier, out of the

two possible interpretations about the suspension of the pending proceedings, we are of the view that the second view to which we have given expression appears to be the better view.

50. Having expressed our views, we now proceed to consider the decisions of this Court on which reliance is placed by the parties. On behalf of the State, reliance is placed on the judgment of a Division Bench of this Court consisting of Chandurkar and Lentin JJ. in Special Civil Application No. 650 of 1971, decided on 26th Mar. 1976: (reported in AIR 1977 Bom 355). That was a petition where land acquisition proceedings in connection with resettlement of the persons likely to be affected by the Krishna Dhom Project were challenged. In that case also it was urged on behalf of the petitioners that having regard to the order of the President, the Court could not enquire into the matter nor suspend the interim stay orders. On the other hand, it was urged on behalf of the State that the Court has certainly the right to look into the matter to find out whether there is an infringement of a fundamental right. The Division Bench after considering Art. 359 (1) and the proclamation issued by the President of India on 27th June 1975 and in particular after considering the observations of the Supreme Court in Makhan Singh's case, (AIR 1964 SC 381) contained in parags. 13, 19 and 30 observed as under:—

"There can be no doubt that the effect of the Presidential Proclamation is that in a pending proceeding the Court will not be able to make any order or issue any writ in order to enforce a fundamental right referred to in the Presidential Proclamation. That appears to us to be the object of a suspension of these proceedings contemplated by the Presidential Proclamation. But it cannot be the object of the Presidential Proclamation that where a pending proceeding can be terminated without giving a relief amounting to enforcement of a fundamental right, the proceeding must still stand suspended....."

"The above quoted observations of the Supreme Court are, in our view, a complete answer to the contention raised on behalf of the petitioners that the moment the petition is framed as one to enforce the right under Art. 14 of the Constitution, it must be deemed to be covered by the Presidential Proclamation and the proceedings must be stayed. As pointed out by the Supreme Court, it is the substance of the matter which must be ascertained and the ascertain-

ment of the substance of the matter will necessarily involve some argument and some discussion. This would mean that the proceedings cannot be mechanically stayed or suspended because they merely refer to a violation of Article 14 of the Constitution. It is important to note that the observations of the Supreme Court indicate that a proceeding will fall within the sweep of Art. 359 (1) "when it is shown that the said claims cannot be effectively adjudicated upon without examining the question as to whether the citizen is in substance, seeking to enforce any of the said specified fundamental rights."

It appears to us that the use of the words "cannot be effectively adjudicated upon" is of some significance. It appears to us that effective adjudication would mean that a decision in favour of the petitioner was necessary which would have the effect of enforcement of the fundamental right claimed by the petitioner. The word "enforce" means, as per the Random House Dictionary, amongst other things, "compel obedience to." Thus the word "enforcement" used in Art. 359 (1) or in Article 226 of the Constitution contemplates an order or a proceeding which compels obedience in accordance with the constitutional imperative in Art. 14 so far as that Article is concerned. The effect of the Presidential Proclamation under Article 359 (1) is that the Court cannot compel the State to give effect to the mandate contained in Art. 14. If that was the object of the Proclamation and the provisions of Art. 359 (1), we fail to see how that object would in any way be frustrated in a given case, it is found on facts that the petitioner has not made out any case of violation of Article 14. The dismissal of a petition consequent on a finding that no breach or violation of the fundamental right under Article 14 has been proved will not amount to any breach of the terms of the Presidential Proclamation. On the other hand, if an enquiry is made to find out whether a breach has been established and the Court stays its hands in a case where the petitioner has been able to establish its breach and further to deal with the proceedings, it will then amount to suspension of the proceedings in compliance with the Presidential Proclamation. The meaning of the word "suspend" as given in the Random House Dictionary is 'to hold or keep undetermined; refrain from forming or concluding definitely.' The state of the proceeding when the Court refuses to go ahead and issue a mandamus or a direction enforcing the fundamental right under Art. 14 even

after it is found that the petitioner has made out a case in his favour for enforcement of that right will still be a state of suspension inasmuch as the proceedings have not concluded definitely. We are, therefore, unable to accept the contention of the learned Counsel for the petitioners as also of Mr. Rane that merely because averments alleging a breach of Art. 14 of the Constitution are made in the petition, we must adjourn the proceedings sine die and allow the proceedings to pend indefinitely without even ascertaining as to whether the petitioner is able to make out a case of the violation of the provisions of Art. 14 of the Constitution."

51. With respect, we agree with the above observations of the Division Bench.

52. It also appears that a similar question was raised before Deshmukh J., in Misc. Petition No. 344 of 1974, Messrs. Bharat Barrel & Drum Mfg. Co. Pvt. Ltd. v. The State of Maharashtra, decided on 25-2-1976 (Bom). There also a notification of acquisition was challenged on the ground of violation of Art. 14 of the Constitution and it was contended that the proceedings could not be proceeded with in view of the Presidential Proclamation of 27th June 1975 and of 8th Jan. 1976, suspending the right to approach a Court for enforcement of fundamental rights under the Constitution. The learned Judge having heard the parties came to the conclusion that the petitioners' alleged challenge was no challenge at all, but that the application was a frivolous one merely to prolong the acquisition by the State for the purpose of the Municipal Corporation, and on merits the learned Judge took the view that the petitioners in that case had no valid right at all to oppose the acquisition and an attempt to resort to provisions of Art. 14 of the Constitution was a mere pretext to somehow gain time and put off the evil day of acquisition.

53. The latest case which is decided by the Court on the point and is relied upon by Mr. Paranjpe is the decision of Regé J., in Misc. Petition No. 501 of 1975, Metro Theatre Bombay Ltd., v. State of Maharashtra, decided on 13-8-1976 (Bom). That was a petition under Article 226 of the Constitution seeking for a writ of mandamus against the respondents directing them to withdraw certain notices issued to the petitioners and to give sanction to the grant of a licence to the 1st petitioners for the sale of mild liquor at their restaurant in Metro Cinema, Bombay, and further directing the 2nd respondent to withdraw or cancel the said notice and to grant to the 1st petitioners a licence for the

sale of mild liquor. Therefore, that was a petition which in terms sought to enforce fundamental rights guaranteed by Art. 14 of the Constitution.

54. The Court had issued a rule nisi on 10th Apr. 1975. The Court had also at the time of admission granted an injunction against the respondents restraining them from taking any action in furtherance of the notice, and, what is more, the Court had also granted a mandatory injunction directing the respondents to issue a temporary licence to the petitioners. Thus the petition was in fact pending when the President passed the order under Art. 359 of the Constitution. It appears from the judgment that after reading the petition, the learned Judge thought that having regard to the Presidential Order, the petition ought to stand suspended. But this proposal of the learned Judge, it appears was opposed by the respondents who relied heavily on the Division Bench decision of this Court in Special Civil Application No. 650 of 1971 viz. Chandurkar and Lentin JJ., dated 26th Mar. 1976 (reported in AIR 1977 Bom 355) to which attention has already been drawn.

55. The learned Judge posed the question as to what is the ambit of the court's power or jurisdiction under the said order directing the suspension of the pending proceedings. Referring to the Division Bench decision, the learned Judge observed:

"It is true that the Division Bench of this Court in its aforesaid decision relying on the prior decision of the Supreme Court in Makhan Singh's case reported in AIR 1964 SC 381, has come to the conclusion as pointed out by the learned Counsel for the Respondents. With great respect to the learned Judges, I have not been able to agree with the said decision. However, before I state my reason for the same, I may first state my views on the said question."

56. Proceeding thus the learned Judge observed, "in my view the said order has the effect of barring the jurisdiction of the court to entertain or deal with any proceedings wherein any of the fundamental rights mentioned in the order are sought to be enforced."

57. In support of his view that the court has no jurisdiction to enquire into the merits of the pending proceedings, the learned Judge relied firstly on the very paragraphs 13 and 19 of the judgment of Gajendragadkar J., in Makhan Singh's case (AIR 1964 SC 381) which were relied upon by the Division Bench for the view it had taken, and observed. "In my view with great respect to

the learned Judges the said ratio drawn from Makhan Singh's case, on which the ultimate conclusion of their decision is based, do not appear to be justified."

58. Having made these observations the learned single judge says that in spite of his disagreement with the views of the Division Bench, if that decision had stood by itself, he would have been bound to follow the same. However the learned single Judge observed, that having regard to certain observations of the Supreme Court in the recent Habeas Corpus case, he was fortified in his view that the Court's jurisdiction in the matter of pending proceedings involving enforcement of fundamental rights mentioned in the Presidential Order is barred and the court should not even undertake an enquiry into the violation of such alleged fundamental right. He further observed that since the judgment of the Supreme Court in the Habeas Corpus case, taking a contrary view was not available to the Division Bench of this Court, the said decision of the Division Bench cannot be considered to be good law.

59. We have already indicated how we prefer the view of the Division Bench, therefore, in so far as the observations of the learned single Judge based on the interpretation of Makhan Singh's case, (AIR 1964 SC 381) are concerned, it is unnecessary to repeat our views once again. It will be therefore necessary to examine whether the learned Judge was right in relying upon the judgment of the Supreme Court in the Habeas Corpus case for coming to the conclusion that the Court has no jurisdiction to deal with the matter, and that the Court should not even undertake an enquiry into the violation of alleged fundamental rights.

60. It is true that in support of his view the learned Judge has relied upon the observations of His Lordship the Chief Justice in the Habeas Corpus case. The observations relied upon are to this effect: (para 44 p. 1227).

"If Courts will in spite of the Presidential order entertain such applications and allow the detenus to enforce to start or continue proceedings or enforce fundamental rights. Art. 359 (1) will be nullified and rendered otiose."

61. The next observations which are relied upon are that of Beg J., in para 345 at page 1308 and they are to this effect:

"This further clarifies and emphasizes that the intention behind the Presidential Order of 1975 was to actually affect the jurisdiction of Courts in which proceedings were actually pending. The inference from

this feature also is that all similar proceedings in future will, similarly, be affected."

62. The last observations which are relied upon are also of Beg J., in para 257 at page 1285 which are to this effect:—

"Art. 359 is very clear on the point. There remains no right, for the time being to an enquiry into conditions which may enable a party to secure release in assertion of rights guaranteed either by Art. 21 or by other articles whose "enforcement" is suspended. Indeed, the clear object of such a suspension seems to me to be that Courts should not undertake inquiries into the violations of the alleged right."

63. By relying on these observations the learned Single Judge came to the conclusion that the court's jurisdiction in the matter of pending proceedings involving enforcement of fundamental rights mentioned in the Presidential Order is barred and the Court should not even undertake an enquiry into the violation of such alleged fundamental right. In other words it would appear that the learned Judge relied upon certain observations in Makhan Singh's case (AIR 1964 SC 381) and on the above observations of their Lordships of the Supreme Court for taking the view he did. But then a perusal of the judgments in Makhan Singh's case and the Habeas Corpus case would show that the inference is not correct. In the first place what was involved in Makhan Singh's case was the right to move the Court for enforcement of the fundamental rights. Earlier also a similar question was involved before the Supreme Court in Mohan Choudhury's case, (AIR 1964 SC 173) and the Court had held that a person has no locus standi to move the Court and the Supreme Court had in terms held that by the Presidential Order it is the petitioner's right to move the Court but not the Court's power or jurisdiction under Art. 32 which had been suspended during the operation of the emergency. with the result that the petitioner had no locus standi to enforce his right if any, during the emergency.

64. Adverting to the decision of the Supreme Court in the Habeas Corpus case, (AIR 1976 SC 1207) that was also a case in which the first part of the order viz, the right to move the Court for enforcement of the fundamental rights was involved. His Lordship Ray C. J., has observed as under in para 34 at page 1224:—

"It is incorrect to say that the jurisdiction and powers of this Court under Article 32 and of the High Courts under Art. 226 are virtually abolished by the Presidential Order

without any amendment of the Constitution. No amendment of the Constitution is necessary because no jurisdiction and power either of this Court or of the High Court is taken away. When a Presidential Order takes away the locus standi of the detenus to move any Court for the enforcement of fundamental rights for the time being, the jurisdiction and powers of this Court and of the High Courts remain unaltered, Art. 359 (1) is not directed against any court. It is directed against an individual and deprives him of his locus standi."

65. Again, Chandrachud J., in para 434 at page 1329 has observed as under:—

"It is also not correct to say that any particular interpretation of Art. 359 (1) will mean the abolition of the jurisdiction and power of the Supreme Court under Art. 32 and of the High Courts under Art. 226 of the Constitution. The true implication of the Presidential Order is to take away the right of any person to move any court for the enforcement of the rights mentioned in the Order. In strict legal theory the jurisdiction and powers of the Supreme Court and the High Courts remain the same as before since the Presidential Order merely takes away the locus standi of a person to move these Courts for the enforcement of certain fundamental rights during the operation of the Proclamation of Emergency."

66. It may be mentioned that in support of that view, reference was made to the decision of the Supreme Court in Mohan Choudhury's case, (AIR 1964 SC 173) also.

67. Bhagwati J., has observed as under in para 556 at page 1383:—

"To my mind, it is clear that if a petition or other proceeding in Court seeks to enforce a positive legal right conferred by some legislation, it would not be barred by the Presidential Order Of course, this does not mean that whenever a petition for a writ of habeas corpus comes before the Court, it must be rejected straightway without even looking at the averments made in it. The Court would have to consider whether the bar of the Presidential Order is attracted and for that purpose, the Court would have to see whether the order of detention is one made by an authority empowered to pass such an order under the Act; if it is not, it would not be State action and the petition would not be one for enforcement of the right conferred by Article 21."

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68. Thus it will be seen that as just pointed out while Their Lordships the Chief Justice, Chandrachud J. and Bhagwati J.,

have in terms held relying on the decisions in Mohan Choudhury's case; (AIR 1964 SC 173) and Makhan Singh's case (AIR 1964 SC 381) that it is the locus standi of the petitioner to move the Court for habeas corpus which is suspended and not the jurisdiction of the Court as such, His Lordship Beg J., however, while agreeing with the majority view of the other learned Judges that the Presidential Proclamation takes away the locus standi of a petitioner to move the Court for a habeas corpus has observed in para 316, at page 1299 as under:—

"It is true that the Presidential Order of 1975, like the Presidential Order of 1962, does not suspend the general power of this Court under Art. 32 or the general powers of High Courts under Art. 226, but the effect of taking away enforceability of the right of a detenu to personal freedom against executive authorities is to affect the locus standi in cases which are meant to be covered by the Presidential Order. Courts, even in Habeas Corpus proceedings, do not grant relief independently of rights of the person deprived of liberty."

69. What is more, His Lordship Beg J., even in respect of the matters covered by the first part of the Order suspending the right to move the Court for enforcement of the fundamental rights mentioned in the Presidential Order has stated that the Court shall have to make some enquiry inasmuch as His Lordship has observed in para 400 at page 1320 as under:—

"A prima facie valid detention order, that is to say, one duly authenticated and passed by an officer authorised to make it, recording a purported satisfaction to detain the petitioner under the Maintenance of Internal Security Act, which is operative either before or after its confirmation by the Government, is a complete answer to a petition for a Writ of Habeas Corpus. Once such an order is shown to exist in response to a notice for a Writ of Habeas Corpus, the High Court cannot inquire into its validity or vires on the ground of either mala fides of any kind or of non-compliance with any provision of the Maintenance of Internal Security Act in Habeas Corpus proceedings."

70. We may also observe in this connection that other learned Judges who have definitely held that the jurisdiction of the court is not barred by the Presidential Order issued under Art. 359 (1), have also taken the view that the Court has power to make an enquiry into the matter and not to dismiss the petition merely because it happens to be a petition for enforcing the writ of habeas corpus.

71. Chandrachud J., in para 477 at page 1343 has observed as under:—

"So long as the statutory prescription can be seen on the face of the order to have been complied with, no further inquiry is permissible as to whether the order is vitiated by legal mala fides."

72. Bhagwati J., has observed in para 556 at page 1383 as under:—

"Of course, this does not mean that whenever a petition for a writ of habeas corpus comes before the Court, it must be rejected straightway without even looking at the averments made in it. The Court would have to consider whether the bar of the Presidential Order is attracted and for that purpose the Court would have to see whether the order of detention is one made by an authority empowered to pass such an order under the Act; if it is not, it would not be State action and the petition would not be one for enforcement of the right conferred by Article 21....."

73. It would thus appear from a scrutiny of the judgment of the Supreme Court in the Habeas Corpus case that Their Lordships have approved the decision in Mohan Choudhury's case; (AIR 1964 SC 173) and Makhan Singh's case, (AIR 1964 SC 381) that what is barred by the Presidential Order is not the jurisdiction of the Court but the locus standi of the petitioner to move the court for enforcement of the fundamental rights mentioned in the order of the President. It is further held as we have pointed out that to the extent indicated by Their Lordships an enquiry is certainly possible and ought to be made to decide the question as to whether in fact the petition raises a question of the infringement of the fundamental rights mentioned in the Presidential Order.

74. In this connection it is important to bear in mind that a judgment of the Supreme Court or of any Court as a matter of fact is not to be read as if it is a statute. In making that observation we are only quoting the observations of His Lordship Chandrachud J., in paragraph 471 of the judgment in the Habeas Corpus case. Again, while dealing with certain observations made by the Supreme Court in Makhan Singh's case, (AIR 1964 SC 381) about the possible pleas available to a detenu, which were pressed before Their Lordships in the Habeas Corpus case, (AIR 1976 SC 1207) Bhagwati J., in para 546, page 1377 has observed as under:—

"Now, at first blush, these observations do seem to support the contention of the

detenus. But there are two very good reasons why I do not think these observations can be of much help in the determination of the question before us. In the first place, the question as to what were the other pleas available to a detenu in challenging the legality or propriety of his detention, despite the Presidential Order dated 3rd Nov. 1962, was not in issue before the Court and did not fall to be decided and the aforesaid observations made by the Court on this question were, therefore, clearly obiter. These observations would undoubtedly be entitled to great weight, but, as pointed out by this Court in *Madhav Rao Jiwaji Rao Scindia v. Union of India*, (1971) 3 SCR 9: (AIR 1971 SC 530) "an obiter cannot take the place of the ratio. Judges are not oracles." These observations do not, therefore, have any binding effect and they cannot be regarded as conclusive on the point."

75. We are aware that these observations were made by Their Lordships of the Supreme Court while dealing with the earlier judgments of the Supreme Court and that those observations have no application so far, as the binding nature of the obiter observations of the Supreme Court on the High Courts and other Courts is concerned. But then what is observed by His Lordship thereafter is of significance to us as laying down the guidelines for interpreting any judgment which may be cited before a Court. His Lordship has observed as under:—

"Moreover, it must be remembered that when we are considering the observations of a High Judicial authority like this Court, the greatest possible care must be taken to relate the observations of a Judge to the precise issues before him and to confine such observations, even though expressed in broad terms, in the general compass of the question before him, unless he makes it clear that he intended his remarks to have a wider ambit. It is not possible for judges always to express their judgments so as to exclude entirely the risk that in some subsequent case their language may be misapplied and any attempt at such perfection of expression can only lead to the opposite result of uncertainty and even obscurity as regards the case in hand. ... It was pointed out by the House of Lords as far back as 1901 in *Queen v. Leatham*, 1901 AC 495 "Every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be exposition of the whole law, but are governed and qualified by the particular facts in

which such expressions are to be found." This Court had also occasion to point out in the *State of Orissa v. Sudhansu Sekhar Misra* (1968) 2 SCR 154: (AIR 1968 SC 647) that the observations in a judgment must be "only in the context of the question that arose for decision." It would not be right, as observed by this Court in *Madhav Rao v. Union of India*, (AIR 1971 SC 530) "to regard a word, a clause or a sentence occurring in a judgment of this court, divorced from its context as containing a full exposition of the law on a question" particularly "when the question did not even fall to be answered in that judgment."

76. Having regard to the above guidelines laid down by His Lordship for interpreting and understanding the judgments of the Supreme Court, it would be always essential to consider as to what exactly was the point which Their Lordships were called upon to decide and what their decision thereon is. Judged in that light all that has been held either in *Mohan Choudhury's case*, (AIR 1973 SC 173) or in *Makhan Singh's case*, (AIR 1964 SC 381) and in the recent *Habeas Corpus* case is that a person has no locus standi to move the Court for a writ of habeas corpus during the period the order of the President is in force. It is nowhere held in any of these cases that the Court has no jurisdiction to deal with the matter. If at all, it has been in terms held that the jurisdiction of the Court to issue writs is not taken away. Again, in none of these cases decided by the Supreme Court so far, the question of interpretation of the second part of the Ordinance about pending matters with which we are concerned in this petition was required to be considered and decided upon. Having regard to that position with great respect we are unable to agree with the learned Single Judge (Rege J.) when he took the view that in the view he was taking that the court has no jurisdiction to inquire into a petition pending on the date of the order of the President he is fortified either by the decision of the Supreme Court in *Makhan Singh's case* or by the observations of Ray C. J. and Beg J., in the *Habeas Corpus* case on which he has placed reliance. That being so the learned Judge was also not right in coming to the decision that the view of the Supreme Court is contrary to the view taken by the Division Bench consisting of Chandurkar and Lentin JJ. in *Special Civil Application No. 650 of 1971* decided on 26th Mar. 1976 = (reported in AIR 1977 Bom 355) and that the said decision of the Division Bench cannot be considered to be good law. Differing therefore from the learned

Single Judge, we hold that the view taken by the Division Bench in Special Civil Application No. 650 of 1971 is not inconsistent with the decision of the Supreme Court either in *Makhan Singh's* case or in the *Habeas Corpus* case (AIR 1976 SC 1207). In our view, therefore, the decision of the Division Bench is still good law, but we would however like to add, as pointed out by us earlier, that the scope of the enquiry which is permissible under the second part of the order of the President in respect of pending matters is still wider in the sense that that provision would not affect the jurisdiction of the Court to dismiss a pending petition if on a perusal of the petition and the return filed by the respondents, it appears that the petitioner has moved the Court after an inordinate delay for which he has no reasonable explanation or that the petition is frivolous on the face of it or that it suffers from *suggestio falsi* and *suppressio veri* or raises a question of fundamental right by attacking the provisions of a section or statute the validity of which has been already pronounced by the Supreme Court or on the ground of *res judicata*.

77. That leads us to the next important point which is urged before us viz. what is to be done about the interlocutory stay orders or injunctions which have been issued prior to the proclamation of the Order of the President under Art. 359 in respect of cases where on an enquiry it is found that there is a breach of one or the other of the fundamental rights referred to in the two Presidential Orders issued under Art. 359 of the Constitution. Since such a proceeding to enforce the fundamental right by the issue of an appropriate writ has to be kept suspended till the expiry of the period mentioned in the Presidential Order, it would automatically follow that the interlocutory orders which might have been issued in such petitions though issued prior to the date of the Presidential Order have got to be evidently suspended as otherwise the very object of suspending such proceedings would be frustrated. Evidently the intention of the Parliament was that during the period of emergency the State must be free to carry on its activities in the larger interests of the nation without any fetters or impediments by the citizens getting the State's proposed activities stayed by the Court either by stay orders or injunctions. It is inconceivable that when the main proceeding for enforcement of the fundamental rights mentioned in the Presidential Order is itself kept suspended any interlocutory order issued in that proceeding could still continue to be operative.

That would make the very object of the proclamation of the President and the provisions under Art. 359 of the Constitution nugatory.

78. In this connection we agree with respect, with the decision of the Division Bench of the Patna High Court in *Kailash Pati Singh v. State of Bihar*, AIR 1976 Pat 248. The learned Judges in para 6 of the judgment have observed as under:—

“The word ‘suspended’ used in Art. 359 (1) cannot be interpreted to mean only staying the proceedings. There is difference between the effect of an order suspending a proceeding and the effect of an order of merely staying the proceedings. In Art. 359 (1), instead of the word ‘suspended’ if the word ‘stayed’ had been used, then any such proceeding where such right is enforced had to be stayed. However, if the proceedings pending before this Court, where such right is enforced, is to remain suspended due to the Presidential Order, then even the order of stay which is only *ad interim* in nature and is to continue during the pendency of the proceeding will also be deemed to be suspended. The matter may be different, if some final judicial order had been passed. It is well known that any order of stay which is to continue during the pendency of a proceeding before the High Court cannot be considered to be a final order.”

79. It is true that the learned single Judge (Rege J.) expressed his inability to agree with that decision and on the other hand he preferred to follow the decision of a single Judge in *Jagadish v. Union of India*, AIR 1976 Cal 17. The learned single Judge whose view has prevailed with Rege J., has observed as under:—

“In view of the aforesaid proclamation it was contended that inasmuch as in this case the enforcement of the right conferred under Article 14 of the Constitution was involved the proceeding should remain suspended and in the premises the interim order must necessarily continue. The position seems to be rather unfortunate because in this case there was an interim order and the effect would be that the interim order would continue so long as the emergency continues or until the proclamation is revoked, though the examination of the question which was possible because the matter is ready for hearing, might have revealed that the proceedings under the notice were valid. In numerous cases (sic) under Art. 14 are involved and while new applications or cases where Article 14 is resorted to are no longer possible during the continuance of the emergency, the persons who have obtained

Rules or orders of injunction prior to the 27th of June, 1975 would continue to enjoy those injunctions without the Court's having the opportunity to examine the validity or the propriety of the said orders simply because the questions under Article 14 are involved in those applications....."

80. Furtheron in the next para the learned single Judge of the Calcutta High Court has observed:—

"In order to facilitate the disposal of these orders of injunctions obtained against the fiscal authorities, the authorities should consider whether it is desirable that Art. 359 (1) of the Constitution should be amended. The result of the proclamation made under Article 359 of the Constitution and the order issued by the President seem to be that the orders of injunction would continue until the emergency is revoked. That might not be what was desired."

81. With great respect, in spite of the view that the result contemplated by the learned Judge was not desired, the learned Judge has taken the view which he has and it is this view which has prevailed with the learned single Judge of this Court. It may be mentioned that there is no discussion in the judgment of the learned single Judge of the Calcutta High Court for taking the view he has done. On the other hand, the Division Bench of the Patna High Court in Kailash Pati Singh's case, (AIR 1976 Pat 248) has come to its decision referred to above, after detailed discussion of the observations of the Supreme Court in paragraph 13 of Makhan Singh's case, (AIR 1964 SC 381). In fact the judgment of the learned single Judge of the Calcutta High Court in Jagadish's case (AIR 1976 Cal 17) was also relied upon before them on behalf of the petitioner. But the learned Judges for very good reasons refused to consider that decision as good law. In fact they expressed their surprise as to how if the proceeding pending before the Court is to remain in moratorium or under a blanket ban, the interim order passed in the same proceeding which is to continue during the pendency of the proceeding can remain in force.

82. We may also mention that the decision of the single Judge of the Calcutta High Court was also cited before the Division Bench of Chandurkar and Lentin JJ. which decided Special Civil Application No. 650 of 1971 = (reported in AIR 1977 Bom 355) and the learned Judges, in our opinion, rightly observed that they were unable to agree with the view taken by the learned single Judge of the Calcutta High Court

With respect, even on that point we are in agreement with the decision of the Division Bench and also the decision of the Patna High Court. We cannot agree with the view of the learned single Judge of the Calcutta High Court on the point of the continuance of the stay or injunction orders even during the period when the main proceeding stands suspended in view of the Presidential Orders issued under Art. 359 (1) of the Constitution.

83. In the result, in our opinion, the learned single Judge of this Court (Rege J.) was not right in the view he has taken either about the scope of the enquiry to be made by the Court in pending proceedings or about the helplessness of the Court in the matter of injunctions or stay orders which were issued prior to the coming into force of the order of the President.

84. Our conclusions therefore are that the decision of the Division Bench of this Court consisting of Chandurkar and Lentin JJ. in Special Civil Application No. 650 of 1971 = (reported in AIR 1977 Bom 355) is still good law in spite of the decision of the Supreme Court in the Habeas Corpus case, (AIR 1976 SC 1207) and in respect of matters which were pending on the date of the order of the President involving the alleged infringement of the fundamental rights mentioned therein, an enquiry is certainly possible to the extent indicated by the Division Bench and also to the extent which is indicated by us. It is not every petition containing an allegation of a breach of a fundamental right mentioned in the order of the President which needs to be suspended without taking into consideration the allegations in the petition and the returns which are filed and to the extent indicated by us, the court has every jurisdiction to dispose of the writ petitions. With regard to stay orders or injunctions issued in the pending proceedings prior to the coming into force of the Presidential Order under Art. 359 (1), if it is found on enquiry on perusal of the case and the returns that the proceeding has to be kept suspended during the period mentioned in the order of the President, the stay orders or injunctions issued in the said petition shall have to be simultaneously suspended.

85. Since we have taken the view that this petition suffers from the vice of inordinate delay of about five years which has not been explained the petition is dismissed with costs and the rule is discharged.

Petition dismissed.

AIR 1977, BOMBAY 384**FULL BENCH**

TULZAPURKAR Ag. C. J.,

CHANDURKAR AND SHAH, JJ.

Shripatrao Dajisaheb Ghatge and another, Petitioners v. The State of Maharashtra and another, Opponents.

Special Civil Applns. Nos. 5377 of 1976, 1880 of 1973, 1428 and 1703 of 1975, D/-22-4-1977.

(A) Constitution of India, Art. 227 (as amended by Constitution (42nd Amendment) Act, 1976) — Power is both judicial and administrative.

The contention that the amended Article 227 retains with the High Court only administrative superintendence over all courts subject to its appellate jurisdiction must be rejected. On a true and proper construction of the language employed in the amended Art. 227 it is clear that superintendence which every High Court is said to possess over all courts subject to its appellate jurisdiction under sub-art. (1) includes judicial superintendence or judicial supervision. Under sub-article (1) it has been generally provided that every High Court shall have superintendence over all courts without specifying whether it is administrative or judicial which ordinarily would mean superintendence of both kinds and this is made amply clear in sub-art. (5) according to which power of superintendence has been conferred upon the High Court to question any judgment of any inferior court provided that such judgment is otherwise subject to either appeal or revision to the High Court and it is obvious that judgments can be questioned judicially and not administratively. In other words, it is plain that judicial supervision over inferior court's judgments is contemplated by sub-art. (5). It will further appear clear that under sub-article (5) some limitation or restriction is placed upon the High Court's judicial supervision or superintendence over the judgments of any inferior court, in that such judicial supervision or judicial superintendence would be available to the High Court only in cases where such judgments are otherwise subject to an appeal or revision but such a limitation or restriction re-emphasises the fact that the superintendence spoken of by the amended Art. 227 (1) includes judicial supervision or judicial superintendence.

(Paras 6 and 7)

(B) Constitution of India, Art. 227 — Article is not merely procedural but confers substantive right on litigant to move High Court. AIR 1962 Punj 94, AIR 1951 Bom 423 and AIR 1968 Bom 51, Distinguished; AIR 1964 SC 381 and 1970 (2) SCR 197, AIR 1953 SC 210, AIR 1950 SC 124, AIR 1955 SC 233 and AIR 1976 SC 1207, Referred. (Para 11)

(C) Constitution of India, Art. 227 (prior to and after Constitution (42nd Amendment) Act, 1976) — Pending petitions — Must be disposed of in accordance with original Art. 227. (Interpretation of Statutes).

The amended Art. 227 has not been given any retrospective operation either by express words or by necessary intendment and the amended Article is clearly prospective in operation. That being the position and since Art. 227 is not procedural but confers a right of action on a litigant it is obvious that all petitions pending as on 1-2-1977 i.e. the date on which the amended Art. 227 came into force must be heard and disposed of in accordance with the original or un-amended Art. 227. (Para 13)

It is a well established principle that where a statute is passed pending an action strong and distinct words are necessary to alter the vested rights of either litigant as they stood at the commencement of the action. Applying this principle it will be clear that pending petitions under the original Art. 227 will not be affected by the amended article, inasmuch as, there are no words at all, much less strong and distinct words, in the amended Art. 227 which suggest either expressly or by necessary implication that any alteration was intended in the right of the petitioners to continue and complete their proceedings in accordance with the Article as it stood at the commencement of their action. (1861) 10 CB (NS) 179, (1885) 15 QBD 234 and AIR 1950 Bom 236, Ref. (Para 14)

The principle is also well established that unless contrary can be shown a provision which takes away the jurisdiction of a court is itself subject to implied saving of litigant's right and since there is nothing in the amended Art. 227 to indicate to the contrary, the petitioners' right to continue the pending petitions under the original Art. 227 must be held to have been saved. AIR 1928 Cal 640 (FB), AIR 1957 SC 540, 1905 AC 369 and AIR 1943 FC 24, Rel. on. (Paras 17, 18)

In S. 58 of the 42nd Amendment Act, 1976 the Parliament has made special

provision with regard to pending petitions under Art. 226 and has by that provision enacted that such pending petitions shall be dealt with in accordance with the amended Art. 226. A similar provision in regard to pending petitions under the unamended Art. 227 has not been made and, therefore, a reasonable inference arises that Parliament did not intend that pending petitions under the original Art. 227 should be governed by the amended Art. 227. (Para 13)

(D) Constitution of India, Art. 227 (as amended by Constitution (42nd Amendment) Act, 1976) — Power of judicial superintendence — Extent of — 'Courts' — Meaning.

The expression 'Courts' occurring in the amended Art. 227 will have to be understood in its normal accepted connotation especially in the absence of any definition being given in the Constitution. The proposition is well settled that all Courts are tribunals but all tribunals are not Courts. The proposition in other words means that some tribunals would be basically courts i.e. courts in their normal connotation while some others would not be courts and, therefore, it cannot be said that Parliament wanted to exclude all tribunals from the purview of the High Court's superintendence under the amended Art. 227 but it can be said that Parliament intended to exclude only such tribunals as are not basically courts from the High Court's superintendence. It follows that the High Court's power of judicial superintendence under the amended Art. 227 certainly covers judgments of all Courts meaning thereby all regular civil and criminal courts constituted under the hierarchy of courts subject to its appellate or revisional jurisdiction but also extends to tribunals, bodies or authorities, whatever be their label provided two conditions are satisfied: (a) such tribunal, body or authority is basically a Court i.e. it performs judicial function of rendering definitive judgments having finality and authoritativeness to bind the parties litigating their rights before it in exercise of sovereign judicial power transferred to it by the State and (b) such tribunal, body or authority is subject to High Court's appellate or revisional jurisdiction. The reliance placed on Arts. 323A and 323B for the purpose of inferring an intention on the part of Parliament to exclude all tribunals from the purview of High Court's superintendence under the amended Art. 227 is misplaced. AIR 1963 SC 874 and AIR 1965

SC 1595, Distinguished; AIR 1961 SC 1669 and AIR 1975 Bom 143 (FB), Ref.

(Paras 22, 23, 24)

Cases Referred: Chronological Paras

AIR 1976 SC 1207: 1976 Cri LJ 945	12
AIR 1975 Bom 143: 76 Bom LR 455 (FB)	22
(1970) 2 SCR 197	10
AIR 1968 Bom 51: 69 Bom LR 551	8
AIR 1965 SC 1595	21
AIR 1964 SC 381: (1964) 1 Cri LJ 269	9, 12
AIR 1963 SC 874	21
AIR 1962 Punj 94	8
AIR 1961 SC 1669	22
(1961) 2 All ER 721: (1961) 3 WLR 39	16
AIR 1957 SC 540	17
AIR 1955 SC 233: (1955) 1 SCR 1104	11
AIR 1954 SC 215	5, 7
AIR 1954 SC 240: (1955) 1 SCR 250	10
AIR 1953 SC 210: 1953 SCR 1144	10
AIR 1951 Bom 423	8, 9
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AIR 1950 SC 124: 51 Cri LJ 1514	11
AIR 1950 Bom 236	14
AIR 1949 Bom 42	5, 6, 7
AIR 1943 PC 164: 70 Ind App 129	10
AIR 1943 FC 24	18
AIR 1937 Bom 153: 39 Bom LR 82	7
AIR 1933 Bom 1: 34 Bom LR 1523	7
AIR 1928 Cal 640 (FB)	17
(1909) ILR 32 Mad 140	18
1905 AC 369: 92 LT 738	3, 4, 15, 16, 18
(1904) ILR 27 Mad 538	18
(1885) 15 QBD 234: 54 LJ QB 489	14
(1875) 1 Ch D 48: 45 LJ Ch 12	13, 18
(1861) 10 CB (NS) 179: 128 RR 666	14
(1850) 9 CB 551: 137 ER 1007	18

In Spl. C. A. No. 5377 of 1976:—

H. M. Seervai and M. L. Pendse with S. M. Mhamane, for Petitioners; R. W. Adik, Advocate General as per notice; M. V. Paranjpe and V. D. Govilkar with Sidhwa as Interveners on behalf of the Union of India; C. J. Sawant, Addl. Govt. Pleader with D. P. Hegde, Asstt. Govt. Pleader, for Opponent No. 1.

In Spl. C. A. No. 1880/73:—

H. M. Seervai and M. L. Pendse with H. D. Gole and V. A. Gangal, for Petitioners; R. W. Adik, Advocate General, as per notice; M. V. Paranjpe and V. D. Govilkar with Sidhwa, on behalf of the Union of India, as Interveners; D. M. Rane, for Opponent No. 1.

In Special Civil Application No. 1428/75:—

H. M. Seervai and M. L. Pendse with H. D. Gole, for Petitioner; R. W. Adik, Advocate General, as per notice; K. H. Bhabha with V. P. Tipnis on behalf of the Union of India as Interveners; C. J.

Sawant, Addl. Govt. Pleader with D. P. Hegde, Asstt. Govt. Pleader, for Opponent.

In Special Civil Application No. 1703/75:—

H. M. Seervai with C. R. Dalvi, for Petitioners; R. W. Adik, Advocate General, as per notice; K. H. Bhabha with Mr. V. P. Tipnis, on behalf of the Union of India, as Interveners; N. K. Iyer, for Respondents; Interveners appearing with the Court's permission; K. K. Singhvi with P. K. Singhvi and B. N. Singhvi; S. J. Deshpande; A. V. K. Mudaliar, for the Nagpur Municipal Corporation.

TULZAPURKAR, Actg. C. J.:— These four petitions have been placed before this larger bench with a view to ascertain the impact of Art. 227 of the Constitution as amended by the Constitution (42 Amendment) Act, 1976 on pending petitions filed under that Article prior to its amendment and to consider the allied questions that arise under the said amended article. Each of the four petitions has been regarded as being representative in character of a large number of petitions that have been filed and are pending in this Court since prior to 1st February 1977, the date on which the amended Art. 227 has come into force.

2. By Spl. Civil Application No. 5377 of 1976 a certain decision rendered in appeal and confirmed in review by the Maharashtra Revenue Tribunal under the Maharashtra Agricultural Lands (Ceiling on Holdings) Act, 1961 has been challenged by the petitioners therein under Art. 227; the petition was filed on 9-12-1976 and rule nisi and interim stay were granted by this Court on 14-12-1976. Spl. Civil Application No. 1880 of 1973 is directed against an order dated 21-6-1973 passed by the Commissioner, Poona Division, rejecting an application made by the petitioners under S. 88D (1) (iv) of the Bombay Tenancy & Agricultural Lands Act, 1948, whereby the petitioners had sought revocation or cancellation of the exemption certificate granted to their landlord under S. 88C on 5-7-1958; the petition was filed under Art. 227 on 3-8-1973 and rule nisi and interim stay have been granted by this Court on 6-8-1973. In Spl. Civil Application No. 1428 of 1975 the petitioners therein have challenged the validity and/or legality of two notifications — Section 4 notification dated 25-8-1969 and S. 6 notification dated 12-9-1972 issued under the Land Acquisition Act purporting to acquire the petitioners' lands for public purpose viz. resettlement

of persons likely to be affected due to Krishna Dam Project under Art. 227; the petition has been filed on 21-6-1975 and rule and interim injunction have been issued by this Court on 1-7-1975. In Spl. Civil Application No. 1703 of 1975 the petitioner's (plaintiff) suit for possession against his tenant under the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 was dismissed by the learned Judge of Small Causes Court at Pune on 5-6-1974 and against the dismissal he had filed an appeal to the District Judge at Pune and the learned Assistant Judge who heard the appeal allowed the same but remanded the suit back to the trial Court with certain directions; the petitioner-plaintiff has challenged the appellate court's order under Art. 227 of the Constitution; the petition was filed on 1-8-1975 and rule and interim stay have been granted by this Court on 4-8-1975. It is thus clear that all these four petitions filed under the unamended Art. 227 have been admitted and are pending in this Court on 1-2-1977 when the amended Art. 227 has come into force and the principal question that has been raised before us is whether the amended Article 227 would be applicable to or affect in any manner these four and similar other pending petitions? If the answer to the first question be in the affirmative, the second question raised is whether this Court can and/or should permit the petitioners to amend their petitions so as to convert them into petitions under Article 226 of the Constitution? Yet another question raised is what is the true effect of deletion of the words 'and tribunals' from the original Art. 227 and addition of the words 'subject to its appellate jurisdiction' after the words 'all courts' in the amended Art. 227 (1) on future petitions that might be filed after 1st February 1977 under the amended Art. 227?

3. On the principal question as to whether the pending petitions (meaning petitions filed and admitted before 1-2-1977) under the original Art. 227 would be governed or affected by the amended Art. 227 which has come into force on 1st February 1977, Mr. Seervai appearing for the petitioners submitted that such pending petitions will have to be proceeded with, heard and disposed of by this Court under the original Art. 227 and the hearing and disposal of these petitions will not be affected in any manner by the amended Art. 227 for three or four reasons; in the first place he urged that the amended Art. 227 has not been given

any retrospective operation either expressly or by necessary intendment so as to apply to or govern the pending petitions and in the absence of such retrospective operation the pending petitions must be dealt with and disposed of in accordance with the original or unamended Art. 227; secondly, he pointed out that in the context of S. 58 of the 42nd Amendment Act, 1976 making special provisions in regard to pending petitions under the original Art. 226 (where expressly it has been enacted that such pending petitions shall be dealt with in accordance with the amended Art. 226) and in the absence of similar provision in regard to pending petitions under the unamended Art. 227 it should be reasonably inferred that the Parliament did not intend to make the amended Art. 227 applicable to pending petitions filed under the original or unamended Art. 227 and the intention was clear that such petitions should be governed and disposed of under the original Art. 227; thirdly, he relied upon S. 6(e) of the General Clauses Act, 1897 as also on the principle enunciated by the Privy Council in the leading case of *Colonial Sugar Refinery Ltd. v. Irving* reported in 1905 AC 369; and lastly, in the alternative, he urged that quite independently of S. 6 of the General Clauses Act, such pending petitions would be saved from the amended Article and would have to be dealt with and disposed of in accordance with the original Article 227 in view of the well-settled general principle that, unless contrary can be shown a provision which takes away the jurisdiction of a court is itself subject to an implied saving of a litigant's right and there is nothing in the amended Art. 227 to indicate to the contrary. On the second question mentioned above, he submitted that if the Court came to the conclusion that the pending petitions under the original Art. 227 were governed by and were required to be proceeded with under the amended Art. 227, it would be both reasonable and equitable to grant permission to the petitioners to amend their petitions so as to convert them into petitions under Art. 226, for, it is because of amendment that has been effected by Parliament in the original Art. 227 that the necessity to amend the petitions in the above manner could be said to have arisen, for which the petitioners cannot be blamed; of course, he fairly conceded that unless the petitioners were able to make out a case under Art. 226 the Court would not be in a position to grant any

relief to them, but that would be an aspect touching the merits of the case which the Court will have to determine after the amendment was allowed. On the third question he submitted that in regard to future petitions the High Court will be able to exercise the power of superintendence under the amended Art. 227 not only over all courts but also over tribunals, bodies or authorities provided two conditions were satisfied viz. (i) such tribunal, body or authority, whatever be its label, was basically a court and (ii) such tribunal, body or authority was subject to High Court's appellate or revisional jurisdiction; in other words, the amended Art. 227 is not confined to exercising judicial superintendence over regular civil or criminal courts constituted under the hierarchy of Courts but would extend to tribunals, bodies or authorities, who perform judicial functions of rendering definitive judgments having finality and authoritativeness to bind the parties litigating their rights before them in exercise of sovereign judicial power transferred to them by the State, provided such tribunals, bodies or authorities are subject to High Court's appellate or revisional jurisdiction.

4. In reply Messrs. Paranjpe and Bhabha, who appeared for the Union of India, Mr. R. W. Adik, the learned Advocate-General of Maharashtra and counsel for the respondents raised two or three contentions. In the first place, it was contended that the amended Art. 227 confers on the High Court only 'administrative superintendence' over all courts subject to its appellate jurisdiction and the amendment effected in the original Article 227 has taken away the power of 'judicial superintendence' that had been conferred on the High Court by that article before its amendment; in other words, by the amendment the article has been brought on par with S. 224 of the Government of India Act, 1935 and has ceased to be on par with S. 107 of the Government of India Act, 1915 or S. 15 of the High Courts Act, 1861 and since judicial superintendence has been taken away by the amendment with effect from 1-2-1977, the High Court cannot exercise judicial superintendence even in regard to pending petitions because that power no longer exists. Secondly, it was contended that assuming without admitting that the amended Art. 227 retains the power of judicial superintendence with the High Court, such power under the amended

article is now confined to all courts which are subject to High Court's appellate or revisional jurisdiction and the expression 'all courts' must mean regular civil or criminal courts constituted under a hierarchy of courts, that is to say, courts constituted under the Bombay Civil Courts Act, the Presidency and Provincial Small Cause Courts Acts, the Bombay City Civil Court Act and criminal courts constituted under the Criminal P. C. and would not extend to any tribunal or authority or even a court constituted under any other enactment for enforcing the rights and liabilities created by such enactment and as such no petition under the amended Art. 227 would lie against the decisions or orders of various tribunals like the Maharashtra Revenue Tribunal acting under the Bombay Tenancy and Agricultural Lands Act, 1948 or Maharashtra Agricultural Lands (Ceiling on Holdings) Act, 1961 or Maharashtra Co-operative Tribunals acting under the Maharashtra Co-operative Societies Act, etc. Thirdly, it was contended that Art. 227 being merely procedural would normally operate retrospectively and cover pending petitions without express provision being made in that behalf and as such absence of a provision in regard to pending petitions under the original Art. 227 as is to be found in Section 58 of the 42nd Amendment Act in regard to pending petitions under Art. 226 would not lead to an inference that the pending petitions under Art. 227 were not governed nor intended to be governed by the amended Art. 227. As regards S. 6 of the General Clauses Act, 1897 and the principle of Colonial Sugar Refinery Co.'s case (1905 AC 369) it was contended that neither S. 6 nor the ratio of the Privy Council decision would be applicable to the pending petitions in question, inasmuch as, both S. 6 as also the Privy Council decision deal with 'accrued right' or 'vested right of appeal' and it is such right and proceeding in respect thereof that are saved from the effect of a repealing enactment, while Art. 227, both in its original form as well as in its amended form merely conferred and confers power upon the High Court to exercise superintendence over all courts and tribunals (under the unamended article) and over all courts subject to its appellate jurisdiction (under the amended article) but did not and does not confer any right on a litigant; in other words, since Art. 227 dealt with and deals with procedural rights by way of conferring

power of superintendence upon High Courts and not with substantive right of any litigant, S. 6 would be inapplicable and the presumption would be that the amended article would have retrospective operation and govern the hearing and disposal of pending petitions.

5. At the outset it must be clarified that the contention raised by Messrs. Paranjpe and Bhabha that the amended Art. 227 confers on the High Court only 'administrative superintendence' over all courts subject to its appellate jurisdiction and that with effect from 1-2-1977 the High Court no longer enjoys any power of judicial superintendence in respect of judgments or orders of such Courts is, in our view, irrelevant qua the pending petitions filed under unamended Art. 227 if the hearing or disposal of such petitions is to be governed not by the amended article but by the original Art. 227, inasmuch as, it was not disputed by them that under the original Art. 227 the High Court had power of judicial superintendence. However, the aspect whether under the amended Art. 227 judicial superintendence has been taken away and merely administrative superintendence has been retained with the High Court would assume importance qua future petitions and also qua pending petitions if such petitions are held liable to be heard and disposed of in accordance with the amended Art. 227. After clarifying the position as above, we shall proceed to deal with the aforesaid contention. The question is whether the amended Art. 227 retains with the High Court merely administrative superintendence over all courts and takes away the High Court's power of judicial superintendence over all courts and tribunals hitherto enjoyed by it under the original Art. 227? According to Messrs. Paranjpe and Bhabha, initially under S. 107 of the Government of India Act, 1915 both administrative as well as judicial superintendence had been conferred upon the High Court with respect to subordinate courts, but with the repeal of Government of India Act, 1915 and coming into force of the Government of India Act, 1935, S. 224 of the latter Act conferred power of administrative superintendence on the High Court in respect of 'all courts subordinate to its appellate jurisdiction' and though under the original Art. 227 of the Constitution power of superintendence, both administrative and judicial, could be said to have been conferred upon the High Court over all courts and tribunals the amend-

ed Art. 227 has been brought on par with S. 224 of the Government of India Act, 1935 and has ceased to be on par with S. 107 of the Government of India Act, 1915 or S. 15 of the High Courts Act, 1861 and therefore under the amended Art. 227 the High Court has merely administrative supervisory powers over all courts subject to its appellate jurisdiction. In support of this contention reliance was placed by Counsel upon the provisions of S. 107 of the Government of India Act, 1915, S. 224 of the Government of India Act, 1935, original Art. 227 of the Constitution and the amended Article 227 of the Constitution and also on two decisions — one of the Supreme Court in Waryam Singh v. Amarnath reported in AIR 1954 SC 215 and the other of this Court in Kavasji Pestonji Dalal v. Rustomji Sorabji Jamadar reported in AIR 1949 Bom 42.

6. It is not possible to accept this contention for two reasons, namely (a) on a true construction of the amended Article 227 (5) it is clear that judicial superintendence or judicial supervision though limited in extent has been retained with the High Court along with its administrative superintendence or supervision and (b) the decided cases on which reliance has been placed do not support the contention urged. Looking at the contention from the construction point of view it will be necessary to set out the material parts of the amended Art. 227 being sub-art. (1) and sub-art. (5) thereof. These run thus:

227. Power of superintendence over all courts by the High Court.—

(1) Every High Court shall have superintendence over all courts subject to its appellate jurisdiction.

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(5) Nothing in this article shall be construed as giving to a High Court any jurisdiction to question any judgment of any inferior court which is not otherwise subject to appeal or revision.

On a true and proper construction of the language employed in the aforesaid provisions it will appear clear that superintendence which every High Court is said to possess over all courts subject to its appellate jurisdiction under sub-art. (1) includes judicial superintendence or judicial supervision. Under the sub-art. (1) it has been generally provided that every High Court shall have superintendence over all courts without specifying whether it is administrative or judicial which

ordinarily would mean superintendence of both kinds and this is made amply clear in sub-art. (5) according to which power of superintendence has been conferred upon the High Court to question any judgment of any inferior court provided that such judgment is otherwise subject to either appeal or revision to the High Court and it is obvious that judgments can be questioned judicially and not administratively. In other words, it is plain that judicial supervision over inferior court's judgments is contemplated by sub-art. (5). It will further appear clear that under sub-art. (5) some limitation or restriction is placed upon the High Court's judicial supervision or superintendence over the judgments of any inferior court, in that such judicial supervision or judicial superintendence would be available to the High Court only in cases where such judgments are otherwise subject to an appeal or revision but such a limitation or restriction re-emphasises the fact that the superintendence spoken of by the amended Article 227 (1) includes judicial supervision or judicial superintendence. Secondly, it would not be quite correct to say that S. 224 (2) of the Government of India Act, 1935 took away from the High Court its judicial supervision or superintendence over all courts subordinate to it. But on a fair reading of that provision it will appear clear that judicial supervision or superintendence which was unquestionably vested in the High Court over its subordinate courts under S. 107 of the Government of India Act, 1915 was merely limited or restricted to some extent and was not taken away altogether as has been suggested by Messrs. Paranjpe and Bhabha and therefore it would be incorrect to say that the amended Art. 227 of the Constitution by reason of its being brought on par with S. 224 of the Government of India Act, 1935 has the effect of taking away from the High Court its power of judicial supervision or superintendence over the subordinate courts. It is true that in the original Art. 227 there was no provision similar to sub-s. (2) of S. 224 of the Government of India Act, 1935 and such a provision now finds a place in the amended Art. 227 in sub-art. (5) thereof but by reason of such provision all that could be said is that judicial supervision or superintendence conferred upon the High Court over all courts subject to its appellate jurisdiction could be said to have become limited or restricted to the same extent as it had

been limited or restricted under S. 224 (2) of the Government of India Act, 1935. This position as we shall point out later has been clarified by the decision of this Court in *Kavasji Pestonji Dalal's case* (AIR 1949 Bom 42). After all this power of judicial superintendence conferred by the amended Art. 227 is, as pointed out by Harries, C. J. in *Dalmia Jain Airways' case* (AIR 1951 Cal 193) (SB) to be exercised most sparingly and only in appropriate cases in order to keep the subordinate courts within the bounds of their authority and not for correcting mere errors.

7. Coming to the decided cases the position was well settled that the superintendence conferred upon each High Court by S. 107 of the Government of India Act, 1915 included judicial superintendence by the High Court over its subordinate courts. In *Emperor v. Balkrishna Hari Phansalkar*, reported in 34 Bom LR 1523: (AIR 1933 Bom 1) Sir John Beaumont, C. J. has observed at p. 1545 (of Bom LR): (at p. 4 of AIR) as under:

"Under S. 107 the High Court has superintendence over all Courts for the time being subject to its appellate jurisdiction. It is not disputed that rights of superintendence include not only superintendence on administrative points, but superintendence on the judicial side too, and that under its power of superintendence the High Court can correct any error in a judgment of a Court subject to its appellate jurisdiction."

In *Emperor v. Jamnadas Nathji* reported in 39 Bom LR 82: (AIR 1937 Bom 153) Broomfield and Sen, JJ. invoked their jurisdiction under S. 107 to reverse a conviction which was wrong on the face of it. In that case the party who could have appealed had not appealed and therefore no application by him in revision could be entertained by the High Court but in order to prevent an obvious miscarriage of justice the court interfered invoking its power of judicial superintendence under S. 107. It was not disputed before us that the original Art. 227 of the Constitution was on par with S. 107 of the Government of India Act, 1915 with the only difference that the power of superintendence under the original Art. 227 was extended to 'tribunals' in addition to 'all courts'. But the original Art. 227 had been differently structured as compared to S. 107 of the Government of India Act, 1915, inasmuch as, the power of superintendence had been divided into two parts; the first part be-

ing sub-art. (1) containing general power and the second part being sub-art. (2) containing enumeration of certain specified powers of superintendence. This difference in the structure of the original Article 227 gave rise to a contention that in view of what was contained in sub-art. (2) the entire article conferred on the High Court merely administrative superintendence over all courts and tribunals, but such a contention was negated by the Supreme Court in *Waryam Singh's case* (AIR 1954 SC 215). In para. 13 of its judgment the Supreme Court dealt with the nature of superintendence under the original Art. 227 of the Constitution in these words:

"The material part of Art. 227 substantially reproduces the provisions of S. 107 of the Government of India Act, 1915 except that the power of superintendence has been extended by the Article also to Tribunals. That the Rent Controller and the District Judge exercising jurisdiction under the Act are Tribunals cannot and has not been controverted. The only question raised is as to the nature of the power of superintendence conferred by the Article. Reference is made to Cl. (2) of the Article in support of the contention that this Article only confers on the High Court administrative superintendence over the Subordinate Courts and Tribunals. We are unable to accept this contention because Cl. (2) is expressed to be without prejudice to the generality of the provisions in Cl. (1)." "Further, the preponderance of judicial opinion in India was that S. 107 which was similar in terms to S. 15 of the High Courts Act, 1861, gave a power of judicial superintendence to the High Court apart from and independently of the provisions of other laws conferring revisional jurisdiction on the High Court." The above observations therefore clearly show that the power of superintendence that was conferred upon each High Court under S. 107 of the Government of India Act, 1915 as well as under the original Art. 227 of the Constitution was not merely administrative superintendence but included judicial superintendence. The position under S. 224 of the Government of India Act, 1935 has been clarified by this Court in *Kavasji Pestonji Dalal's case*, (AIR 1949 Bom 42) to the effect that all that sub-s. (2) of S. 224 did was that it limited or restricted judicial superintendence of High Court in respect of the judgments of inferior courts to a certain extent, namely that such judicial super-

intendence in respect of the judgments of inferior courts would be available to the High Court only where such judgments were otherwise subject to an appeal or revision to the High Court. This conclusion has been reached after considering the marginal notes as well as the enacting parts of S. 107 of the 1915 Act and S. 224 of the 1935 Act and conflicting decisions of several High Courts. In para 10 of its judgment this is what the Division Bench has observed:

"The prohibition under sub-s. (2) only refers to those judgments of an inferior Court which are not otherwise subject to appeal or revision to the High Court. But the prohibition cannot and does not apply to judgments which are subject to appeal or revision. If S. 224 (1) gave the High Court the power of judicial interference, that power obviously has not been wholly taken away, but it has been taken away to the extent of those judgments which are not subject to appeal or revision. In other words, if a judgment is subject to appeal or revision, it seems that the High Court would still have the power to interfere judicially apart from and over and above, merely dealing with those judgments in appeal or revision."

Again in para 28 the Division Bench has observed thus:

"Sub-s. (1) is identical in terms with S. 107, Government of India Act, 1915, except of course with regard to the deletion of Cl. (b) of S. 107, and in my opinion sub-s. (1) includes the power which existed under S. 107, Government of India Act, 1915, of judicial superintendence and correction. By reason of sub-s. (2) that power is taken away only with regard to judgments which are not subject to appeal or revision."

In our view, the amended Art. 227, being on lines of S. 224 of the Government of India Act, 1935, must be construed as conferring power of judicial superintendence on the High Court qua all inferior courts and insertion of sub-art. (5) therein, which is in pari materia the same as sub-s. (2) of S. 224 of the 1935 Act, would only have the effect of limiting or restricting the judicial superintendence over the judgments of inferior courts to the extent to which such judgments are otherwise subject to appeal or revision to the High Court. Reliance was placed on certain observations made by the Supreme Court in Waryam Singh's case in para 13 of its judgment which follow the observations

quoted by us earlier and these are as follows:

"In this connection it has to be remembered that S. 107 of the Government of India Act, 1915 was reproduced in the Government of India, 1935 as S. 224. Section 224 of the 1935 Act, however, introduced sub-s. (2), which was new, providing that nothing in the section should be construed as giving the High Court any jurisdiction to question any judgment of any inferior Court which was not otherwise subject to appeal or revision. The idea presumably was to nullify the effect of the decisions of the different High Courts referred to above. S. 224 of the 1935 Act has been reproduced with certain modifications in Art. 227 of the Constitution. It is significant to note that sub-s. (2) to S. 224 of the 1935 Act has been omitted from Art. 227. This significant omission has been regarded by all High Courts in India before whom this question has arisen as having restored to the High Court the power of judicial superintendence it had under S. 15 of the High Courts Act, 1861 and S. 107 of the Government of India Act, 1915."

It must be pointed out that the Court's decision that judicial superintendence was vested in the High Court under the original Art. 227 actually rested on two grounds: (a) on construction the Court held that sub-Art. (2) did not affect the generality of the provision contained in sub-art. (1) which included judicial superintendence and (b) the preponderance of judicial opinion in India was that S. 107 of the Government of India Act, 1915 gave the power of judicial superintendence to High Court. Therefore, the decision on the point was principally based on construction of the article. Further, while elaborating the second ground on which its decision rested the Court has observed that when S. 107 of the 1915 Act was replaced by S. 224 in the 1935 Act, sub-s. (2) of S. 224 was newly introduced and the idea presumably was to nullify the effect of the decisions of different High Courts but the expression 'the idea presumably was' itself clearly suggests that that was not the definite opinion of the Court. It is thus clear that the two decisions on which reliance was placed by Counsel for the Union of India do not support the contention urged. In our view, on pure construction of S. 224 (2) and amended Art. 227 (5) it is clear that judicial supervision or superintendence, though limited in extent did vest and does vest in the High Court. The con-

tention therefore that the amended Art. 227 retains with the High Court only administrative superintendence over all courts subject to its appellate jurisdiction must be rejected.

8. Having come to the conclusion that even under the amended Art. 227 power of judicial supervision or superintendence with the limitation or restriction indicated above has been retained with the High Court over all courts subject to its appellate jurisdiction, we shall next deal with the contention urged by Messrs. Paranjpe and Bhabha on behalf of the Union of India and Counsel for the respondents that Art. 227 is merely procedural and confers power of superintendence upon the High Court and it neither deals with nor confers any right of action on the litigant and therefore the amendment effected therein would normally operate retrospectively and cover pending petitions without express provision being made in that behalf. On the other hand, on behalf of the petitioners Mr. Seervai contended that Art. 227 has never been regarded as an article dealing with the procedural matters or procedural rights but it confers substantive right upon a litigant to move the High Court and therefore the presumption would be the other way about, namely, that the amendment effected therein would ordinarily be prospective in the absence of retrospective operation being given to it either expressly or by necessary intendment and as such the pending petitions will have to be dealt with and disposed of in accordance with unamended Art. 227. Therefore, the question that arises for consideration is whether Art. 227 is purely procedural and deals with procedural matters like conferring power on the High Court to exercise judicial superintendence or it deals with and confers any right or substantive right on a litigant to move the High Court. In support of the contention that Art. 227 is procedural and merely confers power of judicial superintendence upon High Court and not any right on the litigant reliance was placed upon the language of the article itself as also certain observations in decided cases. The unamended Art. 227 (1) ran thus:

"Every High Court shall have superintendence over all courts and tribunals throughout the territories in relation to which it exercises jurisdiction."

The amended Art. 227 (1) runs thus:

"Every High Court shall have superintendence over all courts subject to its appellate jurisdiction."

It was urged that the aforesaid provision by its very language merely conferred and confers power of superintendence upon every High Court and did not and does not say anything about conferring any right upon any litigant to move the High Court. It was pointed out that whenever the framers of the Constitution wanted to confer any right upon a litigant, appropriate phraseology has been used by them and in this behalf reference was made to Arts. 132 and 133 of the Constitution by which a right of appeal has been conferred upon a litigant to approach the Supreme Court against the judgments or decisions of High Courts. It was further urged that under Art. 227 the High Court can suo motu exercise its power of superintendence over subordinate courts and what can be done by the High Court suo motu cannot be regarded as conferring any right upon a litigant; it was also contended that the granting of relief on a petition filed under Art. 227 was and is discretionary and therefore Art. 227 could not be regarded as conferring any right upon a litigant. Reliance was also placed upon certain observations made by the Punjab High Court in *Chautala Workers' Co-op. Society Ltd. v. State of Punjab* reported in AIR 1962 Punjab 94 and by this Court in two cases, *A. R. Sarin v. B. C. Patil* reported in AIR 1951 Bom 423 and *N. M. Nayak v. Chotalal Hariram* reported in 69 Bom LR 551 : (AIR 1968 Bom 51). In the case before the Punjab High Court a distinction has been made between supervisory or revisional powers on the one hand and the appellate power on the other hand the material observations on which reliance was placed have been set out in the head-note (d) of the report, which runs thus:

"Supervisory or revisional power is considered to be a power vesting in the higher or superior tribunal to satisfy itself about the soundness or correctness of the order of the inferior tribunal. One usually accepted difference between the two powers (appellate and supervisory) appears to be that an appeal confers a right on the aggrieved party to complain in the prescribed manner to the higher forum, whereas the supervisory or revisional power has for its object the right and responsibility of the higher forum to keep the subordinate tribunals within the bounds of law. The latter power, therefore, can always be exercised suo motu in order to see that the subordinate tribunals do not transgress the limits of law.

and keep themselves within the power conferred on them."

In first Bombay decision (A. R. Sarin's case) the following observations of the Division Bench appearing on p. 426 of the report were relied upon:

"But in order that a petition for a writ of certiorari would not lie, the petitioner must have a specific legal remedy, and specific legal remedy in this context can only mean that he must have a right to approach a Court and he must have a right to a remedy if his case was just. Art. 227 only deals with the power of the High Court and not with the rights of litigant. A litigant may approach the High Court, but he has no right to do so, nor has he a right to a remedy because the High Court may refuse a remedy under Art. 227. Therefore the mere power of superintendence conferred upon the High Court does not disentitle a petitioner seeking a writ of certiorari from coming to this Court and asking for that writ."

Similarly in the second Bombay decision (N. M. Nayak's case) the following observations which appear on page 553 (of Bom LR) : (at p. 53 of AIR), of the report were relied upon:

"Now, it is well established that the High Court would exercise its powers under Art. 227 most sparingly in order to prevent gross injustice. The powers under Art. 227 are exercised by the Court in its discretion and cannot be claimed as of right by any party."

In other words, relying upon the language of Art. 227 and the observations quoted from the three rulings cited above it was contended that Art. 227 must be regarded as being merely procedural conferring power of superintendence upon High Court and not an article conferring any right upon a litigant—much less any substantive right or vested right like a right of appeal. It is not possible to accept this contention for the reasons which we shall presently indicate.

9. In the first place no particular phraseology or definite language is required for conferral of a right of action or a right to move a court upon a litigant and simply because Art. 227 says that every High Court shall have superintendence over all courts it does not mean that such language is decisive on the point that no right of action is conferred on the litigant; the language used will have to be considered in the light of the entire scheme of the Constitution which con-

fers fundamental and other rights on citizens and non-citizens and provides for remedies for enforcement of such rights. Secondly, the argument that Art. 227 confers suo motu power of superintendence upon the High Court or that the granting of relief thereunder is discretionary with the High Court and therefore no right could be said to have been conferred on the litigant does not impress us at all. The mere fact that power of judicial superintendence can be exercised by the High Court suo motu does not and cannot negative the right of a litigant to move the Court if the article otherwise confers or grants such a right, for, the two concepts—concept of suo motu exercise of powers and concept of exercising the power on being invited to do so upon an application by a litigant—are distinct and different. Similarly the aspect that granting of relief under Art. 227 is always within the discretion of the High Court can have no bearing on the question whether the article confers a right on the litigant, for, granting of specific performance or injunction is equally discretionary but it cannot be suggested that a plaintiff has no right to file a suit for such reliefs. In this respect Art. 226 and Art. 227 stand on the same footing and it is well established that if a proper case is made out for the exercise of the Court's power under either of these articles and there exist no other circumstances like laches or delay or coming to court with unclean hands etc. it will be the duty of the court to exercise the power in favour of the petitioner. The Supreme Court has in this context observed thus: "Having regard to the nature of the powers conferred and the object intended to be achieved by their conferment, there can be little doubt that in dealing with the applications made before them the High Courts have to exercise their discretion in a judicial manner and in accordance with principles which are well settled in that behalf. The High Courts cannot capriciously or unreasonably refuse to entertain the said applications and deal with them on the merits on the sole ground that the exercise of their jurisdiction under Art. 226 (1) is discretionary". (vide para 18 of the judgment in Makhan Singh's case reported in AIR 1964 SC 381 at p. 394-395). The three decisions, one of the Punjab High Court and the other two of this Court, are clearly distinguishable and the observations relied upon will have to be regarded as having been made in the context of the points that

arose for decision in each of the cases and as such inapplicable to the question at issue before us. In the Punjab case the question that arose for determination related to the nature of power conferred on the State Government under S. 64 (h) (as added in Punjab) of the Motor Vehicles Act, 1939 to deal with the appellate orders passed by the Appellate Tribunal/Authority in appeal and the question was whether the power conferred under Cl. (h) was liable to be struck down as arbitrary and vague in the absence of any test or criteria being indicated therein by reference to which the power could be exercised and the Punjab High Court held that the power under Cl. (h) appeared to be analogous to the power of revision and Cl. (h) could not be struck down as being arbitrary and vague and it was in that context that the Court made a distinction between supervisory or revisional powers on the one hand and appellate powers on the other and made the observations relied upon to the effect that whereas an appeal confers a right on the aggrieved party, supervisory or revisional power has for its object the right and responsibility of the higher forum to keep the subordinate tribunals within the bounds of law and that the same can be exercised suo motu. The observations relied upon were therefore made in the context of the question as to what was the nature of power conferred on the State Government under S. 64 (h) and the Court held the power to be the power of revision and having held so it distinguished that power from the appellate power. The observations made by this Court in A. R. Sarin's case, (AIR 1951 Bom 423), on which reliance has been placed do lend some support to the contention urged on behalf of the Union of India but it may be pointed out that those observations were made in the context of the question whether Art. 227 provides for a specific legal remedy so as to disentitle a petitioner to seek a writ of certiorari under Art. 226 and the Court held that the petitioner was entitled to the writ under Art. 226, inasmuch as Art. 227 could not be said to provide a specific legal remedy and the reason stated is that a litigant may approach the High Court but he has no right to do so, nor has he a right to a remedy because the High Court may refuse a remedy under Art. 227. This reasoning runs counter to the Supreme Court's observations which we have quoted above in Makhan Singh's case reported in AIR 1964 SC 381 at p. 394-395. As

regards the observations made by this Court in N. M. Nayak's case it is clear that those observations do not lend much support to the contention, for, all that those observations indicate is that the power exercisable under Art. 227 is always sparingly used to prevent gross injustice and the exercise thereof is discretionary with the High Court. In none of these cases the question whether Art. 227 is merely procedural or confers a right of action on the litigant directly arose for decision and therefore the observations which were made in the context of other questions that arose for determination in each of the three cases cannot avail the Counsel for Union of India and the Respondents.

10. In our view, while considering the question whether Art. 227 is purely procedural or confers a right on the litigant to move the High Court it will be wrong to consider Art. 227 in isolation but all the three articles viz. Arts. 32, 226 and 227 which deal with high prerogative writs and writ jurisdiction of the Supreme Court and the High Courts will have to be considered together. Furthermore, the nature of remedies provided by such writs and the manner in which and the purpose for which the remedies have been provided under these articles will have an important bearing on the question at issue. At the outset it may be stated that there is a well recognised distinction between remedies in private law and remedies in public law and that writs of habeas corpus, mandamus, prohibition, quo warranto and certiorari are clearly remedies in public law, though issuance of some of them benefits private individuals. All these writs are known in English law as high prerogative writs associated with the King's name. The theory of English law is that the King himself superintends the due course of justice through his own Court preventing cases of usurpation of jurisdiction and insisting on vindication of public rights and protecting the liberty of the subjects by speedy and summary interposition. It is this theory of English law and the concept of prerogative writs that have been borrowed and incorporated in our Constitution by its founding fathers. In the pre-Constitution days only the three High Courts in the presidency towns of Bombay, Calcutta and Madras had the power to issue the prerogative writs but their power to issue the said writs was confined only to the local limits of their original civil jurisdiction (vide Privy Council de-

cision in the Parlakimedi case: 70 Ind App 129 : (AIR 1943 PC 164). This power to issue such writs within those limits was derived by these High Courts as successor Courts of the Supreme Court which had been exercising jurisdiction over each of the Presidency Towns of Bombay, Calcutta and Madras, the Supreme Courts themselves having got under their respective Letters Patent all the powers, jurisdiction and authority of the Courts of King's Bench in England. The other High Courts in India had no power to issue such writs at all. In that situation, the framers of the Constitution, having decided to provide for certain basic safeguards for the people in the new set up which they called 'fundamental rights' thought of providing for speedy and inexpensive remedies for enforcement of such rights and that is how Articles 32, 226 and 227 came to be enacted in the Constitution. Thus the nature of the remedies provided, the manner in which and the purpose for which these have been provided show that these articles will have to be regarded as conferring a right on the litigant to move the Court for enforcement of fundamental and other rights and not as articles merely dealing with procedural matters. In other words, it would be clear that the power conferred upon the Supreme Court under Art. 32 (2) and upon the High Court under Art. 226 (1) to issue directions, orders or writs including the writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari will have to be equated with the conferral of remedies in public law, that is to say, conferral of a right to constitutional remedies upon a litigant notwithstanding the phraseology used in Art. 32 (2) and Art. 226 (1), namely "the Supreme Court/ every High Court shall have power...to issue directions or orders or writs". Such result, in our view, follows from the nature of remedies provided by such high prerogative writs and the manner and purpose for which such remedies have been provided in these articles. That the remedies provided by high prerogative writs are remedies in public law as opposed to remedies in private law and that the theory of English law qua these writs have been borrowed and introduced in our Constitution by its framers will be clear from the following observations of Ramaswamy, J. in the judgment of the Supreme Court in *Md. Hanif v. State of Assam* reported in 1970 (2) SCR 197 at pp. 202-203 :

"It is true that the jurisdiction of the High Court under Art. 226 is an extraordinary jurisdiction vested in the High Court not for the purpose of declaring the private rights of the parties but for the purpose of ensuring that the law of the land is implicitly obeyed and that the various tribunals and public authorities are kept within the limits of their jurisdiction. In other words, the jurisdiction of the High Court under Art. 226 is a supervisory jurisdiction, a jurisdiction meant to supervise the work of the tribunals and public authorities and to see that they act within the limits of their respective jurisdiction. In a proceeding under Art. 226 the High Court is not concerned merely with the determination of the private rights of the parties; the only object of such a proceeding under Art. 226 is to ensure that the law of the land is implicitly obeyed and that various authorities and tribunals act within the limits of their respective jurisdiction. Art. 226 states that the High Court shall have power to issue to any person or authority, including in appropriate cases any Government, directions, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari. All these writs are known in English law as prerogative writs, the reason being that they are specially associated with the King's name. These writs were always granted for the protection of public interest and primarily by the Court of the King's Bench. As a matter of history the Court of the King's Bench was held to be coram rege ipso and was required to perform quasi-governmental functions. The theory of the English law is that the King himself superintends the due course of justice through his own court preventing cases of usurpation of jurisdiction and insisting on vindication of public rights and protecting the liberty of the subjects by speedy and summary interposition. That is the theory of the English law and as pointed out by this Court in *Basappa v. Nagappa*, (1955) 1 SCR 250 : (AIR 1954 SC 240) our Constitution makers have borrowed the conception of prerogative writs from the English law and the essential principle relating to such prerogative writs are applicable in Indian law. It is obvious that the remedy provided under Art. 226 is a remedy against the violation of the rights of a citizen by the State or statutory authority. In other words, it is a remedy in public law."

Similarly, the manner in which and the purpose for which Art. 226 was inserted in our Constitution has been explained by the Supreme Court in *Election Commission v. Saka Venkat Subba Rao* reported in 1953 SCR 1144 : (AIR 1953 SC 210). It was a case prior to the insertion of sub-art. (1-A) in Art. 226 and the question was whether the Madras High Court could issue a writ under Art. 226 to the Election Commission of India which had its office permanently located in New Delhi and the Supreme Court held that the Madras High Court had no jurisdiction to do so. Dealing with the historical background of writ jurisdiction and while coming to the conclusion that the Madras High Court's power to issue writs had a two-fold limitation Chief Justice Patanjali Shastri had made some observations at p. 1150 (of SCR) : (at pp 212, 213 of AIR) of the report which run thus:

"Turning now to the question as to the powers of a High Court under Art. 226, it will be noticed that Art. 225 continues to the existing High Courts the same jurisdiction and powers as they possessed immediately before the commencement of the Constitution. Though there had been some conflict of judicial opinion on the point, it was authoritatively decided by the Privy Council in the *Parlakimedi* case (70 Ind App 129) : (AIR 1943 PC 164) that the High Court of Madras—the High Courts of Bombay and Calcutta were in the same position—had no power to issue what were known as high prerogative writs beyond the local limits of its original civil jurisdiction, and the power to issue such writs within those limits was derived by the court as successor of the Supreme Court which had been exercising jurisdiction over the Presidency Town of Madras and was replaced by the High Court established in pursuance of the Charter Act of 1861. The other High Courts in India had no power to issue such writs at all. In that situation, the makers of the Constitution, having decided to provide for certain basic safeguards for the people in the new set up, which they called fundamental rights, evidently thought it necessary to provide also a quick and inexpensive remedy for the enforcement of such rights and, finding that the prerogative writs which the Courts in England had developed and used whenever urgent necessity demanded immediate and decisive interposition, were peculiarly suited for the purpose, they conferred, in the States' sphere, new and wide powers on the High Courts of is-

suing directions, orders or writs primarily for the enforcement of fundamental rights, the power to issue such directions, etc., "for any other purpose" being also included with a view apparently to place all the High Courts in this country in somewhat the same position as the Court of King's Bench in England. But wide as were the powers thus conferred, a two-fold limitation was placed upon their exercise. In the first place, the power is to be exercised "throughout the territories in relation to which it exercises jurisdiction", that is to say, the writs issued by the court cannot run beyond the territories subject to its jurisdiction. Secondly, the person or authority to whom the High Court is empowered to issue such writs must be "within those territories", which clearly implies that they must be amenable to its jurisdiction either by residence or location within those territories."

11. It may also be pointed out that the sub-heading under which Art. 32 occurs in Part III of the Constitution is "Right to Constitutional remedies". An attempt was made by Mr. Paranjpe to make a distinction between Art. 32 on the one hand and Art. 226 on the other by pointing out that whereas in sub-art. (1) of Art. 32 there is express reference to 'the right to move the Supreme Court', there is no such provision to be found in Art. 226, but we are clearly of the view that the difference pointed out will have no bearing on the issue at issue, for, the language of Art. 32 (2) and the language of Art. 226 (1) (omitting non obstante clause) so far as is material is identical and all that sub-art. (1) of Art. 32 does is that the right to move the Supreme Court for enforcement of fundamental rights has been raised to the level of a fundamental right by being 'guaranteed' thereunder and by including it in Part III and nothing more and this position is clarified by the Supreme Court in *Romesh Thapper's* case reported in AIR 1950 SC 124. In other words, it seems to us clear that both under Art. 32 and Art. 226 a substantive right to constitutional remedies has been conferred upon a litigant and these articles, particularly Art. 32 (2) and Art. 226 (1) cannot be said to be merely dealing with the procedural matters like conferring power upon the Supreme Court or the High Court. The position with regard to Art. 227 would also be the same, for, it was not disputed before us that the nature and content of the powers

conferred upon the High Court under Article 226 and Art. 227 are the same and do overlap and in fact in certain respects the powers under Art. 227 are wider, in that under Art. 227 the Court can act suo motu while under Art. 226 there is no such power and secondly while in a certiorari under Art. 226 the High Court can only annul or quash the decision of the inferior body or authority, it can under Art. 227 do that and also issue further directions in the matter. (vide H. V. Kamath's case: 1955 (1) SCR 1104 : AIR 1955 SC 233). It is true that under Art. 226 the writs mentioned therein could be issued by the High Court for enforcement of fundamental rights which is not done ordinarily under Art. 227 but on rare or exceptional occasions the power of judicial superintendence under Art. 227 could be exercised for enforcing a fundamental right as for instance when the impugned executive action violating a fundamental right is taken under a law which is challenged as being ultra vires. It is, therefore, clear that Art. 227 also cannot be regarded as merely dealing with procedural matters but must be held to be an article that confers a substantive right upon a litigant.

12. There is yet one more aspect to which our attention was invited by the learned Advocate General of Maharashtra which shows that Art. 226 is not merely procedural but confers a right on the litigant to move High Court and in this behalf reference was made to Art. 359 (1) of the Constitution. Art. 359 (1) enables the President, where a proclamation of Emergency is in operation, to declare by an order that the right to move any court for enforcement of such of the rights conferred by Part III as may be mentioned in the order and all proceedings pending in any court for enforcement of the rights so mentioned shall remain suspended for the period during which the proclamation is in force or such shorter period as may be specified in the order. He pointed out that in Makhan Singh's case reported in AIR 1964 SC 381 a contention was raised that the words 'any court' in Art. 359 (1) meant only the 'Supreme Court' and that the issuance of the Presidential Order thereunder suspending the enforcement of fundamental rights did not prevent a citizen from moving the High Court by resorting to Art. 226 of the Constitution but the Supreme Court in effect held that a detenu's right to move the High Court for enforcement of fundamental right

under Art. 226 also got suspended by coming to the conclusion that the expression 'any court' meant any court of competent jurisdiction including the High Court. In para 15 the contention urged has been set out thus:

"His (Mr. Setalvad's) argument, therefore, is that the only right of which a citizen can be deprived under Art. 359 (1) is the right to move the Supreme Court and so his case is that even in regard to fundamental rights specified in the Presidential Order, a citizen is entitled to ask reliefs from the High Court because the right to move the High Court flowing from Art. 226 does not fall within the mischief of Art. 359 (1)." This argument was repelled by the Court in para 16 thus:

"This argument attempts to interpret the words 'the right to move for the enforcement of the specified rights' in isolation and without taking into account the other words which indicate that the right to move which is specified in the said article is the right to move 'any court' in plain language, the words 'any court' cannot mean only the Supreme Court; they would necessarily take in all courts of competent jurisdiction. If the intention of the Constitution makers was to confine the operation of Art. 359 (1) to the right to move only the Supreme Court, nothing could have been easier than to say so expressly instead of using the wider words 'the right to move any court'."

Ultimately in para 18 the Supreme Court has concluded thus:

"Therefore, it is idle to suggest that the proceedings taken by citizens under Art. 226 (1) are outside the purview of Art. 359 (1). We must accordingly hold that the right to move any court under Art. 359 (1) refers to the right to move any court of competent jurisdiction."

The same position was affirmed by the Supreme Court in its latest decision in Shukla's case reported in AIR 1976 SC 1207. In para 33 of the judgment Chief Justice Ray has observed thus:

"A person can enforce fundamental rights in this Court under Art. 32 as well as in the High Courts under Art. 226. It is idle to suggest that the object of Art. 359 (1) is that the right to move this Court only is barred and not the right to move any High Court. Art. 226 does not provide a guaranteed fundamental right like Art. 32. This guaranteed right under Art. 32 itself may be suspended by a Presidential Order under Art. 359 (1). In

such a case it could not be said that the object of the makers of the Constitution is that a person could not move this Court for the enforcement of fundamental rights mentioned in the Presidential Order but could do so under Art. 226. The bar created by Art. 359 (1) applies to petitions for the enforcement of fundamental rights mentioned in the Presidential Order whether by way of an application under Art. 32 or by way of any application under Art. 226."

In our view, Art. 359 (1) furnishes intrinsic evidence that Art. 226 confers a right on a citizen to move the court and is not merely procedural, inasmuch as, Art. 226 has been equiperated with Art. 32 by the Supreme Court to the extent that Art. 226 confers a substantive right, though not a fundamental right, on the litigant to move the High Court for enforcement of fundamental rights and other rights. The position in regard to Art. 227 would be the same.

13. In view of our aforesaid conclusion, it will be easy to deal with the principal question raised before us, namely whether the pending petitions filed and admitted by this Court under the unamended Art. 227 prior to 1st February 1977 are to be heard and disposed of in accordance with the original or unamended Art. 227 or their disposal is governed by the amended Art. 227 and the answer to the question primarily depends upon whether the amended Art. 227 has been given any retrospective operation so as to cover the pending petitions. On reading the amended Art. 227 and comparing the same with the original or unamended one it will appear clear that a couple of changes have been effected. In the first place, sub-art. (1) of the original Art. 227 conferred on the High Court the power of superintendence over all courts and tribunals throughout the territories in relation to which it exercised jurisdiction, whereas in the amended sub-art. (1) the words 'and tribunals' have been deleted and the words 'subject to its appellate jurisdiction' have been substituted after the words 'all courts'; in other words, this amendment purports to take away the High Court's superintendence over 'tribunals'. Secondly a new sub-art. (5), which was not there in the original article, has been inserted in the amended article with the result that a limitation has been placed on the High Court's power of judicial superintendence over judgments of inferior courts, namely that such judicial superintendence will be available to

the High Court only in cases where such judgments are otherwise subject to an appeal or revision to the High Court. It was conceded by Mr. Paranjpe before us that the phrase "subject to its appellate jurisdiction" occurring in sub-art. (1) read with sub-art. (5) clearly shows that for invoking the High Court's power of judicial superintendence it would be enough if the inferior court's judgment to question which the power is to be invoked, was subject to either an appeal or revision to the High Court. Sub-arts. (2), (3) and (4) of the original Art. 227 have remained the same in the amended article. But apart from the aforesaid changes effected it is clear that the amended Article 227 has not been given any retrospective operation either by express words or by necessary intendment and the amended article is clearly prospective in operation. That being the position since we have come to the conclusion that Art. 227 is not procedural but confers a right of action on a litigant it is obvious that all petitions pending as on 1-2-1977 will have to be heard and disposed of in accordance with the original or unamended Art. 227. The general rule applicable in that behalf has been stated in Craies on Statute Law (7th Edition) at p. 401 thus:

"It is a general rule that when the legislature alters right of parties by taking away or conferring any right of action, its enactment unless in express terms they apply to pending actions do not affect them. But there is an exception to this rule viz. where the enactment merely affects the procedure and do not extend to rights of parties. (Per Jessel M. R. in *Re Joseph Suche & Co. Ltd.*, (1875) 1 Ch D 48 at p. 50)."

Moreover, here we are concerned with the question at a stage when the right to move the Court conferred by Art. 227 has been exercised or put in action and proceedings have been commenced. In such a case the pending proceedings must be disposed of in accordance with the original Art. 227. Secondly, we find considerable force in the contention of Mr. Seervai that in the context of S. 58 of the 42nd Amendment Act, 1976 which makes the amended Art. 226 applicable to pending petitions filed under the original Art. 226 and in the absence of a similar provision in regard to pending petitions under the unamended Art. 227 a reasonable inference should be drawn that the Parliament did not intend to apply the amended article to pending

petitions. In this behalf it must be remembered that the amendment of the Art. 227 by the 42nd Amendment Act, 1976 was a part and parcel of series of amendments that were effected or brought about in the Constitution and the amendment of original Art. 227 will have to be considered along with other amendments, particularly the amendments that have been effected in the connected Art. 226 and the special provision made in S. 58 as to pending petitions under Art. 226. Looking at the question from this angle it will appear clear that in S. 58 of the 42nd Amendment Act, 1976 the Parliament has made special provision with regard to pending petitions under Article 226 and has by that provision enacted that such pending petitions shall be dealt with in accordance with the amended Art. 226 and it is also clear that a similar provision in regard to pending petitions under the unamended Art. 227 has not been made and, therefore, a reasonable inference arises that Parliament did not intend that pending petitions under the original Art. 227 should be governed by the amended Art. 227. Mr. Paranjpe sought to explain the insertion of S. 58 in the Constitution on the basis that it was necessary to make some provision principally in respect of interim orders that had been passed by the High Courts in pending petitions under the original Art. 226 while Mr. Bhabha tried to explain it on the basis that because the original Art. 226 contained an admixture of procedural and substantive rights, the special provision of S. 58 was necessary and since the original Art. 227 was purely procedural and the amended Art. 227 took away the jurisdiction of the High Court over the tribunals a provision akin to S. 58 was unnecessary. It is not possible to accept either of the explanations as valid; in the first place, S. 58 does not principally deal with interim orders passed in pending petitions under the original Art. 226 but deals with both as to what should happen to interim orders as also the pending petitions themselves and secondly, as discussed earlier, the original Art. 227 did not deal with procedural matters but conferred a substantive right on the litigant and as such it is not possible to accept the argument that the amended Art. 227 has merely taken away the High Court's jurisdiction over tribunals but it has purported to abridge the litigant's right to move the High Court against the decisions or orders of tribunals. It is, therefore, clear that inference

suggested by Mr. Seervai arises that Parliament did not intend that pending petitions under the original Art. 227 should be governed by the amended Art. 227.

14. In the above context it will be useful to refer to the principle which is well established and which is applicable in cases where a statute is enacted when actions are pending and the principle is that where a statute is passed pending an action as distinct from 'after the date of the cause of action' strong and distinct words are necessary to alter the vested rights of either litigant as they stood at the commencement of the action.: *Midland Rly. Co. v. Pye*, (1861) 10 CB (NS) 179 and *Turnbull v. Forman*, (1885) 15 QBD 234. This principle was invoked and applied by this Court in *Sudkya Ramji v. Md. Issak* reported in AIR 1950 Bom 236. Applying this principle here it will be clear that pending petitions under the original Art. 227 will not be affected by the amended article, inasmuch as, there are no words at all, much less strong and distinct words, in the amended Art. 227 which suggest either expressly or by necessary implication that any alteration was intended in the right of the petitioners to continue and complete their proceedings in accordance with the article as it stood at the commencement of their action.

15. Mr. Seervai next relied upon Section 6 (e) of the General Clauses Act, 1897 as also on the principle enunciated by the Privy Council in the leading case of *Colonial Sugar Refining Co. Ltd. v. Irving* reported in 1905 AC 369 for saving the pending petitions from the operation of the amended Art. 227. According to him, by deleting the words 'and tribunals' occurring in the original Art. 227 the amended Art. 227 has in effect partially repealed the original article, inasmuch as, the High Court's power of judicial superintendence in respect of the decisions and orders of the tribunals is completely taken away and therefore under S. 6 (e) of the General Clauses Act the pending petitions under the original Art. 227 will have to be proceeded with as if the amendment by way of repeal had not been made. Further he pointed out that in *Colonial Sugar Refining Co. case* the Judiciary Act, 1903 (under which Her Majesty in Council ceased to be a Court of Appeal from the decisions of the State Supreme Court and in its place the High Court of Australia was substituted as the forum of

appeal against such decisions) was passed during the pendency of an action in the Court of first instance and the Privy Council in its decision recognised the position that from the date of initiation of original action the suitor had a right of appeal to the superior tribunal according to law as it stood at the commencement of the proceeding. He strongly relied upon the following observations made by their Lordships in that case, which appear at p. 372 of the report:

"The Judiciary Act is not retrospective by express enactment or by necessary intendment. And therefore the only question is, was the appeal to His Majesty in Council a right vested in the appellants at the date of the passing of the Act, or was it a mere matter of procedure? It seems to their Lordships that the question does not admit of doubt. To deprive a suitor in a pending action of an appeal to a superior tribunal which belonged to him as of right is a very different thing from regulating procedure. In principle, their Lordships see no difference between abolishing an appeal altogether and transferring the appeal to a new tribunal. In either case there is an interference with existing rights contrary to the well-known general principle that statutes are not to be held to act retrospectively unless a clear intention to that effect is manifested."

He urged that both under S. 6 of the General Clauses Act as well as under the aforesaid principle of Colonial Sugar Refining Co.'s case the pending petitions filed under the original Art. 227 will have to be continued, heard and disposed of as if the amended article was not applicable, for, according to him, by parity of reasoning it could legitimately be said that each of the petitioners' right to move this Court under the original Art. 227 for invoking supervisory jurisdiction of this Court had accrued to each one of them and got vested in each no sooner each one of them had commenced his original action or proceeding for enforcing his right under the concerned enactment before the concerned authority thereunder. Alternatively he contended that quite independently of S. 6 of the General Clauses Act there is a well settled general principle that unless a contrary can be shown the provision which takes away the jurisdiction of a Court is itself subject to implied saving of the litigant's right and the pending petitions here would fall within that principle.

16. We shall deal with the contention based on S. 6 of the General Clauses Act and that based on the principle of Colonial Sugar Refining Co.'s case (1905 AC 369) separately. Section 6 of the General Clauses Act deals with the effect of repeal of an enactment and under S. 6 (c) it has been provided that the repeal of an enactment "shall not affect any right accrued" under the enactment so repealed and under S. 6 (e) it has been provided that "any proceeding in respect of any such right" (meaning the 'accrued right under S. 6 (c)) has to be continued as if the repeal had not taken place. In our view, having regard to the provisions of S. 6 (c) and S. 6 (e) it will be difficult to apply those provisions to pending petitions under the original Art. 227 unless we accept the further argument of Mr. Seervai that no sooner each of the petitioners commenced his original action or proceeding for enforcing his right under the concerned enactment before the concerned authority a substantive right to move the High Court under the original Art. 227 had accrued to him. However, it is unnecessary for us to go that far and hold that S. 6 (e) would apply to the pending petitions under the original Article 227, for, in our view, the general principle which has been invoked by him alternatively and which is applicable quite independently of S. 6 would govern the disposal of these pending petitions. Since we are not resting our judgment on the provisions of S. 6 (e) of the General Clauses Act, it is unnecessary to deal with or discuss two or three cases on which Mr. Bhabha relied including English decision in *Director of Public Works v. Ho Po Sang*, (1961) 2 All ER 721, for contending that the pending petitions would not be saved under S. 6 (c) of the said Act.

17. According to Mr. Seervai, quite independently of the provisions of S. 6 of the General Clauses Act there is a well settled principle firmly established and accepted by Courts that unless contrary can be shown a provision which takes away the jurisdiction of a court is itself subject to implied saving of litigant's right and since there is nothing in the amended Art. 227 to indicate to the contrary, the petitioners' right to continue the pending petitions under the original Art. 227 must be held to have been saved. He contended that it cannot be disputed that the amended Art. 227 clearly takes away the supervisory jurisdiction of the High Court over tribunals qua their de-

cisions or orders and since there is nothing to indicate to the contrary in the amended article, such amended article which takes away the High Court's supervisory jurisdiction over tribunals must be regarded as being subject to implied condition that litigant's right to continue the action which he has commenced before the amended article has come into force is clearly saved. In this behalf strong reliance was placed by him upon two decisions, one a Full Bench decision of the Calcutta High Court in the case of Sadar Ali v. Doliluddin Ostagar, (AIR 1928 Cal 640) where the principle has been enunciated and the other of the Supreme Court in the case of Garikapati Veeraya v. N. Subbiah Choudhry, (AIR 1957 SC 540) in which the principle has been approved. In the Calcutta case the question that arose for determination was whether or not the appellants had a right to file Letters Patent Appeal from the decision of a single Judge sitting in second appeal in the absence of a certificate from him that the case was a fit one for appeal and the question had arisen in the context of new Letters Patent requiring such a certificate which had come into effect on 14-1-1928. The Full Bench held that the date of presentation of second appeal to the High Court was not the date which determined the applicability of the amended Cl. 15 requiring permission or certificate of the deciding Judge for further appeal but the date of institution of suit was the determining factor. It may be stated that the question was not decided by reference to S. 6 of the General Clauses Act, but upon general principles governing the question of retrospective operation of the amended Letters Patent. Chief Justice Rankin in the course of judgment observed thus: (at p. 643 of AIR)

"In this view the only question which remains is the question whether the new clause can be given retrospective effect. The provision that the new Letters Patent shall come into force on the date of publication in the Gazette does not operate to give it such effect. Nor does the fact that the jurisdiction and authority of the Court is the primary subject of the Letters Patent found a valid argument to the effect that after the date of commencement the Court can have no authority to entertain such an appeal as this. Unless the contrary can be shown the provision which takes away jurisdiction is itself subject to the implied saving of the litigants' rights."

The above general principle enunciated by Rankin, C. J. has been referred to with approval by the Supreme Court in Garikapati Veeraya's case (AIR 1957 SC 540) at two places in para. 25 and para. 43 of the judgment. We may point out that in para. 43 where the aforesaid principle has been referred to a second time the position becomes clear that in the context of question which the Supreme Court was required to consider in that case, the aforesaid principle has been accepted as a principle of general applicability quite apart from S. 6 of the General Clauses Act. The question of construing Art. 133 of the Constitution in the context of President's Adaptation Order whereby S. 109 and S. 110 of Civil P. C. were brought in conformity with Art. 133 was dealt with by the Court in that para and while dealing with that question the Court has observed thus: (at pp. 562, 563 of AIR)

"We now pass on to consider another construction of Art. 133 which appears to us to be quite cogent. We have seen that Ss. 109 and 110 of the Civil P. C. were adapted by the President's Order and the valuation had been raised from Rs. 10,000 to Rs. 20,000 in order to bring it into conformity with Art. 133. Clause 20 of that Adaptation Order itself provided that such adaptation would not affect the vested rights. Therefore those litigants who had a vested right of appeal from judgments, decrees or final orders of a High Court in a civil proceeding arising out of a suit or proceeding instituted prior to the Constitution and which involved a right of property valued at over Rupees 10,000 but below Rs. 20,000 are still to be governed by the old Ss. 109 and 110. This means that the words "judgment, decree or final order" occurring in Ss. 109 and 110 of the Code as adapted must be read as a judgment, decree or final order made after the date of the adaptation other than those in respect of which a vested right of appeal existed before the adaptation and which were preserved by Cl. 20. If Ss. 109 and 110 must be read in this way why should not Art. 133 be read as covering all judgments, decrees or final orders of a High Court passed after the commencement of the Constitution other than those in respect of which a vested right of appeal existed from before the Constitution? It is said that there is no saving provision to Art. 133 like Cl. 20 of the Adaptation Order and therefore Art. 133 cannot be read in a

restricted way. This argument is unsound and here the observations of Rankin, C. J. in the Special Bench case of Calcutta referred to above become apposite, namely, that the provision which takes away jurisdiction is itself subject to the implied saving of the litigant's right." It will thus appear clear that quite apart from S. 6 of the General Clauses Act the aforesaid general principle could be said to be well established and applying that principle here it can be said that since in the amended Art. 227 there is no indication to the contrary the proceedings by way of petitions, which have been validly commenced under the original Art. 227 and which are pending at the time when the amended Art. 227 has come into operation, will have to be dealt with and disposed of in accordance with the original Art. 227, inasmuch as, the petitioners' right to continue the validly instituted petitions upto the end cannot be affected by the amended Art. 227.

18. Coming to the Colonial Sugar Refining Co.'s case (1905 AC 369) it is obvious that the principle laid down there was in the context of the accepted position that the right of appeal was regarded as having been vested in a suitor no sooner he commenced his original action and the question would be whether the principle could be extended to the original action itself in the sense that once it is instituted or commenced the litigant could be said to have acquired a vested right to continue the same unaffected by any alteration in the law. In that context it will be useful to refer to a decision of the Federal Court in Venugopal's case (AIR 1943 FC 24) where the Federal Court has taken the view that a right to continue a duly instituted suit is in the nature of a vested right and it cannot be taken away except by a clear indication of intention to that effect. In that case a suit had been instituted in 1932 in British India with respect to property situate in British India and also in Burma. In 1937 Burma became separate from British India and a question arose whether the suit could be continued in the British Indian Court where it had been instituted and the Federal Court ruled that it could be so continued even after Burma had been separated. On the basis of S. 38 of the English Interpretation Act (equivalent to S. 6 of our General Clauses Act) which governed the interpretation of the Constitution Act two rival contentions were urged. On the one hand it was contended that what was saved under

the said section was a substantive right under the repealed enactment and Cl. (e) of sub-s. (2) of S. 38 could not be invoked in cases where the substantive right was not taken away by the repealing Act but the forum or method of enforcing it was changed. On the other hand, it was contended that the right to obtain relief in a suit pending at the time when the repealing enactment came into operation was itself in the nature of substantive right. The Federal Court did not decide that point but preferred to rest its judgment on the principle enunciated by the Privy Council in Colonial Sugar Refining Co.'s case (1905 AC 369). Even that decision was sought to be distinguished on behalf of the appellant on the ground that the right of appeal against a decree stood on a different footing from a right to continue a suit to its normal termination but the Federal Court negatived the contention by saying that the Court was unable to see any distinction between the two cases and it extended the principle of Colonial Sugar Refining Co. case to the latter case. Justice Varadachariar observed in that behalf thus:

"It will be noticed that in that case the Judiciary Act was passed during the pendency of the action in the Court of first instance and their Lordships' decision recognised that, from the date of the initiation of the action, the suitor had a right of appeal to a superior tribunal according to the state of the law as it stood at the time of the commencement of the proceeding. This necessarily involves the recognition of an equally valuable right that the proceedings should in due course be tried and disposed of by the tribunal before which it had been commenced. This principle that a statute should not be so interpreted as to take away an action which has been well commenced has been affirmed in various cases in differing circumstances. In (1850) 9 CB 551, it was observed by Wilde C. J. that:

"it must have been well known to both branches of the Legislature that strong and distinct words would be necessary to defeat a vested right to continue an action which has been well commenced. Cf. (1875) 1 Ch D 48 and see also (1904) ILR 27 Mad 538 and (1909) ILR 32 Mad 140." On parity of reasoning we are inclined to hold that the petitioners herein would be entitled to continue their pending petitions and have them disposed of in accordance with the original Art. 227.

19. Having regard to the above discussion we hold that the pending peti-

tions under the original Art. 227 will not be affected by the amended Art. 227 and must be dealt with and disposed of in accordance with the original or unamended Art. 227.

20. In view of the aforesaid conclusion reached by us on pending petitions, it is unnecessary to deal with or decide the question whether the pending petitions should be permitted to be amended by converting them into petitions under Art. 226. However, if it became necessary we would certainly grant the necessary permission to amend and that too without imposing any condition as to costs, inasmuch as, the amendment shall have been necessitated by reason of the 42nd Amendment Act, 1976 and not for any fault of the petitioners.

21. The next question that arises for our consideration is: What is the true effect of deletion of the words 'and tribunals' from the original Art. 227 and addition of the words 'subject to its appellate jurisdiction' after the words 'all courts' in the amended Art. 227 on the High Court's power of judicial superintendence such as has been retained with it under the amended article? In other words the question is whether the expression 'courts' is confined to regular civil and criminal courts constituted under the hierarchy of courts or would include tribunals, bodies or authorities, whatever be the label, that are basically courts and this question has a direct bearing on the future petitions that might be filed in the High Court after 1-2-1977 under the amended Art. 227. We have summarised in the earlier part of this judgment the rival contentions on this question and it is unnecessary to set out these over again. In support of the contention that the expression 'courts' occurring in the amended Art. 227 is confined to regular civil and criminal court constituted under the hierarchy of courts and that all tribunals have been excluded from the purview of the High Court's superintendence, counsel for the Union of India mainly relied upon the fact that the amended Art. 227 refers to High Court's power of superintendence over 'all courts subject to its appellate jurisdiction' and the words 'and tribunals' have been expressly deleted from the original Art. 227 (1) and therefore it was urged the expression 'all courts' must mean regular civil or criminal courts constituted under the hierarchy of courts, that is to say, courts constituted under

the Bombay Civil Courts Act, Presidency and Provincial Small Cause Courts Acts, Bombay City Civil Court Act and criminal courts constituted under the Criminal P. C. and must exclude all tribunals, bodies or authorities. Secondly it was pointed out that a distinction between regular civil and criminal courts constituted under the hierarchy of courts on the one hand and tribunals on the other has been recognised by the Constitution as well as by judicial decisions and in that behalf strong reliance was placed upon the observations of the Supreme Court in para. 6 of the judgment in *Engineering Mazdoor Sabha v. Hind Cycles Ltd.* reported in AIR 1963 SC 874 which run thus:

"Article 136 (1) refers to a Tribunal in contradistinction to a Court. The expression 'a Court' in the technical sense is a Tribunal constituted by the State as a part of ordinary hierarchy of courts which are invested with the State's inherent judicial powers. The Tribunal as distinguished from the Court, exercises judicial powers and decides matters brought before it judicially or quasi-judicially, but it does not constitute a court in the technical sense. The Tribunal, according to the dictionary meaning, is a seat of justice; and in the discharge of its functions, it shares some of the characteristics of the court. A domestic Tribunal appointed in departmental proceedings, for instance, or instituted by an industrial employer cannot claim to be a Tribunal under Art. 136 (1). Purely administrative Tribunals are also outside the scope of the said Article. The Tribunals which are contemplated by Article 136 (1) are clothed with some of the powers of the courts."

The argument was that if for purposes of Art. 136 (1) the expression 'court' has been interpreted as meaning 'court' in the technical sense, that is, a tribunal constituted by the State as a part of ordinary hierarchy of courts, the same meaning should be given to that expression in the amended Art. 227. It was pointed out that the aforesaid decision was referred to with approval by the Supreme Court in a later decision in *Associated Cement Companies Ltd. v. P. N. Sharma* reported in AIR 1965 SC 1595. Thirdly Counsel contended that having regard to the introduction of a new part in the Constitution by the 42nd Amendment Act, 1976, namely Part XIV-A comprising two new Arts. 323A and 323B dealing with the proposed constitution of tribunals ad-

ministrative tribunals for adjudication of disputes and complaints concerning public services under the Union and State and tribunals for other matters, a clear intention to exclude all tribunals from the High Court's superintendence could be attributed to the Parliament when it amended Art. 227 by deleting the words 'and tribunals' from the original Article 227 (1) and in that behalf strong reliance was placed upon the provisions contained in Art. 323A (2) (d) and (3) and Art. 323B (3) (d) and (4); it was urged that though the Tribunals contemplated by Art. 323A and Art. 323B has not yet been constituted there was conditional ouster of civil court's jurisdiction having regard to Cl. (2) (d) of Art. 323A and Cl. (3) (d) of Art. 323B and in view of the scheme envisaged by these two new articles an intention could be attributed to Parliament that it wanted to exclude all tribunals from the purview of the High Court's superintendence under the amended Art. 227.

22. It is not possible to accept this contention for the reasons which we will presently indicate. In the first place, neither the expression 'court' nor the expression 'tribunal' has been defined in the Constitution and therefore the dictionary meaning or the normal connotation of these expressions will have to be considered. Secondly the proposition is well-settled that all Courts are tribunals but all tribunals are not courts. If necessary, reference may be made to Justice Hidayatullah's judgment in *Harinagar Sugar Mills Ltd. v. Shyam Sunder* (AIR 1961 SC 1669) where the above proposition has been clearly stated; the proposition in other words means that some tribunals would be basically courts i.e. courts in their normal connotation while some others would not be courts and therefore it cannot be said that Parliament wanted to exclude all tribunals from the purview of the High Court's superintendence under the amended Article 227 but it can be said that Parliament intended to exclude only such tribunals as are not basically courts from the High Court's superintendence. It is obvious that this result will follow if the expression 'Courts' is understood and regarded in its ordinary meaning or its accepted normal connotation, namely an adjudicating body which performs judicial function of rendering definitive judgments having finality and authoritativeness to bind the parties litigating their rights before it and that too in exercise of the

sovereign judicial power transferred to it by the State. Any tribunal or authority possessing these two attributes will be a court (vide Full Bench decision of this Court in *Bapusaheb Balasaheb Patil v. State of Maharashtra* reported in 76 Bom LR 455: (AIR 1975 Bom 143) (FB)). As regards the Supreme Court decisions on which reliance has been placed by Counsel for the Union of India, it may be pointed out that in both the cases the question that had arisen was whether the concerned adjudicating body was a 'tribunal' within the meaning of Art. 136 (1) of the Constitution or not and if so, whether an appeal against the impugned decision or order of that body would lie to the Supreme Court under that article; the distinction between a court and a tribunal was never in issue before the Supreme Court and hence the observations explaining the two concepts in contradistinction to one another would be obiter, if not casual observations. Even if obiter, these observations were made in the context of Art. 136 (1) where both the expressions 'court' and 'tribunal' have been used and therefore those observations will have no bearing when the concept of 'court' is to be understood in the amended Art. 227 where the expression 'courts' stands by itself and not in juxtaposition with the other expression 'tribunal'; the context having changed the expression 'Courts' in the amended Article 227 cannot be interpreted to mean the same thing when that expression is used in juxtaposition with the expression 'tribunal' in one and the same article like Art. 136 (1). Therefore, de hors the concept of 'tribunal' the expression 'Courts' occurring in the amended Art. 227 will have to be understood in its normal accepted connotation especially in the absence of any definition being given in the Constitution and would include such tribunals as satisfy the two tests mentioned above.

23. Further the reliance placed on the newly introduced Arts. 323A and 323B in Part XIV-A for the purpose of inferring an intention on the part of Parliament to exclude all tribunals from the purview of High Court's superintendence under the amended Art. 227 appears to us to be misplaced. In our view, these two articles are merely enabling provisions empowering the Parliament to make laws providing for constitution of such tribunals for adjudication or trial of disputes and complaints or matters more particularly specified therein and under Art. 323A (2)

(c) and under Art. 323B (3) (d) it has been provided that any law that may be made by the Parliament constituting such tribunals may provide for exclusion or jurisdiction of all courts except the Supreme Court under Art. 136 with respect to disputes and complaints or other matters falling within the purview of such tribunals, sub-art. (3) of Art. 323A and sub-art. (4) of Art. 323B merely provide that the provisions of these articles shall have effect notwithstanding anything in any other provision of the Constitution or any other law for the time being in force. It is clear that the law made by Parliament constituting such tribunals may or may not provide for the exclusion of jurisdiction of all courts except the Supreme Court with respect to matters falling within the purview of such tribunals or may do so subject to some conditions. Such a provision, in our view, cannot lead to the inference that Parliament had the intention of excluding all tribunals irrespective of their nature or their functions from the purview of High Court's judicial superintendence while amending the original Art. 227. In fact, it is not the petitioners' contention that all tribunals are still within the purview of High Court's judicial superintendence; the contention is that Parliament has clearly evinced an intention to curtail High Court's judicial superintendence over tribunals but the curtailment refers to such tribunals which are not basically courts. In our view, the introduction of the new Arts. 323A and 323B in the Constitution by the 42nd Amending Act, 1976 cannot avail the Respondents in support of the contention raised on their behalf.

24. Having regard to the above discussion, we are of the view that the High Court's power of judicial superintendence under the amended Art. 227 certainly covers judgments of all Courts meaning thereby all regular civil and criminal courts constituted under the hierarchy of courts subject to its appellate or revisional jurisdiction but also extends to tribunals, bodies or authorities, whatever be their label provided two conditions are satisfied: (a) such tribunal, body or authority is basically a Court i.e. it performs judicial function of rendering definitive judgments having finality and authoritativeness to bind the parties litigating their rights before it in exercise of sovereign judicial power transferred to it by the State, and (b) such tribunal, body or authority is subject to High Court's appellate, or revisional jurisdiction.

25. In conclusion the four petitions which have been placed before us are directed to be disposed of by Division Bench or single Judge as the case may be, in the light of our above decision.

26. There will be no order as to costs. Order accordingly.

AIR 1977 BOMBAY 405

(AT NAGPUR)

MASODKAR AND KAMBLI JJ.

Smt. Yamunabai Govindrao Mahajan and another, Petitioners v. Nagpur Improvement Trust, Nagpur and others, Respondents.

Special Civil Appln. Nos. 434 and 477 of 1971, D/- 11-11-1976.

Constitution of India, Article 31 (2) — Bombay Court Fees Act (1959), Sch. I Article 15 — Constitutionality — Art. 15 of Court Fees Act is not unconstitutional — Scope of guarantee under Art. 31.

Article 15 of Schedule I of the Bombay Court-fees Act, 1959, seeking levy of the one-half ad valorem Court-fee in the matters of reference under S. 18 of the Land Acquisition Act, 1894, is not in any manner unconstitutional nor can it be treated so under Article 31 (2) of the Constitution of India.

(Para 14)

Party seeking to invoke the process of Civil justice which is departmentally available under the structure of the law in the hierarchy of the Courts is bound by other laws and would clearly be subject to its terms like any other suitor in civil cases. Only because the laws that govern the initiation or institution of claims and its investigation by the Civil Court create a modality and require the party to incur such an expenditure for that purpose, it cannot be said that the initial right to get the compensation is in any manner being impeded.

(Para 6)

It is clear that though the Court-fee has to be paid upon the application made to the Collector in pith and substance it is the fee that is paid in Court, for, Collector would have no option if the conditions of the statute are satisfied but to forward the reference for the adjudication of the Court. The fee thus charged under Art. 15 of Schedule I, is the one which is required to be paid in Court and is not a fee collected or paid upon an application made to the Collector. Because proceedings with regard to civil claim for the enhanced compensation are initiated by an application to the Collector, this position that

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it is a fee in law paid in Court is not affected. (Para 9)

Once the relation of the claim to the administration of Civil justice is established, its levy is competently made and the appropriate legislature seeks to recover the same by keeping in view several relevant factors. The levy of the fees under Art. 15 of Schedule I in issue is thus with competence and has clear relation to the administration of civil justice. AIR 1973 SC 724 Foll,

(Para 10)

The right and assurance of the compensation according to law for the acquired property which is bona fide adjudicated by the machinery provided by such law is the maximum guarantee of Art. 31 (2) of the Constitution. The matters of evaluation of property by a person interested and his desire to get the same adjudicated, need not be mixed and confused with the right guaranteed by the Constitution. (Para 10)

The levy is clearly circumscribed by the objective factors reasonably worked out and cannot in any manner be said to be arbitrary imposition. There is no ground to think that any irrational element has been introduced in the matter of the rate of fee prescribed by Art. 15. Under Art. 31 (2) of the Constitution what is material to find is the law authorising compulsory acquisition of the property for public purposes that lays down the manner and determination of compensation along with the principles of such determination and not the matters of its reasonableness. Even if that can be said to be in issue because of Art. 19 of the Constitution, it is clear that on the face of it by the very nature of it the fee collected under Art. 15 of the Bombay Court Fees Act answers the reasonableness. (Para 11)

The guarantee of Art. 31 (2) is to the extent of permitting acquisition of private property for public purposes by or under the authority of law that lays down the manner and principle of determination of compensation. That does not further guarantee that this manner of determination should always and in all circumstances be free in the sense the services required for adjudication should be made available without charge of any fee. The parties truly without any funds to pay the same may be entitled to invoke the provisions with regard to pauperism available in the Code of Civil Procedure. (Para 12)

Cases Referred: Chronological Paras
AIR 1973 SC 724 10

W. G. Deo, for Petitioners; M. P. Badar, (for No. 1) and V. P. Salve, Asstt. Govt. Pleader, (for Nos. 2 and 3), for Respondents.

MASODKAR J.:— These two petitions arise out of land acquisition proceedings initiated for the purpose of Nagpur Improvement Trust relating to Khasra Nos. 72, 73, 74 and 75 of Mouza Fardi, in which the petitioners in these cases have interest. Though initially petitions have been filed seeking several reliefs including the one for the quashing of the scheme known as "Eastern Industrial Area Street Scheme" and also seeking further entitlement of compensation as per the principles and the provisions of Land Acquisition Act, 1894, at the hearing Mr. Deo stated that the petitioners do not press their prayers with regard to the validity of the Industrial Area Street Scheme. As to the other prayers regarding the compensation, the learned counsel states that the matter is being considered in the appropriate forum under the provisions of the Nagpur Improvement Trust Act 1936 read with provisions of Land Acquisition Act and with liberty to question the eventual decision on the grounds raised in these petitions, he withdraws those prayers. However, he restricts the petitions to the prayer with regard to payment of Court-fee which the petitioners were required to pay on the applications for making references under S. 18 of the Land Acquisition Act, read with S. 61 of the Nagpur Improvement Trust Act, 1936.

2. To appreciate the said grievance, few facts need be stated and the same are these. Before the Land Acquisition Officer petitioners in each case put in their claims with regard to compensation for the property that was being acquired. The Land Acquisition Officer made an award under S. 11 and filed the same under S. 12 (1) of the Land Acquisition Act in each case, i. e. on 28th October 1970 and 18th August 1970, the same being Annexure-VII and Annexure-VII, respectively, along with these two petitions. Being dissatisfied with the said awards, on December 21, 1970 and October 2, 1970 respectively, applications under S. 18 of the Land Acquisition Act, 1894, for reference were made. The reference application in each case was required to bear the court-fee stamp as provided for by Bombay Court-Fees Act, 1959, calculating the court-fees as per Article 15 of Schedule I of the Bombay Court-fees Act. Without prejudice to the petitioners' claim that no court-fee is payable because the provision seeking levy was unconstitutional, the petitioners have paid Rs. 3350/- and Rs. 1700/- respectively in these two cases as court-fee as per Article 15 of Schedule I being one-half of ad valorem fee worked out on the difference between

the amount awarded by the Collector and the amount claimed by the applicants.

3. The contention is that the provision regarding the levy of this fee is ultra vires of Art. 31 (2) of the Constitution of India and further it being a fee, it is unreasonable on the face of it. The prayer in each of the petitions that survived and that was argued relates to seeking a declaration that the provision of Article 15 of Schedule I of the Bombay Court-fees Act, 1959 be declared ultra vires and the petitioners in each case pray for refund of the fees paid upon their respective applications for reference.

4. Mr. Dēo in support of this submission contends that it is incumbent on the State in the matter of compulsory acquisition of property for the public purposes to acquire the same only by authority of a law that provides for compensation for the property so acquired and further which specifies the principles on which the manner in which the compensation is to be determined and given. According to the learned counsel, the constitutional guarantee under Art. 31 (2) of the Constitution is an obligation on the State and requiring a person to pay the court-fee for determining the compensation would be making a law which does not provide for the compensation as such. The payment of court-fees and the nature of fees taken in Court, it is argued, cannot possibly have any correlation with the services rendered by State, for here it is the State which is extracting the property and not rendering any service. Thus for the purpose of seeking determination of the compensation if the law were to require a fee as a pre-condition for determining compensation, on the face of it the complaint is, it will be unreasonable and further would mean denying the compensation itself. The submission suggests several cases where the persons who are really paupers will be disabled to get any just and equitable compensation because they are unable to bear the burden of court-fee and thus acquisition itself would be without payment of compensation as originally intended by the Constitution. Further such an acquisitory process would be one, unauthorised by law. Counsel argues that the nature of the order made under S. 11 of the Land Acquisition Act is nothing but an offer and it is the right given to the party in the matter of compensation either to accept or reject that offer. The words available in sub-article (2) of Art. 31 of

the Constitution of India, as to the manner for determination of the compensation, should receive such a construction that would, without any impediment whatsoever including the one requiring the payment of court-fee, permit adjudication and determination of the quantum of compensation as per law. It is further urged that the Land Acquisition Act itself does not require the party dissatisfied with the offer to pay any particular fee for further adjudication; it is by the Bombay Court-fees Act an impediment is enacted and the said impediment thus being operative upon the right secured by a law providing for the manner of determining the compensation in terms of Art. 31 (2), would be unconstitutional. It is further submitted that article of the Court-fees Act has no relation nor has any nexus with the cost of administration of justice, because, it is recovered at the time when the application is made and not in the Court. In fact according to the learned counsel it is an executive charge for making a reference and the principles of the cost of judicial administration and the possible nexus cannot be made applicable.

5. We have carefully considered all these submissions and it is difficult to uphold the same. Provision of Art. 31 (2) on which reliance is placed is in negative term conferring a right, no doubt, with regard to compensation in the matter of compulsory acquisition of property for public purposes. Sub-article (2) is satisfied once the compulsory acquisition is by the authority of law and the said law as far as the present controversy is concerned provides for the principles on which and the manner in which the compensation is to be determined and given. The provisions of sub-article (2) undoubtedly are the part of the right to property guaranteed. By itself it purports to lay down how that right is to be governed in the matters of compulsory acquisition of property for public purposes. It enacts constitutionally a permissive legislative field that can eclipse individual rights in property in favour of public need. To satisfy basically the requirements of that provision is to find whether the taking or acquiring is by or under the authority of a competent legislation. Such law would necessarily provide by laying down the principles and the manner in which the compensation for acquired property would be determined and/or paid. Constitution clearly contemplates such a trivalent measure for ac-

quisition of property for public purpose. To put it otherwise the requirements are simply three, viz. the acquisition must proceed under the authority of law; the said law must lay down the principles of compensation; and further it must lay down the principles for determination of compensation. The provisions of the Land Acquisition Act, 1894, read with the Nagpur Improvement Trust Act, 1936, as far as present matter is concerned fully satisfy this constitutional trivalence. Now the complaint herein is against the Court-fees Act that requires a court-fee to be paid upon an application contemplated by S. 18 of the Land Acquisition Act for seeking a reference for adjudication for enhanced compensation. By that prescription we fail to see how the Provisions of Art. 31 (2) of the Constitution can be said to be violated for, we have a law laying down the principles of compensation and similarly the manner of its determination. Once these requirements are there the guarantee under the article is fully satisfied. Further probe in the scheme of the Land Acquisition Act would also indicate that complaint is without any force.

5-A. The provisions of the Land Acquisition Act indicate that after the issue of notice to the interested parties, the Land Acquisition Officer proceeds under S. 11 to make an enquiry with regard to compensation. The law enjoins upon the officer to take into account the objections which any person has taken pursuant to the notice, firstly, to the measurements and, secondly, about the value of the land and also into the respective interests of the persons claiming compensation. The award that has to be made under S. 11 after such enquiry has to state the true area of the land and the compensation which in the opinion of the Collector has to be paid for the land and if there is a claim for apportionment, the apportionment of the said compensation. No doubt provisions of S. 11 by themselves do not indicate the principles for working out the said compensation. But it is implicit in the very purpose of the enquiry which is for all purposes the executive determination of the compensation for the acquired property. This determination undoubtedly partakes in the nature of quasi judicial enquiry to which the principles of fairplay and justice are clearly applicable. Not only the Collector is bound to apply the principles enacted un-

der Ss. 23 and 24 of the Land Acquisition Act by virtue of S. 15 of the said Act, but is further enjoined in the scheme of the proceedings to behave consideration upon the evidence or the material that may be tendered by the persons interested in the property. This enquiry for the purpose of determination of the compensation is thus governed by the principles for such determination and lays down the manner in which it has to be completed. As a result of the enquiry award follows. No doubt the nature of the award made under S. 11 with respect to compensation for the acquired property is treated and is tantamount to an executive offer but that is because the persons interested have a further option to seek enhancement of the compensation so offered. It is styled judicially as an offer because there is a possibility of its acceptance or non-acceptance resulting in a reference at the instance of the dissatisfied party to a Civil Court for enhanced claims. For the purpose of law however the award made by the Collector is both, the result of adjudication and application of the principle for determination of compensation. The acquisitive law's purposes as contemplated by the provisions of Art. 31 (2) of the Constitution are thus fully satisfied once the Collector under the provisions of the Land Acquisition Act permits participation by issue of the notice and after applying the principles makes an award. The making of this award of compensation is thus unimpeded by any onerous conditions. Upon the claim put up before the Collector who is charged with duty to make an award the interested person is not required to pay any court-fee; nor the award so made under S. 11 if accepted by the interested person requires him to pay any court-fee, either with regard to claim set up or with regard to claim so awarded.

5-B. Now comes the stage in the scheme of the Acquisition Act itself of providing further remedy to dissatisfied person with the award of compensation. Had the law stopped at the determination made by the Collector in the shape of executive award and left the party aggrieved to follow the remedy of general law, we have no doubt that the provisions of such law would have answered all the requirements contemplated and to which we have made a reference above by Art. 31 (2) of the Constitution. But the Legislation purports to make a self-contained

and self-serving scheme. Thereunder the provisions of S. 18 of the Land Acquisition Act permit of a making of an application to the Collector for the purpose of reference to the Court by which the person interested and not satisfied with the award can seek enhancement of the compensation. It may be mentioned that provisions of Chapter VI of the Nagpur Improvement Trust Act which are relevant enable the Trust to acquire the land under the provisions of the Land Acquisition Act as are amended by the provisions of Nagpur Improvement Trust Act and for performing the functions of the Court in reference to the acquisition of land for the Trust a Tribunal is required to be constituted in accordance with S. 62 of the Trust Act. By virtue of S. 61 of that Act, the Tribunal so constituted is deemed to be the Court and the President of the Tribunal to be the Judge. Thus by virtue of S. 18 of the Land Acquisition Act the dissatisfied interested person is enabled to approach this Tribunal which for all purposes is a Court if claim is set up for enhanced compensation. Under the provisions of the Land Acquisition Act such a reference would have been to the Court as defined in S. 3 (d). Further scheme of S. 18 indicates that an application has to be filed with the Collector which if it is otherwise tenable takes the shape of a reference to Civil Court. But the disputes so raised for the purpose of enhanced compensation have to be determined or adjudicated upon by the Court or the Tribunal which is deemed to be the Court under the relevant Act. The nature of the proceedings initiated upon an application for reference by the party concerned is clearly one of civil claim with regard to the entitlement of the compensation in place of the compensation offered under an award made under S. 11. As far as applicable to the hearing of the reference before the Civil Court S. 53 of the Land Acquisition Act, 1894 makes the Code of Civil Procedure applicable. Under the Trust Act only S. 54 of the Land Acquisition Act has been excepted but the provisions of S. 53 would still be applicable to the proceedings in reference before the Trust Tribunal. Effect of exclusion of S. 54 by the Trust Act is merely taking away the remedy of further appeal which would be available under the Code of Civil Procedure.

6. This self-serving scheme of the statute primarily shows that once there

is executive determination of the compensation the interested person if dissatisfied is being provided with a civil remedy and the mode and manner of taking that remedy in the Court is regulated. For all intents and purposes along with the nature and constitution of the remedy, it is clear that the person interested and dissatisfied and seeking a reference is placed in the place of a plaintiff claiming higher compensation for the property acquired than the one awarded under S. 11 of the Land Acquisition Act. The civil claim so set up though not a suit but is clearly akin to it and is governed by the Civil Procedure Code. Party seeking to invoke the process of civil justice which is departmentally available under the structure of the law in the hierarchy of the Court is bound by other laws and would clearly be subject to its terms like any other suitor in civil cases. Only because the laws that govern the initiation or institution of claims and its investigation by the Civil Court create a modality and require the party to incur such an expenditure for that purpose, it cannot be said that the initial right to get the compensation is in any manner being impeded. If we were to stretch the logic of impeding the fundamental rights in this manner, then even a party required to call witnesses and pay for them would complain that it is onerous. The position of the party and the purpose of the proceedings clearly dominate the necessity in such matters to put the party and the proceedings to the regulation of other laws and only because those laws impose a liability because the justice is sought from the Civil Court to pay the court-fee on the claim so set up, the right to compensation cannot be said to have been affected in any manner.

7. This would be evidenced by further scrutiny of certain provisions of the Land Acquisition Act.

8. As we stated above, the manner and procedure for the purpose of initiating proceedings in Civil Court is laid down by S. 18 of the Land Acquisition Act. The initiation has to be by a written application to the Collector and the party is required to state the grounds on which the objections to the award or its amendment are made. Limitation is prescribed within which the application has to be tendered. Orders made by the Collector are subject to the revisional jurisdiction under S. 115 the Code of Civil

Procedure by the High Court. If everything is appropriately complied with, the Collector is required by law to make a reference. Collector is required further to make a statement with regard to the matters of objections and S. 19 (1) (d) relevantly casts an obligation to disclose the grounds on the basis of which the Collector determined the compensation of the acquired property. S. 20 directs that upon reference the Court would start the hearing of the proceedings by causing notices to be served on the persons interested and the Collector. These three Ss. 18, 19 and 20 together indicate that the application for reference is in substance the Civil claim in the matter of higher compensation which has to set out the grounds of objection to sustain that claim and the Collector has to indicate the grounds on which the compensation has already been determined. That indicates that these are the basic pleadings and with these pleadings the matter is sent in the shape of the reference for adjudication by the Court which involves as usual the incidental services of the adjudicating forum established by the State in the matters of dispensation of civil justice.

9. Now turning to the provisions of the Bombay Court-Fees Act, 1959 which seek to charge fee mainly in the matters of involving the dispensation of justice in courts, at the threshold it must be observed that for the purpose of reference, by Article 15 of Schedule I of the Bombay Court-fees Act, 1959, the fee is charged upon the application by which adjudication in the Civil Court is sought. The incident or the cause for collection of court-fees thus is clearly the application of the person who sets up civil claim for higher compensation. Competency to charge such fees and make law for its levy and collection cannot be doubted under the constitutional scheme nor was so raised before us. Like any other civil claim required to be initiated by means of filing a plaint or an application or memorandum in writing made to the Court, application for the purpose of reference to the Court under S. 18 of the Land Acquisition Act provides an appropriate incident seeking to levy the fee, for, eventually what ensues is the adjudication by the Court in its civil jurisdiction of a civil claim. It is clear that though the court-fee has to be paid upon the application made to the Collector in pith and substance it is the fee that is paid in Court, for, as we indi-

cated above, Collector would have no option if the conditions of the statute are satisfied but to forward the reference for the adjudication of the Court. The fee thus charged under Art. 15, of Schedule I, in our view is the one which is required to be paid in court and is not a fee collected or paid upon an application made to the Collector. Because proceedings with regard to civil claim for the enhanced compensation are initiated by an application to the Collector, this position that it is a fee in law paid in Court is not affected. Application is an incidence upon which the court-fee can be levied and the Collector being the authority entertaining such applications though would collect the same, yet it is a fee paid in Court.

10. About the character of such fees in the legislative field it is ample to refer to the authoritative pronouncement of the Supreme Court in the case of Secretary, Government of Madras, Home Department v. Zenith Lamps & Electricals Ltd. (AIR 1973 SC 724). The ratio of this judgment reinforces the legislative competence and clearly brings out that the nexus for the levy and collection of the court-fee is provided by the very administration of justice in and under the State. The Court in that case observed in paragraph 31 as follows:

"But even if the meaning is the same, what is 'fees' in a particular case depends on the subject-matter in relation to which fees are imposed. In this case we are concerned with the administration of civil justice in a State. The fees must have relation to the administration of civil justice. While levying fees the appropriate legislature is competent to take into account all relevant factors, the value of the subject-matter of the dispute, the various steps necessary in the prosecution of a suit or matter, the entire cost of the upkeep of courts and officers administering civil justice, the vexatious nature of a certain type of litigation and other relevant matters."

(Underlining added).

These observations clearly indicate that once the relation of the claim to the administration of civil justice is established, its levy is competently made and the appropriate legislature seeks to recover the same by keeping in view several relevant factors. The levy of the fees under Art. 15 of Schedule I in issue is

thus with competence and has clear relation to the administration of civil justice. As we have indicated above, the reference under S. 18 entails involvement of the administration of civil justice drawing upon the services of the judicial hierarchy of courts at the instance of the party dissatisfied with an executive award or determination of compensation under S. 11 of the Land Acquisition Act. The charging principle underlying the provisions of the Court-Fees Act is clearly connected to the civil administration of justice seeking recovery of the court-fee from the party which intends to initiate the proceedings and to set the wheels of justice in motion. A person interested in the property acquired after the statutory adjudication of the compensation under S. 11 is not a different class than any other civil suitor seeking to establish in Civil Court a claim against a public or State authority. There is no such guarantee in Art. 31 (2) of the Constitution that such a suitor only because his property is subjected to acquisition for public purpose should be differently treated even for the purpose of adjudication of his civil claim in the matter of compensation. Conceivably it cannot be so. The right and assurance of the compensation according to law for the acquired property which is bona fide adjudicated by the machinery provided by such law is the maximum guarantee of Art. 31 (2) of the Constitution. The matters of evaluation of property by a person interested and his desire to get the same adjudicated, need not be mixed and confused with the right guaranteed by the Constitution. The interested person like any other citizen is entitled to put his valuation in the matter of compensation including his own fanciful claims. Like any other suitor after the basic determination, which law presumes will be fair and bona fide, such a person is permitted to seek adjudication of his claim from the competent Civil Court and for that purpose is required by the Court-Fees Act to bear the burden of the fees which have relation to the rendering of the services in the administration of justice.

11. We thus fail to see how such a levy which is competently enacted can be said to affect the right conferred by Art. 31 (2) of the Constitution of India. About the reasonableness, the levy of fee under Art. 15 of the Schedule I of the Bombay Court-Fees Act on the face of it shows a rationale in that it charges one-half of ad valorem fee on the diffe-

rence, if any, between the amount awarded by the Collector and the amount claimed by the applicant according to the scale prescribed under Art. 1 of Schedule I subject to a minimum fee of fifteen rupees. Had the matter been of a civil suit simpliciter, the prescription would have been on the ad valorem basis; but the legislative reasonableness is explicit in making the charge half of the said fee; so also it is only the difference between the compensation determined by the Collector and the claim of the person interested that is subjected to this charge. Thus the levy is clearly circumscribed by the objective factors reasonably worked out and cannot in any manner be said to be arbitrary imposition. There is no ground to think that any irrational element has been introduced in the matter of the rate of fee prescribed by Art. 15. Once we grant the principle that the State is entitled to recover reasonable fee having correlation to the services involved and rendered by the administration of civil justice, even if compared with the other fees which are competently collected under the Court-Fees Act, the levy of this fee shows care and circumspection. Under Art. 31 (2) of the Constitution what is material to find is the law authorising compulsory acquisition of the property for public purposes that lays down the manner and determination of compensation along with the principles of such determination and not the matters of its reasonableness. Even if that can be said to be in issue because of Art. 19 of the Constitution, we are satisfied that on the face of it by the very nature of it the fee collected under Art. 15 of the Bombay Court-Fees Act answers the reasonableness.

12. As is usual in the field of reasonableness, reference was made to hypothetical cases wherein question as to a party who is truly pauper and as such unable to seek a reference and, therefore, losing the remedy provided by the law validly made under Art. 31 (2) of the Constitution was raised. But, in our view, such cases and such illustrations are not decisive. The guarantee of Art. 31 (2) is to the extent of permitting acquisition of private property for public purposes by or under the authority of law that lays down the manner and principle of determination of compensation. That does not further guarantee that this manner of determination should always and in all circumstances be free in the sense the services required for adjudica-

tion should be made available without charge of any fee. Having indicated the manner the law made under Art. 31 (2) may itself indicate the mode and manner of determination of compensation and other matters such as initiation, conditions of initiation and its adjudication being left to the modality of other Acts. Question of detriment does not arise, for, here there is first an executive determination in the shape of award of the compensation free of any charge and it is only when the party sets up a higher claim of its own over and above that compensation, such a party is asked to pay fee in Court by a modality of making an application for reference. It is not necessary in these petitions to say whether the provisions of Order XXXIII Civil Procedure Code dealing with the claims of pauper suitors would be attracted or not. But it is likely that upon the view indicated above, in that the fees collected upon the application are fees paid in Court, the parties truly without any funds to pay the same may be entitled to invoke the provisions with regard to pauperism available in the Code of Civil Procedure. For the purpose of the present petitions suffice it to observe that the petitioners before us are not paupers and in fact have paid the court-fee and have raised a challenge that they are not liable to pay that court-fee because of Art. 31 (2) of the Constitution.

13. Upon the view we have taken as to the construction of the remedy made available and resultant necessity involving the judicial services, the levy of the fee is clearly related and competently made. Further there is obvious possibility involved in all civil litigations that the fees initially paid will be directed to be borne upon success by the opponent as it will form part of the costs that usually follow the success in a civil cause. The reasonableness of the levy and its possible return in the shape of costs, all indicate that petitioner's remedy is not in any manner put under onerous statutory conditions.

14. In view of all this, we reject the submissions advanced in support of the petition and adjudge that upon the debate raised before us, Art. 15 of Schedule I of the Bombay Court-Fees Act, 1959, seeking levy of the one-half ad valorem court-fee in the matters of reference under S. 18 of the Land Acquisition Act, 1894, is not in any manner unconstitutional nor can be treated so un-

der Article 31 (2) of the Constitution of India. We have disposed of the question on the basis and assumption that Art. 31 (2) is applicable to the provisions of the Land Acquisition Act, 1894, as the levy of court-fee collected was under the Bombay Court-Fees Act, 1959. In this we make it clear that we are not applying the saving indicated by Art. 31 (5) of the Constitution of India.

15. Rule would stand discharged in both these petitions. However, we make no orders as to costs.

Rule discharged.

AIR 1977 BOMBAY 412

JOSHI, J.

Balkrishna Raghunath Gharat, Appellant v. Sadashiv Hiru Gharat, Respondent.

Second Appeal No. 248 of 1971, D/-21-12-1976.

Hindu Adoptions and Maintenance Act (1956), S. 10 (iv) read with S. 4 — Adoption of person over fifteen years of age — Valid only if recognised by custom — Resort to any text, rule or interpretation of Hindu Law is of no avail. AIR 1972 Bom 98 Not Followed.

When we read S. 4 with S. 10, the only interpretation admissible is that if any text or rule or interpretation of Hindu law permitted adoption of boys over 15 years in age, they will not have any effect unless a specific provision was made in any other section of the Act recognising them or giving them the old sanctity. (Para 13)

If the parties succeed in establishing the custom or usage sanctioning such adoptions of boys more than 15 years of age, then only they could be deemed to be persons capable of being taken in adoption within the meaning of S. 10. S. 10 restricts the cases of boys in whose community there is such a custom. If adoption of boys more than 15 years in age is recognised by any text or rule or interpretation of Hindu law and not by custom, there being no express provision in the Act, the said text, rule and interpretation would cease to have effect. Such adoptions were upheld by the Bombay High Court, not because of the proof of custom but because of the interpretation put on the texts. Hence, if such adoption was permissible under any text, rule or interpretation of Hindu Law, then the

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same could not be allowed to be proved in view of overriding effect of S. 4. AIR 1976 Bom 264 Followed, AIR 1972 Bom 98 Not Followed. (Paras. 14, 20)

Cases Referred: Chronological Paras

AIR 1976 Bom 264	12, 20
AIR 1972 Bom 98 : 73 Bom LR 667	12, 20
(1972) S. A. No. 1444 of 1965 D/- 24-4-1972 (Bom)	20
AIR 1924 Bom 349 : JLR 48 Bom 387	15, 19
(1899) ILR 23 Bom 250	17
(1866) ILR 10 Bom 80	18
(1871) 8 Bom HCR 67	16

M. V. Paranjpe, B. G. Pradhan and J. A. Barday, for Appellant; V. P. Thosar with J. M. Baphana, for Respondent.

JUDGMENT:— Plaintiff's suit for a declaration that the adoption made by him of the Defendant-Respondent is void, having been dismissed by the lower Court and confirmed in appeal by the learned District Judge, Kolaba, he has come in second appeal.

2. The appeal does raise a somewhat important point of Hindu Law on which the authorities of this Court at least do not appear to be unanimous. The question as to whether the adoption of a boy over 15 years of age is void, or valid being sanctioned by custom, arises in this way:

The Plaintiff who had taken the defendant in adoption on 12th February 1968 and got the adoption deed registered, alleged that according to the custom in his community adoption of a boy more than ten years of age at the date of adoption is not valid. As the defendant was 22 years of age at the date of the alleged adoption the said adoption is ipso facto bad in law and not binding on the plaintiff.

3. The short answer made by the defendant was that they are the members of Somavanshi Kshatriya Community in Alibag Taluka which has its own association presided over by a president elected by the members of the community. At the time of adoption, permission of the President is required to be obtained and there is a long standing custom sanctioning the adoption of persons of any age.

4. The learned trial Judge framed a number of issues which in my opinion did not catch the crux. He cast the burden of proving the invalidity of Defendant's adoption on the plaintiff. In the alternative he framed a somewhat general issue as to whether the adoption is invalid under the practice of the community

of the parties, probably an issue which covered the plaintiff's principal contention that the custom sanctioned adoption of boys upto the age of 10 years. Both these issues were answered in the negative. The learned District Judge formulated a somewhat omnipotent point as to whether the adoption of the Defendant was not in compliance with the provisions of the Hindu Adoption and Maintenance Act and answered it in the negative. It is this finding which is impugned before me.

5. Before I turn to the controversial questions I may at the cost of repetition refer to certain material allegations in the pleadings of the parties. The Plaintiff, for getting rid of the defendant's adoption on the ground of age, made a two-fold attack. In the first instance he pleaded that there was a custom in the community of the parties that the age of the boy should not exceed 10 years at the date of adoption. In the alternative took resort to section 10 (iv) of the Hindu Adoptions and Maintenance Act, 1956 and averred further that as the defendant had completed more than 15 years of age, the adoption was void being not in compliance with law. To rebut these averments, the defendant pleaded another custom which according to him put no upper age limit on the age of the boy to be taken in adoption and denied the custom set up by the plaintiff. It is common ground that the adoption is evidenced by a registered deed of 14th February 1968 and at the date of the adoption the boy was aged 22 years i. e. in any event, more than 15 years. Therefore, this is a case in which two apparently contrary customs are set up, the plaintiff contending that the custom sanctioned adoptions of boys below 10 and the defendant pleading that there is no upper age limit. But on the question whether the adoption is valid or void by virtue of the provisions contained in the Act, both the parties rely upon the same provisions, the interpretation of which is a matter of debate and to which I will refer shortly. Before dwelling on the questions of law, I may refer in brief to the evidence adduced by the parties for proving the alleged custom.

6. The plaintiff did not enter the box, nor did he examine any witnesses. The defendant examined three witnesses viz. Laxman Yesu Gharat, Prabhakar Surekar and Keshav Thakur. Laxman Gharat claims to be the President of Pathare Kshatriya Pachkalshi Somavanshiya

Samaj. He is officiating as the President for the last seven years next before his deposition recorded in November 1969. He made a negative statement that there is no usage or custom that the boys below ten years only should be adopted. He hastened to add in the same breath that there are no restrictions ever put on the age limit of the adopted boys. He produced a number of documents filed before him by certain members of the community evidencing their respective adoptions, but those members have not stepped into the witness box. He had to concede that this practice referred to by him is nowhere recorded in the books maintained by the Samaj. The various documents referred to by him were handed over to the Secretary who was then in charge of the affairs of the association, but no register was ever maintained. Prabhakar Surekar (D. W. 2) who claims to have been adopted by one Radhabai Balkrishna in 1961, speaks to his age being 31 years at the date of adoption and the sanction of the Samaj. His adoption deed was not registered and what was handed over to the Samaj was an uncertified copy of an unregistered deed. The next and the last witness Keshav Thakur (D. W. 3), another member of this community, swears to his adoption by one Kashinath somewhere in 1963 and at the time of adoption he was 29. The requisite consent of the Samaj was taken. The last two witnesses do not utter a word on the custom set up by the defendant in the written statement but endeavour to speak to certain facts within their personal knowledge viz. their ages at the dates of their alleged adoptions. It is clear that the material oral evidence on record is the solitary statement of the President Laxman Gharat that there is no upper age limit for the boy to be taken in adoption. In simpler words, he says that in his community boys of any age can be taken in adoption; but while making this statement he asserts that the community never put any restriction much less to the effect that the boy should be below ten years. This statement is made to disprove the custom set up by the Plaintiff.

7. Before going to the legal aspect as to on whom the burden should lie, and whether it has been discharged or not, I may point out that the learned District Judge has dismissed the evidence of the three witnesses on the point of custom while reversing the finding of the lower Court. He has pointed out that the nu-

merous deeds of adoption or their copies were not at all proved and could not be read as substantive evidence. On the other hand, he has described them as good as waste papers. On the evidence of the remaining two witnesses, his observations are that they attempt to prove their own adoptions. This evidence, taken at its face value, is certainly too meagre and not worthy of credence to uphold the custom set up by the defendant. It is needless to repeat as to what type of evidence is necessary to uphold the custom because the law is well settled on this point. The evidence must be unequivocal and it must tend to prove that the custom is ancient, certain and reasonable. A couple of instances and that too of a comparatively recent date can by no stretch of imagination be held to be sufficient evidence to uphold the custom which aims at changing the course of law. Therefore, without dilating further, I am disposed to conclude on the evidence that the custom set up by either side is not at all proved.

8. This takes me on to the most crucial and debatable questions and to appreciate them, reference to certain provisions in the Hindu Adoptions and Maintenance Act, 1956 which governs the present case would be necessary. This Act came on the statute book on 21-12-1956. The expressions "custom" and "usage" have been defined in S. 3 to mean that unless the context otherwise requires, they connote any rule which, having been continuously and uniformly observed for a long time, has obtained the force of law among Hindus in any local area, tribe, community, group or family provided that the rule is certain and not unreasonable or opposed to public policy; and provided further that, in the case of a rule applicable only to a family, it has not been discontinued by the family. The expressions "custom" and "usage" having been defined by the statute, they have to be given this very meaning wherever they occur subsequently in the Act and more particularly in S. 10 (iv) of the Act.

9. The next important section is S. 4 which reads as follows:

"4. Save as otherwise expressly provided in this Act,—

(a) any text, rule or interpretation of Hindu law or any custom or usage as part of that law in force immediately before the commencement of this Act shall cease to have effect with respect to any matter for which provision is made in

this Act;"

In this context the relevant portion of S. 10 on which hinges the present case needs reproduction and it would read thus:

"10. No person shall be capable of being taken in adoption unless the following conditions are fulfilled, namely:—

x x x x x x x
x x x x x x x

(iv) he or she has not completed the age of fifteen years, unless there is a custom or usage applicable to the parties which permits persons who have completed the age of fifteen years being taken in adoption."

10. Two more important sections in this context need a reference. S. 5 lays down that adoptions under the Act are to be regulated by the provisions contained in Chapter II which has the caption 'Adoption.' S. 5 (1) runs thus:

"5. (1) No adoption shall be made after the commencement of this Act by or to a Hindu except in accordance with the provisions contained in this Chapter, and any adoption made in contravention of the said provisions shall be void."

Section 6 which prescribes the requisites of a valid adoption reads as follows:

"6. No adoption shall be valid unless:—

x x x x x x x
x x x x x x x

(iii) the person adopted is capable of being taken in adoption; and

(iv) the adoption is made in compliance with the other conditions mentioned in this chapter."

It is needless to refer to the other provisions contained in this Chapter, but in passing I may add that S. 7 deals with the capacity of a male Hindu to take in adoption, whereas S. 8 speaks of the capacity of a female Hindu to take in adoption. S. 9 deals with persons capable of giving in adoption and to S. 10 a reference is already made. S. 11 lays down other conditions for a valid adoption, but they are of little moment in the present litigation.

11. On a combined reading of Ss. 5, 6 and 10 it would be clear that an adoption which is not in strict compliance with the provisions of law will be void and no alternative is left. S. 10 defines the persons capable of being taken in adoption and one of the restrictions imposed is on the age limit. If the boy has completed the age of 15 years, the adoption is not recognised by the Act and it is rendered void subject to the proviso.

The proviso is the existence of a custom or usage applicable to the parties permitting adoption of boys more than 15 years of age. Going back to the facts for a while, I may point out that the defendant being admittedly more than 15 years of age at the time of adoption, the adoption would be *ex facie* void.

12. However, Mr. Thosar, the learned advocate for the Defendant who argued the matter at great length, tried to bring his case within the four corners of the proviso or exception to sub-section (iv) of S. 10 by laying great emphasis on the custom or usage which according to him is proved by the evidence on record alluded to in the foregoing paragraphs. I have already concluded that the said evidence as a matter of fact has failed him and the learned trial Judge has answered this point against the defendant-respondent. But Mr. Thosar tried to get rid of this difficulty by falling back upon certain observations in the reported cases to which a reference would be made shortly and impressing upon this Court that this custom, so far as the erstwhile Bombay State, which is now a part of Maharashtra State and in which the old Hindu law on adoption prevailed, is concerned, is recognised and has hardened into a rule of law. A judicial note be taken of the custom allowing adoption of boys more than 15 years in age or putting no upper age limit on the ages of the boys to be given in adoption and he need not be called upon to prove the custom once again. Even if the oral evidence is read against him and it fails to establish the alleged custom, still the precedents of this Court can be taken into account and on the issue of custom and/or usage the point can be in his favour. In support of his submission he relied upon certain observations of Nain J. in *Dnyanu Gopal Powar v. Jijaba Baba Powar*, 73 Bom. L. R. 667; (AIR 1972 Bom 98) correctness of which is doubted by the Division Bench of this Court in *Laxman Ganpati v. Anusuyabai*, AIR 1976 Bom 264. In *Dnyanu's* case the widow who had inherited her husband's properties, had sold them in 1942 and 1943 to the defendants. In 1959 she adopted the plaintiff as a son to her husband and died thereafter. The plaintiff brought a suit against the defendants for possession of the properties on the ground that the alienations made by the widow were without legal necessity. Numerous contentions were taken and one of the points raised was that the age of the adopted

son was more than 15 years at the date of adoption; therefore, the adoption was not valid. While repelling this attack Nain J. observed thus:

".....However this sufficiency of evidence for establishing a custom or usage loses all importance in territories which were formerly part of State of Bombay, such as Satara District. Even prior to the passing of the Hindu Adoptions and Maintenance Act in 1956, the Hindu law applicable to the Bombay State was that a person may be adopted at any age even though he may be older than the adopter and even though he may be married and had children. It is well-known that Hindu law in India is derived from various texts and commentaries some of which have by custom held the field in various parts of India. Hindu law, therefore, is by itself customary law, except to the extent to which it has been subsequently codified. In my opinion, therefore, the prohibition contained in S. 10 (iv) against the person adopted who has completed the age of 15 years has no meaning in relation to male persons adopted in the territories which were comprised in the former State of Bombay which include the District of Satara from where this appeal comes. The custom or rule of Hindu law prevailing in these territories permitting adoption of males over the age of 15 years is expressly saved by S. 10 (iv)."

With respects, the learned Judge in the concluding two sentences uses the two expressions 'custom' or 'rule of Hindu law.' The exception embodied in S. 10 (iv) is the custom. S. 10 makes no reference whatsoever to the rule of Hindu law. On the other hand, it appears that the provisions of S. 4 were not brought to the notice of the learned Judge.

13. Now, going back to S. 4 which speaks of the overriding effect of the Act, it is clear that all the texts, rules or interpretation of Hindu law or customs or usages seem to have no effect with respect to any matter for which provision is made in the Act. When we read S. 4 with S. 10, the only interpretation admissible is that if any text or rule or interpretation of Hindu law permitted adoption of boys over 15 years in age, they will not have any effect unless a specific provision was made in any other section of the Act recognising them or giving them the old sanctity. In other words, if any such old text, rule or interpretation of Hindu law (meaning thereby old Hindu law as it stood before

the Act) permitted adoptions of boys more than 15 years in age, they could not stand sanctioned by the new Act unless there was express provision in the Act itself.

14. Now, advertent to S. 10, no doubt there is an express provision, but it is with respect to custom or usage which has been defined in S. 3 and to which a reference is already made. What sub-section (iv) of S. 10 says is that adoptions of boys over 15 years of age are not recognised by law unless there is a custom or usage applicable to the parties permitting such adoptions. If the parties succeed in establishing the custom or usage sanctioning such adoptions of boys more than 15 years of age, then only they could be deemed to be persons capable of being taken in adoption within the meaning of S. 10. Section 10, to my mind, restricts the cases of boys in whose community there is such a custom. If adoption of boys more than 15 years in age is recognised by any text or rule or interpretation of Hindu law and not by custom, there being no express provision in the Act, the said text, rule and interpretation having ceased to have effect, cannot run to the rescue of the defendant-respondent. In other words, if such sanction of taking boys of more than 15 years of age in adoption is to be found in the old text, rule or interpretation of Hindu law, then the exception to sub-sec. (iv) of S. 10 would be of little moment to the defendant-respondent. Therefore, it is quite essential to find out how and why and under what authority this restriction of the age limit under the old law came to be imposed. Before touching this subject, I may mention here that the parties to this litigation claim to be Somavanshiya Kshatriyas which could be put in the category of 'Regenerate class' (Dwijia Class) recognised by the old Hindu law.

15. Now, going to the old Hindu law as it stood before this Act was brought on the statute book, there was a limitation on age. This limitation had its origin in the text of the law which was interpreted, so far as Bombay State was concerned, in a different manner looking upon it as a text which was recommendatory in its nature and not mandatory. It appears from the commentaries on pages 234, 235 and 236 of Mayne's Hindu Law, 1953 edn. that a boy whose upanayana or thread ceremony was not performed, could be taken in adoption and that is how the restriction on the age limit

came in. The original text is to be found in Dattaka Mimamsa, Vol. IV Sec. 23, Colebrooke, Dig. II p. 301. The learned author has further observed that upanayana is performed in cases of Brahmins as early as the 5th year and carried upto the 8th. In a given case it may be extended to 16th year. But the next important observation is: "The primary periods for upanayana in the case of a Kshatriya are eleven, and of a Vaisya twelve years. According to Dattaka Chandrikam the age of the boy to be adopted is only material as determining the time at which upanayana may be performed. Unless it was performed in the family of the adopter, the boy could not be given in adoption so far as the other provinces except Bombay are concerned. On quoting Nilakantha and the opinions of Shastries from Poona who appear to have opined that there is nothing in the text that the adoption should precede moonj (Upanayan) and marriage, it is further observed by the learned commentator:

"It has been held by the Bombay High Court that a man can adopt a son older than himself on the ground that the rule as to age is only recommendatory. But the learned Judges themselves admit that "it is contrary to the recognised notions of Hindus as to adoptions and to the fundamental idea of an adopted son. (vide Balabai v. Mahadu ILR 48 Bom 387 at p. 389: (AIR 1924 Bom 349)."

A survey of these observations, to my mind, indicates that the restrictions on the age of the boy at the date of adoption did find place in the original text, but the restrictions were interpreted to be recommendatory. However, it cannot be said that they had no foundations either in the text or rule of law.

16. Reference to certain observations in the decided cases of our High Court under the old Hindu law and on a couple of which Mr. Thosar himself relied, would be necessary. The oldest case is of Nathaji v. Hari reported in (1871) 8 Bom HCR 67. The principal question involved in that case was whether the adoption of a shudra who is married at the time of his adoption is valid or not if the adopted person be a 'Sagotra' (of the same family) of the present type. However, from the observations made by the learned advocate appearing for the appellant who sponsored the view, that the adoption of a married person is invalid under the Hindu Law, it seems that he relied upon certain texts like Dattaka Chandrika Sec. II, para 25 (b),

T. L. Strange's Manual of Hindu Law para 104, page 27 and other compilations of English authors. He drew the attention of the Court to certain passages not only from Dattaka Chandrika, but from Dattaka Mimamsa. Reference was also made to Nilakantha's quotations referred to in one of the texts in which he said: "And my father has said that a married man, who has even had a son born, may become an adopted son." But the learned advocate commented further that Nilakantha's father was not a 'rishi' and his opinion was not authoritative. Naturally Mr. Gadgil appearing for the Respondent referred to certain portions in Mayukha and also passages from Kalika Puran. Why I am referring to these notes of arguments is to point out and to place on record that the restrictions on the age had their foundations in the old texts. It is not a restriction brought into existence by customs or conventions. His Lordship Melvill J. after dealing with these passages appearing in the various texts has pointed out that the authority of the Dattaka Chandrika, as regards Brahmins, is absolute and that an adoption is necessarily invalid if made after the Upanayana has been performed in the natural family. On the other hand, the author of the Vyavahara Mayukha seems to have taken an opposite view; but the commentators on Mayukha also were relying upon the statement made by Nilakantha referred to a little earlier. It is needless to make a reference to the further observations in this context as to on what grounds the argument was accepted or not, but next comes an important observation which has been relied upon by Mr. Thosar and it runs thus:

"Independently of the Hindu law, we think that there is sufficient authority for holding that such adoptions are in the Dakhan recognised by the custom of the country."

Mr. Thosar wants me to read in these observations that the custom having recognised such adoptions, he is relieved of the burden of proving the custom and this custom should prevail over the other barriers of law. Ultimately the Court concluded that the adoption of a married Shudra was valid. However, this authority lends support to the view that the restrictions on the age limit had their origin in the texts.

17. The next authority nearer to the point is to be found in the case of Gopal Balkrishna v. Vishnu Raghunath, (1899)

ILR 23 Bom 250. The learned Bench of which Mr. Justice Ranade was a party, observed that the fact that an adopted son is older than the adopting mother does not make his adoption invalid. The rule prescribing a difference of age in favour of the adopting mother is only directory and not mandatory. The principal point involved in the appeal was the effect of the adoption on the vesting and divesting of the estate. While challenging the adoption a point was raised whether a person who is older than the person taking him in adoption is valid or not. It was an adoption by a widow and the boy was older than the widow. In that context arguments were advanced, but his Lordship Ranade J. in the concluding paragraph observed; "It is not strictly necessary to discuss the validity of the other objection arising out of the difference of age between his adopting mother and the appellant." The learned Judge then proceeded to point out the objections and the pertinent observations run thus:

"The original authorities referred to by these text-writers are the same, being collected from Steele's Hindu Law and Customs, and the opinions of Shastris. As regards the earlier Smriti texts, there seems to be no definite rule laid down on the point. The inference in favour of the adopted son being younger than his adoptive father, is extended to the mother by a somewhat loose analogy and interpretation of the text that the adopted son should be the relation of a legitimate son. But in a system of law where bachelors and widowers are permitted to adopt, and where minors also can adopt, if they have arrived at the age of discretion, and where further married men with children have been held to be fit subjects for adoption, these strict interpretations of the old texts seem to be not a little out of place. If a male person at any time of life may adopt a man of any age, and such male person is also permitted to marry a female minor of any age, it is obvious that the rule prescribing a difference of age in favour of the adopting mother must be only regarded as a directory rule, and not a command, the infraction of which invalidates the adoption. As observed above, it is not necessary to decide this point in the present appeal."

True it is that these observations of the learned Judge are obiter, but they make a reference to the Smriti texts and the texts lay down these restrictions on

the age. They have been interpreted by this Court to be directory in their nature and not mandatory. Even then the position under the old Hindu Law remains that there were bans on the age limit in the texts and in course of time they came to be interpreted in the manner above said and validated adoptions of persons who were either married or older than the adopter himself. In other words, the ban on the age limit found in the texts, was relaxed not on the ground of custom but on the interpretation.

18. The next authority is to be found in the case of Dharma Dagu v. Ramkrishna Chinnaji, (1886) ILR 10 Bom 80. The precise issue was whether the adoption of a married Asagotra Brahman was prohibited by the Hindu law in force in the Presidency of Bombay. The point was answered in the negative, but the principal reasoning which weighed with the Court was the doctrine of *factum valet*. Speaking for the Court, His Lordship Birdwood J. observed:

"Where a rule is in effect directory only, an adoption contrary to it, however blamable, is nevertheless, to every legal purpose, good."

This authority takes a survey of the entire old case law laying emphasis or stress on the quotations dealing with the validity of the adoption of married persons; but what is pointed out is the existence of certain provisions in the old law defining the age limit for adoption.

19. More or less to the same effect are the observations in Balabai Tukaram Balur v. Mahadu Krishna Balur, ILR 48 Bom 387; (AIR 1924 Bom 349). In this case the question for decision was whether it is permissible to a person to adopt a son older than himself and it was answered in the affirmative. The reasoning for taking such a view is to be found in the penultimate paragraph of the judgment. On observing that no express text directly bearing on the point was cited at the bar. His Lordship Macleod C. J. speaking for the Bench observed that the directives given in the old text have been treated as recommendatory and not mandatory.

20. My learned brother Malvankar J. in an unreported case Second Appeal No. 1444 of 1965 decided on 24-4-1972 (Bom) has catalogued various judgments on this point to which a passing reference is made by the division bench of this Court in Laxman Ganapati Khot v. Anusayabai, AIR 1976 Bom 264. Three prin-

principal questions were raised before the Division Bench, and they are: (1) whether, in view of the provisions of Ss. 4 and 10 (iv) read with S. 3 (a) of the Hindu Adoptions and Maintenance Act, 1956, it is open to the first defendant to prove that there was a custom or usage applicable to the parties which permitted persons who were over the age of 15 to be taken in adoption; (2) whether any such custom or usage has been proved in the present case; and (3) whether the first defendant has succeeded in proving the factum of the adoption on which he relies. The learned Judges dealt with the third point first and came to the conclusion that the factum was not established. On observing that it was not necessary for them to express on the remaining two points still as the point was urged at great length, they proceeded to give their own views. Their attention was drawn to the judgment in *Dnyanu Gopal v. Jijaba Baba*, 73 Bom LR 667: (AIR 1972 Bom 98) decided by Nain J. The division bench, in my opinion, has rightly pointed out that the attention of the learned Judge Nain was not drawn to the provisions of S. 4 of the Act. The learned Judges seem to take the view that if the adoption of a person over the age of 15 years was permissible under any text, rule or interpretation of Hindu Law before the Act came into force, and not in accordance with any custom, then the same could not be allowed to be proved, in view of the provisions of the said sections viz. Ss. 4, 6 and 10. These observations, to my mind, clinch the issue. As I have already indicated in the foregoing paragraphs that the restrictions on the age of the boy to be given in adoption could be traced to the original text and the relaxation owes its origin to their interpretations as put by this Court in the various authorities. Although the texts or rules were liberally interpreted, upholding the adoptions of persons older than the adopter or removing the ban on the age of the boy to be adopted, still the basic question remains and it is that such adoptions were upheld not because of the proof of custom but because of the interpretation put on the texts. If this be the correct position of law,—and it is, to my mind,—then S. 4 read with S. 10 (iv) is a complete answer to the numerous points raised by Mr. Thosar before me. S. 4 overrides all the provisions in the old texts, rules or interpretations of Hindu

law. They are not saved by S. 10 (iv). What is saved by S. 10 (iv) of the Act is the custom which permits the adoption of a boy who has completed the age of 15 years. Therefore, the question of custom, to my mind, as I read these sections and the origin of these restrictions, recedes to the background. In view of the overriding effect of S. 4, a party cannot be allowed to prove that adoption of a person over the age of fifteen years was permissible. On these grounds I am disposed to set aside the decree of the lower Court.

21. In this view of the matter I take, it is needless, nay, it would be futile to deal with the various other points urged at considerable length by Mr. Thosar.

22. In the result, the appeal is allowed with costs throughout. The plaintiff's claim is decreed by declaring that defendant's adoption is null and void as he was more than 15 years of age at the date of adoption.

Appeal allowed.

AIR 1977 BOMBAY 419

HAJARNAVIS AND LENTIN, JJ.

Mrs. Vera D. Thackersey, Appellant v. Bai Manekbai Annasaheb Thackersey, Respondent.

First Appeal No. 598 of 1975, D/- 11-2-1976.*

(A) Succession Act (1925), Ss. 264 and 265 (1) — Grant of letters of administration — Contentious proceeding — Power of Civil Judge (Senior Division) authorised under Bombay Act 14 of 1869 to decide. (Bombay Civil Courts Act (14 of 1869), S. 28-A) — High Court Rules and Orders — Bombay High Court Rules (Civil Manual, Vol. 1, 1960), R. 255 (ii)).

Reading S. 28-A of the Bombay Civil Courts Act, 1869 and R. 55 (ii) of the Bombay High Court Rules (Civil Manual, Vol. 1, 1960) there can be no doubt that a Civil Judge (Senior Division) has been invested with all the powers of a District Judge to take cognizance of any contested proceeding under the Succession Act, 1925, which may be transferred to him by the District Judge. Thus the Civil Judge (Senior Division), to whom

*(Against decision of N. A. Kadam, 2nd Jt. Civil J. Sr. Division at Pune in Misc. Appln. No. (146 of 1974) 376 of 1974).

AU/AU/A409/77/JHS/RSK

an application for grant of letters of administration is so transferred by the District Judge, could dispose of the same, on merits irrespective of the fact that a caveat had been entered and the matter had become contentious: AIR 1967 Guj 214 and AIR 1962 Mad 450 (FB) Followed. (Para 11)

There is no conflict whatsoever between S. 264 of the Succession Act and S. 28-A of the Bombay Civil Courts Act nor can it be said that the High Court's power of delegation under S. 28-A of the Bombay Civil Courts Act is circumscribed by S. 265 (1) of the Succession Act. (Paras 15, 16)

(B) Succession Act (1925), S. 264 — 'District Judge' — Not persona designata.

The expression 'District Judge' as used in S. 264 does not refer to a persona designata. On the contrary it means the Judge of a principal civil court of original jurisdiction as defined in S. 2 (bb) of the Act. AIR 1949 Nag 408 and AIR 1970 Assam 111, Followed; AIR 1949 Bom 188 and AIR 1931 Bom 582, Distinguished. (Para 25)

Cases Referred: Chronological Paras

AIR 1970 Assam 111	24
AIR 1967 Guj 214	12
AIR 1962 Mad 450 (FB)	17
AIR 1949 Bom 188: 51 Bom LR 148	26
AIR 1949 Nag 408	23
AIR 1931 Bom 582: ILR 55 Bom 544	26

A. C. Agarwal with V. B. Joshi, for Appellant; M. V. Paranjape with S. S. Phadnis and P. M. Pradhan, for Respondent.

LÉNTIN, J.:— This appeal has been filed against the judgment and order dated 16th April 1975 passed by the learned 2nd Joint Civil Judge, Senior Division, Poona, returning to the petitioner, who is the appellant before us, her application for letters of administration together with all documents, for presentation to the District Judge, Poona, under S. 288 of the Indian Succession Act, 1925.

2. On 6th October 1973, one D. A. Thackersey died intestate at Poona, leaving a large estate. His widow, namely the appellant, filed Application No. (146 of 1974) 376 of 1974 for letters of administration in the Court of the learned District Judge at Poona. This application was ordered to be registered on 20th June 1974. On 24th June 1974, the learned District Judge transferred the matter for disposal to the Court of the learned Civil Judge, Senior Division, Poona. Thereafter, the deceased's mother, one

Manekbai, who is the respondent before us, filed a caveat, the contents whereof are not material for the purpose of this judgment. She also challenged the jurisdiction of the learned Civil Judge, Senior Division, Poona to hear and decide the application, on the ground that the latter was merely the District Judge's delegate and the matter having become a contentious one, by reason of the filing of the caveat, the learned Civil Judge, Senior Division, was liable to return the application for presentation to the Court of the learned District Judge, under S. 288 of the Indian Succession Act, 1925. This contention of the respondent found favour with the learned Joint Civil Judge, Senior Division, Poona, who by her judgment and order dated 16th April 1975, ordered the application and documents to be returned to the appellant for presentation to the District Judge, Poona. Hence the present appeal.

3. In challenging the correctness of the impugned judgment and order, it was contended by Mr. Agarwal, the learned Counsel appearing on behalf of the appellant, that the learned Joint Civil Judge, Senior Division, Poona, misconstrued the provisions of S. 288 of the Indian Succession Act, as also that there was some misappreciation on her part as to her own powers to hear and decide the matter. Mr. Agarwal urged that the learned Joint Civil Judge, Senior Division, was not the District Judge's delegate and that she, viz. the former, had jurisdiction to hear and decide the application, irrespective of the fact that the same had become contentious by reason of the filing of the caveat by the respondent.

4. On the other hand, Mr. Paranjape, the learned Counsel appearing on behalf of the respondent, attempted to justify the correctness of the impugned judgment and order on several grounds. He contended that the learned Joint Civil Judge, Senior Division, was merely the delegate of the learned District Judge who alone had the jurisdiction to hear the matter as the same had become contentious by reason of the filing of the caveat. He further contended that the High Court had no power whatsoever to invest any Judge subordinate to the District Judge to try a contentious matter pertaining to letters of administration or probate. He also attempted to justify the impugned order on the ground that S. 264 of the Succession Act, 1925, was in direct conflict with S. 28-A of the Bombay Civil Courts Act, 1869. He also contended that

the High Court's power of delegation was circumscribed statutorily by S. 265 (1) of the Succession Act, which factor was brought to the forefront by the provisions of S. 272 which dealt with delegation only in the case of non-contentious matters. Finally, Mr. Paranjape contended that the District Judge was persona designata, with the result that the delegation under S. 28-A (1) of the Bombay Civil Courts Act was bad in law. According to Mr. Paranjape, the High Court could appoint a District Delegate under S. 265 of the Succession Act in connection with non-contentious cases only, which was the only power which was vested in the High Court.

5. Our attention was invited to certain provisions of the Indian Succession Act, 1925, S. 28-A of the Bombay Civil Courts Act, 1869 and R. 255 of the High Court Rules, Civil Manual Volume I, 1960, which it would be necessary to allude to in order to appreciate the rival contentions urged before us.

6. Section 2 (bb) of the Indian Succession Act defines "District Judge" as "the Judge of a principal Civil Court of original jurisdiction." S. 264 (1) provides that a District Judge shall have jurisdiction in granting and revoking probates and letters of administration in all cases within his district. S. 265 (1) confers power in the High Court to appoint Delegate of the District Judge to deal with non-contentious cases and reads as under:—

"The High Court may appoint such judicial officers within any district as it thinks fit to act for the District Judge as Delegates to grant probate and letters of administration in non-contentious cases, within such local limits as it may prescribe:

x x x x x x x

Sub-section (2) states that persons so appointed shall be called "District Delegates." S. 286 provides that a District Delegate shall not grant probate or letters of administration in any case in which there is contention as to the grant, or in which it otherwise appears to him that probate or letters of administration ought not to be granted in his Court. S. 288 lays down the procedure inter alia in the case of contentious proceedings before the District Delegate and reads thus:—

"In every case in which there is contention, or the District Delegate is of

opinion that the probate or letters of administration should be refused in his Court, the petition, with any documents which may have been filed therewith, shall be returned to the person by whom the application was made, in order that the same may be presented to the District Judge,....."

7. Pausing here for a moment, it may be stated that while the learned Joint Civil Judge, Senior Division, Poona, was correct in holding that the matter before her was a contentious one (a caveat having been filed), she was obviously not correct in apparently proceeding on the basis that she was the District Delegate, for reasons we shall be stating hereafter.

8. Section 28-A of the Bombay Civil Courts Act, 1869 empowers the High Court to invest Civil Judges with jurisdiction under certain Acts. Sub-clause (1) of that section, with which we are concerned is as follows:—

"The High Court may by general or special order invest any Civil Judge, within such local limits and subject to such pecuniary limitation as may be prescribed in such order, with all or any of the powers of a District Judge or a District Court as the case may be under the Indian Succession Act, 1865. The Probate and Administration Act, 1881, or paragraph 5 of Schedule III to the Code of Civil Procedure, 1908."

9. Rule 255 of the High Court Rules (Civil Manual, Volume I, 1960), issued by the Bombay High Court, Appellate Side, comprises of sub-rules (i) and (ii). By sub-rule (i), it is provided that under S. 265 of the Indian Succession Act, 1925, the High Court has appointed all Civil Judges to act for the District Judges as delegates to grant probate and letters of administration in non-contentious cases arising within the local limits of their respective jurisdiction. Sub-rule (ii) is important and hence we reproduce it as under:—

"In exercise of the powers conferred by S. 28-A (1) of the Bombay Civil Courts Act (XIV of 1869), the High Court has invested all Civil Judges (Senior Division) with all the powers of a District Judge to take cognizance of any contested proceeding under the Indian Succession Act, 1925, arising within the local limits of their respective jurisdiction that may be transferred to them by their respective District Judges."

Thus, while sub-rule (i) refers to appointment of Civil Judges as delegates to

act for the District Judge in non-contentious cases, by sub-rule (ii), the High Court has invested all Civil Judges (Senior Division) with all the powers of a District Judge to take cognizance of contested matters as provided in that sub-rule.

10. It is not in dispute, and rightly so, that by reason of the caveat having been filed, the matter before the learned Joint Civil Judge, Senior Division, Poona, became a contentious matter. The question that however, does arise is whether she, viz, the learned Joint Civil Judge, Senior Division, was correct in returning the application for presentation to the District Judge under S. 288 of the Succession Act, as done by her. It is not without significance that the order dated 24th June 1974 passed by the learned District Judge, Poona, transferring the matter to the learned Civil Judge, Senior Division, Poona, was not passed in the capacity of the latter being a Delegate of the former. This is amply brought to the forefront by the wording of that order which is clear and explicit, namely—

"Transferred to the file of the Civil Judge, S. D. Poona for disposal according to law."

11. Reading S. 28-A and sub-rule (ii) of Rule 255, there can be no doubt that the learned Joint Civil Judge, Senior Division, Poona, was invested with the powers of the District Judge himself. If he could have decided the application, which he no doubt could, so could she, viz, the learned Joint Civil Judge, Senior Division. With respect, this position does not appear to have been brought to her pointed attention. All that the learned District Judge did was to transfer simpliciter the matter to the learned Civil Judge, Senior Division, who by virtue of S. 28-A of the Bombay Civil Courts Act and R. 255 of the High Court Rules, could and should have disposed of the same on merits, irrespective of the fact that a caveat had been entered and the matter had become a contentious matter.

12. In arriving at this conclusion, we are fortified by a decision of a Division Bench of the Gujarat High Court in *Bai Zabu Khima v. Amardas*, AIR 1967 Guj 214, where also it had been contended that the learned Civil Judge had no jurisdiction to grant letters of administration, as the matter had become contentious. It was further urged that only if the case had been non-contentious, the learned Civil Judge could have had jurisdiction to entertain the application and to grant

letters of administration as a District Delegate under S. 265 of the Indian Succession Act. Referring to S. 28-A (1) of the Saurashtra District and Subordinate Civil Courts Ordinance, 1948, which provided that the High Court may by general or special order invest any Civil Judge within such local limits and subject to such pecuniary limitation as may be prescribed in such order, with all or any of the powers of a District Judge or a District Court as the case may be, under the Indian Succession Act, 1925, and further in exercise of the powers conferred under this section the High Court of Saurashtra having issued a Notification dated 30th July 1948 empowering all Civil Judges, Senior Division, within their territorial limits to exercise all the powers of a District Judge, the Division Bench of Gujarat High Court repelled the contentions urged before it and held that the learned Civil Judge was competent to entertain the application and to grant letters of administration to the applicant despite the fact that the matter before him had become a contentious one by reason of the filing of a caveat.

13. No attempt was made by Mr. Paranjape to distinguish this authority, and no doubt rightly so, as it is on all fours to the facts of the matter before us.

14. However, Mr. Paranjape contended that the High Court had no power to invest any Judge subordinate to the District Judge to try a contentious matter pertaining to letters of administration or probate. According to Mr. Paranjape, S. 264 of the Indian Succession Act was in direct conflict with S. 28-A of the Bombay Civil Courts Act, which section was enacted in the statute book in 1912, namely much prior to the coming into force of the Indian Succession Act of 1925.

15. We do not agree with any of these contentions urged by Mr. Paranjape. We fail to see why the High Court would have no power to invest any Judge subordinate to the District Judge to try contentious cases pertaining to letters of administration or probate. We do not subscribe to the contention that S. 264 of the Indian Succession Act is in conflict with S. 28-A of the Bombay Civil Courts Act. S. 264 gives jurisdiction to the District Judge to grant or revoke probates or letters of administration in all cases within his district, whereas S. 28-A empowers the High Court to invest Civil Judges with all or any power of a District Judge or a District Court,

We see no conflict or even incongruity between the one and the other. Mr. Paranjape inadvertently did not take into account the provisions of S. 8 (1) of the General Clauses Act, 1897 which provides that:—

"Where this Act, or any Central Act or Regulation made after the commencement of this Act, repeals and re-enacts, with or without modification, any provision of a former enactment, then references in any other enactment or in any instrument to the provision so repealed shall, unless a different intention appears, be construed as references to the provision so re-enacted."

16. There is also no merit in Mr. Paranjape's contention that the High Court's power of delegation was circumscribed statutorily by S. 265 (1) of the Indian Succession Act or that this was brought to the forefront by S. 272 of that Act. As already stated earlier, S. 265 (1) empowers the High Court to appoint judicial officers to act for the District Judge as delegates for the grant of probate or letters of administration in non-contentious cases. We see no force in the contention urged before us, that hence the High Court could not by virtue of S. 28-A of the Bombay Civil Courts Act invest a Civil Judge with all or any of the powers of a District Judge, including the jurisdiction to decide a contentious matter. S. 272 which provides for grant of probate and letters of administration by a Delegate in non-contentious cases, carries the matter no further. It is nobody's case that a Delegate could do otherwise.

17. Mr. Agarwal, the learned Counsel appearing on behalf of the appellant, invited our attention to the decision of the Full Bench of the Madras High Court in the case of Rama Subbarayalu v. Rengammal, AIR 1962 Mad 450 (FB), where it was held that the jurisdiction of a subordinate Judge in the Madras State invested with the power under S. 29 (1) of the Madras Civil Courts Act to take cognizance of any proceedings under the Succession Act, which cannot be disposed of by the District Delegate, is that of a District Judge and not that of a District Delegate under the Succession Act and he is competent to dispose of a contentious application for probate. It was further held that the subordinate Judge invested with a power under a notification issued by the High Court will have jurisdiction to hear and dispose of not merely contentious proceedings relating to the

issue of probate or letters of administration, but other matters under the Act as well.

18. We are in respectful concurrence with this decision of the Full Bench of the Madras High Court.

19. Mr. Paranjape, however, attempted to distinguish the Full Bench decision of the Madras High Court on three counts. Firstly, that it was not decided in that case that the District Judge is a *persona designata*. Secondly, that the amendment to the Madras Civil Courts Act was subsequent to the enactment of the Indian Succession Act of 1925 whereas in the matter before us, the enactment of S. 28-A of the Bombay Civil Courts Act was prior to the enactment of the Indian Succession Act, 1925. And thirdly, that it was not decided by the Full Bench of the Madras High Court that the right of the High Court to confer power upon the lower judiciary was severely restricted by S. 265 (1) of the Indian Succession Act.

20. We regret that this attempt at distinguishing the Madras decision is somewhat feeble and must meet with failure.

21. It was next urged by Mr. Paranjape that under S. 264, the power conferred on the District Judge was as *persona designata* and hence investing any civil Judge with the powers of the District Judge by the High Court under S. 28-A of the Bombay Civil Courts Act, was bad in law. According to Mr. Paranjape, the High Court was competent only to appoint a Delegate of the District Judge under S. 265 of the Indian Succession Act and that too only to deal with non-contentious matters. This, emphasised Mr. Paranjape, was the only power which the High Court could exercise. Mr. Paranjape invited our attention to certain sections of the Indian Succession Act, viz. Ss. 264, 266, 267, 268, 283 and 299. According to Mr. Paranjape, the fact that in these sections the words used are, "the District Judge," and not "the District Court," indicates that the District Judge acts as *persona designata* and in no other capacity.

22. We do not find it difficult to repel this contention. There is nothing in the scheme, ambit or scope of the Indian Succession Act to warrant our coming to the conclusion which Mr. Paranjape invites us to do. On the contrary, a bare glance at the definition, which is important, of "District Judge" in S. 2 (bb), is sufficient to negative this contention of

Mr. Paranjape. If the District Judge had been *persona designata*, he would not have in that definition been defined as the Judge "of a Principal Civil Court of original jurisdiction". It is these words which are revealing and lay at rest any controversy on this aspect. It is in this light, and in no other, that the words, "District Judge," as defined in S. 2 (bb), have been used in the sections relied upon by Mr. Paranjape. Thus when reference is made in these sections to "District Judge," it must necessarily mean a judge of a principal Civil Court of original jurisdiction. The question of the District Judge being a *persona designata*, therefore, does not arise.

23. On this aspect, in *Ganpat v. Mahadeo*, AIR 1949 Nagpur 408 it, was observed by the Division Bench of that Court that—

".....in interpreting S. 264 we have to substitute the definition given in S. 2 (bb) and when that is done S. 264 (1) reads as follows:

"The Judge of a principal Civil Court of original jurisdiction shall have jurisdiction in granting probates... in all cases within his district." "

It was held by the Nagpur High Court that an Additional District Judge at Yeotmal could exercise the powers of a District Judge in the matter of granting probate of a will except that his jurisdiction is limited to cases arising out of the Yeotmal Revenue District.

24. In *Sagar v. Nabin*, AIR 1970 Assam 111, it was held by a Division Bench of that Court, that the term "District Judge" used in the Indian Succession Act, has reference not to a *persona designata*, but to a Court, and that Court is the principal Civil Court of original jurisdiction. Hence probate and letters of administration under the Indian Succession Act which could be issued by the Court of District Judge could also be issued by the Additional District Judge in Assam.

25. These decisions are a complete answer to Mr. Paranjape's contentions. We respectfully agree with the ratio of these decisions which fortify the conclusion arrived at by us, namely, that from the scope and ambit of the Indian Succession Act, there is nothing to indicate that the expression, "District Judge," refers to a *persona designata* in the matters of grant or revocation of probate or letters of administration but, on the contrary, that this

expression means the Judge of a principal Civil Court of original jurisdiction as defined in S. 2 (bb) of the Indian Succession Act.

26. In support of his contention that the District Judge is a *persona designata* Mr. Paranjape invited our attention to a decision of the Division Bench of the Bombay High Court in the case of *Spring Mills, Ltd. v. Ambekar*, 51 Bom LR 148: (AIR 1949 Bom 188) and also to an earlier decision of a Division Bench of the Bombay High Court in *Sholapur Municipality v. Tuljaram Krishnasa*, ILR 55 Bom 544: (AIR 1931 Bom 582). The *Spring Mills* case was under the Payment of Wages Act, 1936. The *Sholapur Municipality* case was under the Bombay City Municipalities Act, 1925. In view of the fact that there are direct authorities under the Indian Succession Act itself which lay down that the District Judge is not a *persona designata*, it is unnecessary to take recourse to authorities under other Acts. In neither the *Spring Mills* case nor the *Sholapur Municipality* case, was the Court required to construe the provisions of the Indian Succession Act, much less the definition of "District Judge" as appearing in S. 2 (bb) of the Indian Succession Act.

27. The ratio laid down by the Division Bench of the Assam High Court and the Nagpur High Court, and the Full Bench of the Madras High Court, fortify the view which we have taken, and negative the contentions urged to the contrary on behalf of the respondent.

28. Mr. Paranjape finally urged, though somewhat faintly, that S. 388 of the Succession Act postulated that power could be delegated only by the State Government, and that too by a notification. This contention was, however, abandoned, when it was brought to his notice that S. 388, which is under the Chapter, "Succession Certificates," would have no application in the facts and circumstances of the matter before us.

29. In the result, the impugned judgment and order are set aside and the appeal is allowed with costs.

Appeal allowed.

AIR 1977 BOMBAY 425

(AT NAGPUR)

DHARMADHIKARI, J.

M/s Rupam Pictures and another, Appellants v. Dr. Brijmohan and others, Opponents.

Civil Revn. Appln. No. 248 of 1974, D/- 16-12-1976.*

(A) Civil P. C. (1908), S. 115 — Arbitration Act (1940), Ss. 39 (1) (iv) and 20 — Controversy involved in revision application falling under S. 39 (1) (iv) — Revision, held, wrongly preferred — Revision permitted to be converted into an appeal against order. (Para 4)

(B) Arbitration Act (1940), S. 20 — Limitation Act (1963), Art. 137 — Application under S. 20 — Art. 137 is applicable. AIR 1973 Delhi 15 Dissented from.

Article 137, which is a residue Article, will apply to an application under S. 20 of the Arbitration Act, and, therefore, period of limitation for filing such an application will be three years from the time the right to apply accrues. Case Law discussed. AIR 1973 Delhi 15, Dissented from. (Para 16)

The application contemplated by S. 20 Arbitration Act is to be filed before a Court having jurisdiction in the matter. The term "Court" is defined in S. 2 (c) of the Arbitration Act which means a Civil Court having jurisdiction to decide the questions forming the subject-matter of the reference. Sub-s. (2) of S. 20 then provides that such an application is to be numbered and registered as a suit. Therefore, the application under S. 20 of the Arbitration Act is to be filed in a Civil Court. These proceedings are governed by the Civil P. C. Art. 137 of the Limitation Act only contemplates application to Court. In the Third Division of the Schedule to the Limitation Act, 1963 all other applications mentioned in the various Articles are applications filed in a Court. Art. 119 deals with an application filed in a Court, though under the Arbitration Act. If this is so, then, the residue Article will obviously apply to an application under S. 20 of the Arbitration Act, which is to be filed before a Civil Court and for which no period of limitation is provided

*(Against order passed by A. S. Medhekar Civil J. Sr. Division at Amravati, D/- 17-10-1973).

elsewhere in the Third Division of the Schedule to the Limitation Act, 1963.

(Para 15)

(C) Arbitration Act (1940), Ss. 39 (1) (iv) and 20 — Right to apply under S. 20, when accrues — It is a question of fact or in any case a mixed question of law and fact — Such question cannot be gone into for first time in appeal against order.

(Para 18)

Cases Referred: Chronological Paras

AIR 1976 SC 287	7, 16
AIR 1975 SC 946 : 1975 Lab IC 602 : 1975 Tax LR 479	12
AIR 1973 Delhi 15	8, 10
AIR 1973 Gau 100	7, 13
AIR 1970 SC 209 : 1970 Lab IC 269	10, 13, 16

AIR 1970 Bom 413	11
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AIR 1969 SC 474	13
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AIR 1969 SC 1335 : 1969 Lab IC 1538	8, 9, 10, 13, 16
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AIR 1967 SC 990	13, 16
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AIR 1953 SC 98	9
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AIR 1950 EP 352	16
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AIR 1949 Cal 390	16
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AIR 1931 Bom 164	17
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AIR 1914 Bom 225 (2)	16
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(1584) 3 WR 16 : 76 ER 637	12
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V. R. Manohar, for Applicants; M. B. Mor and S. C. Mehadia, for Opponent No. 1.

ORDER:— Opponent No. 1 Brijmohan filed an application under S. 20 of the Arbitration Act against the applicants as well as opponents Nos. 2 to 5 contending that the original opponents had entered into an agreement with him on 24-11-1965 whereunder he had advanced an amount of Rs. 26,250/- to the opponents on the terms and conditions enumerated therein. Further, according to him, as the opponents failed to comply with the terms and conditions of the agreement, vide registered notice dated 11-11-1967 he asked them to pay an amount of Rs. 31,885.86 as dues on account of his business commission. Vide reply dated 27-9-1968 the opponents contended that the entire dues were paid to his father and as no business was done for the concerned pictures for November 1967 onwards, nothing more was payable to him. Therefore, as according to opponent Brijmohan, a dispute or a difference had arisen between the parties, to which the arbitration agreement applied, he filed an application under S. 20 of the Arbitration Act. The application in that behalf was filed on 2-1-1971.

2. The opponents to the original application opposed the said application on

various grounds. They also contended that the application was barred by limitation. Original applicant Brijmohan adduced evidence in support of his case and ultimately vide order dated 17-10-1973, the Civil Judge, Senior Division, Amravati, permitted filing of the said agreement and directed that reference should be made to the Arbitrators appointed by the parties. It is this order which is challenged in this revision application.

3. Initially when the matter came up for hearing before this Court on 3-12-1976, Shri Mehadia, the learned counsel for opponent No. 1, was absent. After the matter was heard and was closed for judgment he appeared and requested that he could not appear before the Court on 3-12-1976 as his name was not shown in the cause list notified by this Court. In view of this, the matter was re-heard at his request. At the outset a contention was raised by Shri Mehadia that this revision application is not maintainable under S. 115 of the Civil P. C.

4. In my opinion there is some substance in this contention of Shri Mehadia. S. 39 of the Arbitration Act deals with appealable orders. The controversy involved in this revision application is covered by Cl. (iv) of S. 39 (1) of the Arbitration Act. In view of this, it is not disputed by Shri Manohar, the learned counsel for the applicants, that instead of filing a revision application, his clients should have filed an appeal before this Court. However, he contended before me that the present revision application should be treated as an appeal and should be decided on that footing. In my opinion, the request made by Shri Manohar deserves to be granted. In cases where an appeal lies but a revision application is wrongly preferred, the Court has wide discretion to treat it as an appeal if conditions laid down by law are fully satisfied. I find that all the necessary conditions are satisfied in the present case. Therefore, it will not be proper to dismiss this revision application at this stage on such technical ground. In view of this, the present revision application is permitted to be converted into an appeal and is directed to be registered as an appeal against an order.

5. Shri Manohar, the learned counsel for the appellants contended before me that the learned Judge of the trial Court committed an error apparent on the face of the record in not deciding the question of limitation at all. According to

Shri Manohar, the provisions of Art. 137 of the Limitation Act, 1963 apply to the present application and, therefore, respondent No. 1 Brijmohan should have filed this application within a period of 3 years from the date when the right to apply accrued to him. According to Shri Manohar, the right to apply accrued to Brijmohan on 11-11-1967 when the first notice was issued by him. Therefore, the application filed by him on 2-1-1971 is obviously barred by limitation.

6. On the other hand it is contended by Shri Mehadia, the learned counsel appearing for the respondent No. 1, that the provisions of Art. 137 of the Limitation Act, 1963 are not applicable to the present application at all. He further contended that no period of limitation is prescribed for filing of such an application. Further, according to learned counsel, even if it is assumed that Art. 137 of the Limitation Act, 1963 applies to such an application, then also the application is within time as the right to apply accrued to the respondent No. 1 on 27-9-1968 when a reply was given by M/s Rupam Pictures to the notice issued by him. Till then it cannot be said that any dispute or difference had arisen between the parties, to which the agreement could apply. The difference between the parties arose for the first time on 27-9-1968 and, therefore, the application filed on 2-1-1971 is within limitation.

7. From the rival contentions raised before me, therefore, it is quite obvious that the main controversy involved in this appeal relates to application of Article 137 of the Limitation Act 1963 to the present application which is filed under S. 20 of the Arbitration Act. Article 137 of the Limitation Act, 1963 reads as under :

"Description of application.	Period of limitation.	Time from which period begins to run.
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Part II — Other applications.

137. Any other application for which no period of limitation is provided elsewhere in this Division.	Three years.	When the right to apply accrues.
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From the bare reading of his Article it is quite obvious that it applies to all other applications for which no period of limitation is provided elsewhere in Third Division of the Schedule to the Limitation Act, 1963. According to Shri Manohar, the Third Division of the Schedule to the Limitation Act, 1963 deals with ap-

plications in the specified cases and as no period of limitation is prescribed by the said division so far as application under S. 20 of the Arbitration Act is concerned, Art. 137 will apply to such an application. In support of his contention Shri Manohar has relied upon a decision of Gauhati High Court in the Union of India v. Bimal Kumar Kar (AIR 1973 Gau 100) as well as upon the observations of the Supreme Court in Vulcan Insurance Co. Ltd. v. Maharaj Singh (AIR 1976 SC 287).

8. On the other hand Shri Mehadia is relying upon the earlier decision of the Supreme Court in Town Municipal Council, Athani v. Presiding Officer, Labour Court, Hubli (AIR 1969 SC 1335). He is also relying upon a decision of Delhi High Court in Union of India v. M/s. Risri Raj and Co., Delhi (AIR 1973 Delhi 15). According to Shri Mehadia, the law laid down by the Supreme Court in Town Municipal Council, Athani's case is still a good law and Art. 137 of the Limitation Act applies only to the applications contemplated by Civil P. C. According to the learned counsel, the said article has no application to the applications filed under the special Acts, including the Arbitration Act.

9. In view of the contention raised by Shri Mehadia, it will be useful if a reference is made to the decision of the Supreme Court on which reliance is placed by him. The Supreme Court had an occasion to consider the scope of Art. 137 of the Limitation Act, 1963 in the context of the provisions of the Industrial Disputes Act, 1947, in Town Municipal Council, Athani v. Presiding Officer, Labour Court, Hubli (AIR 1969 SC 1335) (supra). After making a reference to the various provisions of the Act as well as to the earlier decisions, ultimately in paras 10 and 11 of the said decision the Supreme Court observed as under (at p. 1342):

"10. It appears to us that the view expressed by this Court in those cases must be held to be applicable, even when considering the scope and applicability of Art. 137 in the new Limitation Act of 1963. The language of Art. 137 is only slightly different from that of the earlier Art. 181 inasmuch as, when prescribing the three years' period of limitation, the first column giving the description of the application reads as "any other application for which no period of limitation is provided elsewhere in this division." In fact, the addition of the word "other" between the words "any" and "applica-

tion" would indicate that the legislature wanted to make it clear that the principle of interpretation of Article 181 on the basis of ejusdem generis should be applied when interpreting the new Article 137. This word "other" implies a reference to earlier articles, and, consequently, in interpreting this Article, regard must be had to the provisions contained in all the earlier articles. The other articles in the third division to the schedule refer to applications under the Civil P. C. with the exception of applications under the Arbitration Act and also in two cases applications under the Cr. P. C. The effect of introduction in the third division of the schedule of reference to applications under the Arbitration Act in the old Limitation Act has already been considered by this Court in the case of Sha Mulchand & Co. Ltd., 1953 SCR 709 : (AIR 1953 SC 98) (supra). We think that, on the same principle, it must be held that even the further alteration made in the articles contained in the third division of the schedule to the new Limitation Act containing reference to applications under the Cr. P. C. cannot be held to have materially altered the scope of the residuary Art. 137 which deals with other applications. It is not possible to hold that intention of the legislature was to drastically alter the scope of this article so as to include within it all applications, irrespective of the fact whether they had any reference to the Civil P. C.

11. This point, in our opinion, may be looked at from another angle also. When this Court earlier held that all the articles in the third division to the schedule including Art. 181 of the Limitation Act of 1908 governed applications under the Civil P. C. only, it clearly implied that the applications must be presented to a Court governed by the Civil P. C. Even the applications under the Arbitration Act that were included within the third division by amendment of Articles 158 and 178 were to be presented to Courts whose proceedings were governed by the Civil P. C. At best the further amendment now made enlarges the scope of the third division of the schedule so as also to include some applications presented to courts governed by the Criminal P. C. One factor at least remains constant and that is that the applications must be to courts to be governed by the articles in this division. The scope of the various articles in this division cannot be held to have been so enlarged as to

include within them applications to bodies other than Courts, such as quasi-judicial tribunal, or even an executive authority. An industrial Tribunal or a Labour Court dealing with applications or references under the Act are not courts and they are in no way governed either by the Civil P. C. or the Cr. P. C. We cannot, therefore, accept the submission made that this article will apply even to applications made to an Industrial Tribunal or a Labour Court. The alterations made in the article and in the new Act cannot, in our opinion, justify the interpretation that even applications presented to bodies, other than courts, are now to be governed for purposes of limitation by Art. 137."

10. However, in a subsequent decision namely, *Nityanand v. Life Insurance Corporation of India* (AIR 1970 SC 209), the decision in *Town Municipal Council, Athani's case* (AIR 1969 SC 1335) (cit. supra) again came for consideration of the Supreme Court. After making a reference to the said decision in paras 3 and 4 of the later decision, namely, *Nityanand's case*, the Supreme Court observed as under (at p. 210):

"3. In our view Art. 137 only contemplates applications to Courts. In the Third Division of the Schedule to the Limitation Act, 1963, all the other applications mentioned in the various articles are applications filed in a court. Further Section 4 of the Limitation Act, 1963 provides for the contingency when the prescribed period for any application expires on holiday and the only contingency contemplated is "when the court is closed". Again under Section 5 it is only a court which is enabled to admit an application after the prescribed period has expired if the Court is satisfied that the applicant had sufficient cause for not preferring the application. It seems to us that the scheme of the Indian Limitation Act is that it only deals with applications to courts, and that the Labour Court is not a court within the Indian Limitation Act, 1963.

4. It is not necessary to express our views on the first ground given by this Court in Civil Appeals Nos. 170 to 173 of 1968 D/- 20-3-1969 (AIR 1969 SC 1335). It seems to us that it may require serious consideration whether applications to courts under other provisions, apart from Civil Procedure Code are included within Art. 137 of the Limitation Act, 1963, or not."

The High Court of Delhi in *Union of India v. M/s Rishi Raj & Co., Delhi* (AIR 1973 Delhi 15) has held that in view of the decision of the Supreme Court in *Town Municipal Council, Athani v. Presiding Officer, Labour Court, Hubli* (cit. supra) the contention that the application under S. 20 of the Arbitration Act falls within the scope of Art. 137 of the Limitation Act, 1963 cannot be accepted. Therefore Delhi High Court has not considered the questions on merits.

11. This Court had also an occasion to consider these two decisions of the Supreme Court in *M/s Popular Process Studio v. Employees' State Insurance Corporation* (AIR 1970 Bom 413). After making a detailed reference to these two decisions of the Supreme Court, ultimately in para 7 of the said judgment this Court observed that "it is thus finally settled that Art. 137 of the Limitation Act, 1963 is confined to applications to 'Courts' within the meaning of that Act but the question whether it applies to applications to Courts under provisions other than those of the Code of Civil Procedure is left open." Therefore it is not possible for me to accept the view taken by the Delhi High Court.

12. Although the statement of objects and reasons leading to the passing of an enactment cannot be looked into as a direct aid to the construction, yet it could be used for the limited purpose for finding out the intention behind the legislation as well as the conditions prevailing at the time of passing of the enactment. It is further well settled that it is a sound rule of interpretation that a Statute should be so construed as to prevent the mischief and to advance the remedy according to the true intention of the makers of the Statute. While deciding the true scope of the Legislation, it is permissible to have regard to all such factors as can legitimately be taken into account in ascertaining the intention of the Legislature, such as the history of the Statute, the reason which led to its being passed, the mischief which it intended to suppress and the remedy provided by the statute for curing the mischief. This was the rule laid down in *Heydon's case* (1584) 3 W.R. 16 : 76 ER 637, which is accepted by the Supreme Court in various cases. It is no doubt true that as a general principle of interpretation of a statute, where the words of the statute are plain, precise and unambiguous, the intention of the Legislature is to be gathered from the language

of the statute itself and no external evidence is admissible to construe it, but where the statute is not exhaustive or where its language is ambiguous, uncertain, clouded or susceptible of more than one meaning or shades of meaning, then external evidence as to the evils, if any, which the statute was intended to remedy, or of the circumstances which led to the passing of the statute may be looked into for the purpose of ascertaining the object which the Legislature had in view in using the words in question and in enacting the legislation. (see *Anandji Haridas & Co. Pvt. Ltd. v. Engineering Mazdoor Sangh*, AIR 1975 SC 946).

13. The Division Bench of Gauhati High Court had an occasion to consider this aspect of the matter in *Union of India v. Bimal Kumar Kar* (cit. supra), (AIR 1973 Gau 100). After making a reference to the earlier decisions of the Supreme Court in *Wazir Chand v. Union of India* (AIR 1967 SC 990) and *Mohd. Usman v. Union of India* (AIR 1969 SC 474) as well as to the provisions of the new Limitation Act, the Gauhati High Court came to the conclusion that the legal position has changed after the commencement of the new Limitation Act. The Gauhati High Court has also made a reference to the recommendations of Law Commission. In this context a reference could be usefully made to the following observations of the Gauhati High Court in para 8 of the said decision:

"It is, therefore, clear that the legal position has changed after the commencement of the new Limitation Act and the provisions of the Limitation Act will be attracted to an application under the Special Act, such as the Arbitration Act. The matter is no longer in dispute about Art. 137 applying to any applications. An application under S. 20 of the Act is also an application within the meaning of Section 2 (b) of the Limitation Act, 1963 and the 'applicant' therein is a 'petitioner' within the meaning of S. 2 (a) (i) of the Limitation Act. That being the position, Art. 137, which is a residuary article, will apply to an application under S. 20 of the Arbitration Act and the period will be three years from the time the right to apply accrues."

It is no doubt true that in this decision the Gauhati High Court has not made any reference to the decisions of the Supreme Court in *Town Municipal Council, Athani v. Presiding Officer, Labour Court, Hubli*, (AIR 1969 SC 1335) and *Nityanand v. Life Insurance Corporation*

of India (both cit. supra) : (AIR 1970 SC 209). However, if the decision of the Gauhati High Court is considered in the light of the observations of the Supreme Court in para. 11 of the judgment in *Town Municipal Council, Athani's case* and in paras. 3 and 4 of the *Nityanand's case*, then in my opinion, the view taken by the Gauhati High Court is the only possible view having regard to the object as well as the intention of the Legislature. It is quite obvious that this provision is made by the Legislature for the purpose of resolving the controversy raised in this behalf under the old Limitation Act.

14. For properly understanding this aspect of the matter, a reference could be usefully made to the provisions of the new Limitation Act. In clause (b) of S. 2 of the Limitation Act, 1963, a new definition of the word "application" has been inserted. Cl. (b) of S. 2 provides that "application" will include a petition. In view of the said new definition of the word "application", the scope of the Limitation Act has been enlarged by making it applicable to the applications as well as to the petitions under the Special Enactments. This intention of the legislature is further clear from the Statement of Objects and Reasons of the Limitation Act, 1963, which declares as follows:

"A new definition of application is being inserted so as to include a petition, original or otherwise. The object is to provide a period of limitation for original applications and petitions under special laws as there is no such provision now."

15. In this context a reference also could be made to the provisions of S. 20 of the Arbitration Act itself which read as under:

"20 (1) Where any persons have entered into an arbitration agreement before the institution of any suit with respect to the subject-matter of the agreement or any part of it, and where a difference has arisen to which the agreement applies, they or any of them, instead of proceeding under Chapter II, may apply to a Court having jurisdiction in the matter to which the agreement relates, that the agreement be filed in Court.

(2) The application shall be in writing and shall be numbered and registered as a suit between one or more of the parties interested or claiming to be interested as plaintiff or plaintiffs and the re-

mainder as defendant or defendants, if the application has been presented by all the parties, or, if otherwise, between the applicant as plaintiff and the other parties as defendants.

(3) On such application being made, the Court shall direct notice thereof to be given to all parties to the agreement other than the applicants, requiring them to show cause within the time specified in the notice why the agreement should not be filed.

(4) Where no sufficient cause is shown, the Court shall order the agreement to be filed and shall make an order of reference to the arbitrator appointed by the parties, whether in the agreement or otherwise or where the parties cannot agree upon an arbitrator, to an arbitrator appointed by the Court.

(5) Thereafter the arbitration shall proceed in accordance with, and shall be governed by, the other provisions of this Act, so far as they can be made applicable."

The application contemplated by S. 20 of the Arbitration Act is to be filed before a Court having jurisdiction in the matter. The term "Court" is defined in S. 2 (c) of the Arbitration Act which means a Civil Court having jurisdiction to decide the questions forming the subject-matter of the reference. Sub-sec. (2) of S. 20 then provides that such an application is to be numbered and registered as a suit. Therefore, the application under S. 20 of the Arbitration Act is to be filed in a Civil Court. These proceedings are governed by the Civil P. C. Article 137 of the Limitation Act only contemplates application to Court. In the Third Division of the Schedule to the Limitation Act, 1963, all other applications mentioned in the various Articles are applications filed in a Court. Article 119 deals with an application filed in a Court, though under the Arbitration Act. If this is so, then, in my opinion, the residue Article will obviously apply to an application under S. 20 of the Arbitration Act, which is to be filed before a Civil Court and for which no period of limitation is provided elsewhere in the Third Division of the Schedule to the Limitation Act, 1963.

16. The view which I am inclined to take in this behalf also finds support in the observations of the Supreme Court in *Vulcan Insurance Co. Ltd. v. Maharaj Singh* (AIR 1976 SC 287). (cit. supra). In this context a reference could usefully be made to the observations of the Su-

preme Court in para 23 of the said decision which read as under: (at pp. 293, 294)

"23. We do not propose, as it is not necessary, to decide whether the action commenced by respondent no. 1 under S. 20 of the Act for the filing of the arbitration agreement and for appointment of arbitrators was barred under Cl. 19 of the policy. It has been repeatedly held that such a clause is not hit by S. 28 of the Contract Act and is valid; vide — *Baroda Spinning and Weaving Co. Ltd. v. Satyanarayan Marine and Fire Insurance Co. Ltd.*, ILR 38 Bom 344: (AIR 1914 Bom 225 (2)); *Dawood Tar Mahomed Bros. v. Queensland Insurance Co. Ltd.*, AIR 1949 Cal 390 and the *Ruby General Insurance Co. Ltd. v. Bharat Bank Ltd.* (AIR 1950 EP 352). Clause 19 has not prescribed a period of 12 months for the filing of an application under S. 20 of the Act. There was no limitation prescribed for the filing of such an application under the Indian Limitation Act, 1908 or the Limitation Act, 1963. Article 181 of the former did not govern such an application. The period of three years prescribed in Article 137 of the Act of 1963 may be applicable to an application under S. 20. Nor are we concerned in this case to decide whether the time taken by respondent no. 1 in prosecuting his application in Muzaffarnagar court could be excluded under S. 14 (2) of the Limitation Act, 1963. Nor do we propose to decide whether the application under S. 20 could be defeated on the ground of the extinction of the liability of the company under Cl. 19. We may, however, observe in passing that in view of the decision of this Court in *Wazir Chand Mahajan v. Union of India* (1967) 1 SCR 303 at p. 308 : (AIR 1967 SC 990 at p. 993) if the difference which had arisen between the parties was the one to which the arbitration clause applied then the application under S. 20 of the Act could not be dismissed on the ground that the claim would not ultimately succeed either on facts or in law. The matter will have to be left for the decision of the Arbitrator. Without any discussion we may just state that the High Court is not right in its view that respondent no. 1's claim was not barred under cl. 19 because of the provisions of law contained in S. 37 (3) of the Act."

(Underlining is mine)

In this decision in the clearest terms it is laid down by the Supreme Court that there was no limitation prescribed for

filing an application under S. 20 of the Arbitration Act under the Indian Limitation Act, 1908, or in the Limitation Act, 1963. Article 181 of the former did not govern such an application, but the period of 3 years prescribed in Art. 137 may be made applicable to the application under S. 20 of the Arbitration Act. If these observations of the Supreme Court are read in the context of the amended provisions of Limitation Act, 1963 as well as the observations of the Supreme Court in para 11 of the decision in Town Municipal Council, Athani's case (AIR 1969 SC 1335) and para 4 of the decision in Nityanand's case (AIR 1970 SC 209) (cit. supra) it is quite obvious that a change has been brought out in this behalf by the Limitation Act, 1963. Therefore, in my opinion, the provisions of the Limitation Act, 1963, namely, Art. 137, which is a residue Article, will obviously apply to an application under S. 20 of the Arbitration Act, and, therefore, the period of limitation for filing such an application will be three years from the time the right to apply accrues.

17. The next question, therefore, which requires consideration in the present appeal is to find out as to when the right to apply accrued to the applicant. Section 20 of the Arbitration Act deals with a dispute or difference between the parties to which arbitration agreement applies. All that S. 20 (1) of the Arbitration Act provides is that (a) the petitioner should establish first that he entered into an arbitration agreement before the institution of the suit with respect to the subject-matter of the agreement and (b) the differences had arisen to which the agreement applied. In the present case it is the contention of Shri Manohar that the difference or dispute arose on 11-11-1967 when the first notice was issued by respondent no. 1 Brijmohan. On the other hand it is contended by Shri Mehadia that the dispute or difference in this case arose on 27-9-1963 when the reply was given by the appellant M/s Rupam Pictures to the second notice issued by Brijmohan. According to him, till then no dispute was raised at all by the appellant M/s Rupam Pictures. Unless there was denial of the claim or a dispute raised in that behalf, it cannot be said that any difference has arisen between the parties. According to Shri Mehadia, the existence of a difference or a dispute is an essential condition for the arbitrator's jurisdiction. Failure to pay the amount is not necessarily a difference

or a dispute and the mere fact that a party could not or did not pay does not in itself amount to a dispute unless a party who chooses not to pay raises a point of controversy in that behalf. In this context he has relied upon a decision of this Court in Dawoodbhai v. Abdulkadar (AIR 1931 Bom 164). However, it is not necessary to decide this question at this stage.

18. It is quite obvious from the order passed by the learned Judge of the trial Court that the trial Court has not at all considered the question of limitation. Though the question as to whether the provisions of Art. 137 of the Limitation Act, 1963 will apply to such an application or not is a pure question of law, the question as to when the right to apply accrued is a question of fact, or in any case is a mixed question of law and fact, which cannot be gone into for the first time in this appeal. In this view of the matter, in my opinion, this is a fit case where the matter should be remitted back to the trial Court for deciding the whole question over again in accordance with law.

19. In the view which I have taken, therefore, this appeal is allowed. The order passed by the trial Court is set aside and the matter is remitted back to the trial Court for deciding the whole matter afresh in accordance with law after giving a reasonable opportunity of being heard to both the parties. It is needless to say that after remand the parties are at liberty to amend their pleadings and to adduce such evidence, both oral and documentary, as they desire. However, in the circumstances of the case there will be no order as to costs.
Appeal allowed.

AIR 1977 BOMBAY 431

MASODKAR, J

M/s. Shah Amrutlal Shantilal Shah Firm and others, Appellants v. Madhyavarti Sahakari Hatamag Vinkar Singh Ltd. and another, Respondents.

A. F. O. D. No. 433 of 1969, D/- 15-3-1977.*

Limitation Act (36 of 1963), Arts. 14, 70, 113 — Sanjaiti contract — Suit either

*(Against decision of D. M. Wagh Civil J. Sr. Division at Kolhapur in Spl. Civil Suit No. 62 of 1966).

JU/IU/D789/77/MBR

for recovery of goods deposited or in alternative for its price — Art. 70 or Art. 113 and not Art. 14 is applicable.

The word 'Sanjaiti' or 'Sanjait' indicates taking of an article of merchandise without ascertaining the price and with liberty to retain or return it. Under the commercial practice of Sanjait transactions goods are supplied by an agreement by one trader to another with an obligation on the latter to hold them in deposit till the same are appropriated by him by its sale or return them not so appropriated to the former with its already fixed price. The liability of the person receiving the goods in deposit is to make good the value or to return the goods. In either case, the refusal either to pay the value or to return the goods deposited would give rise to a cause of action for the purpose of a civil suit

(Paras 10, 13, 17)

In view of this, the suit, on the basis of Sanjaiti contract, either for the recovery of the goods deposited or in the alternative for its price is governed not by Article 14 but by Art. 70 or by the residuary Art. 113.

(Paras 19, 20)

The practice of Sanjaiti supply of goods does not bring about sale contemplated by Art. 14 nor goods pass upon delivery to the acceptor under it extinguishing the title of the depositor. The term "movable property deposited" in Art. 70 is wide enough to include such type of transaction. Applying Arts. 70 and 113, the cause of action arises only after the refusal to follow the obligation under the contract is communicated by the depositor to the person receiving the goods.

(Paras 13, 19, 21)

Cases Referred: Chronological Paras

AIR 1958 Bom 10	16
AIR 1914 Mad 51 : ILR 37 Mad 175	19
(1907) ILR 32 Bom 14	16
(1907) 6 Cal LJ 535	19
(1883) ILR 7 Bom 542	16
(1877) ILR 1 Bom 19	16

K. J. Abhyankar, for Appellants; S. G. Mandrekar and A. V. Datar, for Respondents.

JUDGMENT:— The appeal is filed by the original defendants Nos. 1, 2 and 3. The Cross-Objections are filed by the plaintiff. Plaintiff, which is a registered Co-operative Society, filed the present suit against defendant No. 1, a registered firm and defendants Nos. 2, 3 and 4, styling them to be the partners of that firm, either for the recovery of 1191 Sarees or in the alternative for its price Rs. 10,260/-. Briefly stated, the plaintiff's

case was that defendant No. 1 firm were supplied Sarees during the period from 5th December 1959 to 28th January 1964 under a practice called 'Sanjaiti' supply. It was the practice that Sarees were to remain with the defendants in deposit and price was to be paid for the Sarees as the same were sold and defendants were at liberty to return the remaining unsold Sarees. Out of the stock so supplied, it had been the case of the plaintiff that 1191 Sarees were in deposit with defendants and that defendants were liable to return the same or pay the price thereof. After serving a notice produced at Ex. 72 and replied by the defendant as per Ex. 74, the present suit was filed.

2. The defence had been that defendant No. 4 was not the partner of defendant No. 1. It only consists of the other two defendants being defendants Nos. 2 and 3. Though the dealings are admitted with the plaintiff, the basis of Sanjaiti is denied. Defendants pleaded that in fact the supply had been under two different transactions, one covering the period 5-10-1959 to 30-3-1961 and another distinct transaction from 23-9-1963 to 28-1-1964. For the second period, according to the defendants, everything was paid and there was nothing due for which the defendants could be held liable.

3. The trial Court found in favour of the plaintiff substantially with regard to the period of 5-10-1959 to 13-3-1961 and holding further that the plea raised by the defendants that defendant No. 1 had not received the goods of three Sanjaiti notes of dates 10-12-1959, 6-1-1960 and 1-2-1960 was untrue and found that the balance of Sarees for this period with the defendants is 910 Sarees which the defendants are liable to return or pay to the plaintiff for the same. As to the second period between 23-9-63 and 20-10-64, it substantially accepted the defence that it was an independent transaction and recorded a finding that defendants had paid for the supply of these Sarees numbering 281 out of the second period. Taking into account this payment, the Sarees which remained with the defendants worked to 910 and their liability has accordingly been worked out.

4. In the appeal, the first part of the finding and the eventual liability of the defendants is questioned while in the cross-objections the second part of the finding relating to the second period is questioned.

5. Upon careful consideration of the submissions on both sides it appears that

there is neither merit in the appeal nor in the cross-objections.

6. Mr. Abhyankar in support of the appeal urged that upon the finding of the learned Judge that there were two distinct transactions the claim based on the first transaction would be barred by limitation and the answer given by the learned trial Judge to the bar of limitation because of the payment of the bill by the defendants on 28th August 1965 as evidenced by Exhibit 165 is unsustainable at law. The learned Counsel submitted that to the first part of the transaction Art. 14 of the Limitation Act, 1963, would be attracted for this was a case of sale and the suit filed on 29-7-1966 for recovery of the amount of the price would be barred by limitation. As to the nature of the transaction, the learned Counsel submits that for all purposes that is deemed to be a sale between the plaintiff and the defendants the property in goods passing in favour of the purchaser, payment of price being deferred till the contingency of appropriating the goods is reached. He submits that the appreciation of the learned Judge on facts too is unsustainable.

7. In support of the cross-objections Mr. Mandrekar urged that there is a patent error committed by the learned Judge in treating the second part of the transaction as separate and then holding that the balance has to be worked out on the basis of the payments made for 281 Sarees during the second period. The appropriation of the payments made and found by the learned Judge is thus disputed.

8. Turning to the evidence, the transaction of the so-called first period, which ranged between 5-10-1959 to 13-3-1961 is evidenced apart from the oral testimony of witnesses examined on behalf of the plaintiff being P. W. 1 Balgonda (Exhibit 49) and P. W. 2 Ilahi Husen Maindargi (Ex. 50), by the documents styled as Sanjaiti chits ranging from Ex. 77 to Ex. 107, out of which only few are in dispute. These documents indicate that it was a sort of note or Tippan of the goods given in Sanjait. It mentions that to the defendant No. 1-firm the goods are sent as per specification and also it mentions the rate of the said goods. It further mentions the items sent under each note. It is significant that this is the note of despatch of the goods and it does not raise by itself nor demand by itself any price from the addressee of the goods itself. At the foot of each document there appears

to be a signature on behalf of the defendant No. 1-firm indicating that the goods have been so received for the defendant No. 1-firm. Thus, these notes, which are several in number, indicate despatch of items of Sarees sent to the defendant No. 1 for the purpose of sale and not by itself evidence any sale in favour of the defendant. In one of the documents it is called a delivery note (Exhibit 87).

9. Thus, these documents do not help the defence by themselves that any sale was effected by the parties.

10. Now, the word "Sanjaiti" or "Sanjait" indicates taking of an article of merchandise without ascertaining the price and with liberty to retain or return it. (See Molesworth's Marathi-English Dictionary page 810). This appears to be the recognised commercial connotation operative as a practice under which the goods are removed from one shop and are deposited in another, not under any sale but under an arrangement that the recipient of these goods will be at liberty to sell those goods or return the same if the same were not so sold.

11. Apart from the usual commercial connotation of the word 'Sanjait' used in these several notes, the evidence and the conduct of the parties clearly indicate that this was merely the supply of goods by which the plaintiff-Co-operative Society used to despatch the sarees and the defendant used to accept the same in deposit with a view to sell them and with liberty to return the same. Defendant, however, accepted to pay the stated price mentioned in the note in case of appropriation of the goods by sale. The evidence of Balgonda (Exhibit 49) indicates that this is how the goods were supplied. So is the evidence of Ilahi Husen Maindargi (Exhibit 50), who was in the service of the plaintiff. The negative denials with regard to this practice as spoken to by the defendants' witness Shantilal Manikchand (Exhibit 64) indicates that by Sanjait basis the practice meant was that the plaintiff was to keep the sarees for sale with the defendants and the defendants were to sell them or to return the unsold sarees to the plaintiff. Looking to the several documents and the long standing practice between the parties, this evidence indicates that the sarees were supplied by the plaintiff-Co-operative Society to the defendants on Sanjaiti basis and not on the basis of sale.

12. Coming to the case of the defendants that under three Sanjait Notes goods

were not received, except the word of Manikchand and his reliance on his own account books, there is hardly any material. These notes admittedly appear to have been made in the course of dealings between the parties during the first period and further properly proved being the copies retained by the plaintiff in his custody after the supply of the originals thereof to the defendants. The persons admittedly shown to have received the goods under the notes were in the employment of the defendant-firm by name Mr. Jokhe and Mr. Joshi. Defendant has not examined either of them. Looking to these facts it cannot be said that the finding recorded by the learned Judge that under these notes goods were so supplied is, in any way, erroneous. After all, when the parties lead evidence and the same is appreciated by the trial Court and there being no error in that appreciation, such questions are not entertainable even at the stage of the first appeal. Finding with regard to the Sanjait notes is supportable by the evidence led by the plaintiff and there is hardly any material on which defence can rely to indicate that in fact no goods were supplied under any of these notes.

13. It is not possible to accept the submission of the learned Counsel that to the claim of the plaintiff based and proved of the kind of Sanjait notes, Art. 14 of the Limitation Act should be applied and each separate transaction should be viewed as if it was an independent sale. To attract that Article, there must be a sale at price and then the time would run from the date of the delivery of the goods so sold whereunder property would pass to vendor. The commercial practice of Sanjaiti supply of goods does not bring about sale upon delivery nor goods pass to the acceptor under it extinguishing the title of that despatcher. As noted it is a special commercial mode and though some of the factors alive to sale are present, it does not bring about that result. Upon the evidence what results under this practice is supply and deposit of goods by one trader to another with liberty to the latter to appropriate the goods by selling it and return the unsold goods. For all purposes, the relations between these traders under the Sanjait system would be that of a factor and factor with an obligation on the latter to hold the goods of the former in deposit till the same are appropriated by him by its sale or return the goods not so appropriated on any event with its already fixed

value. Primarily, the transaction is that of deposit for sale by others and not sale itself. Therefore the money would become due only when the goods are so sold or appropriated and either the account or the return of the goods so deposited is sought by one factor from another.

14. In the present case the finding relates to the period of supply between 1959 and 1961 as far as the first transaction is concerned. As against this, several payments have been made from time to time presumably as and when the goods were sold by the defendants. Eventually, the goods remained in deposit till notice of 7-7-1965 as per Exhibit 72 was duly served and the liability to return the goods was first denied as per Exhibit 74. Thereafter the cause for recovery of the goods would properly arise and that too upon the repudiation evidenced by Exhibit 74 and from that date the suit would be well within time.

15. Another answer found out by the learned Judge on the basis of part payment of the outstanding dues or outstanding price appears to be incorrectly reached. The learned Judge presumably was having in his mind that this was a case of continuous mutual account between the parties. In 1961 certain liability arose and the plaintiff had made a part payment towards that liability. Therefore he treated that the suit was within limitation. It is difficult to endorse as correct this approach or reasoning. In fact, the so-called bill of 20th August 1963, which is signed by Mr. Jokhe is not a payment by the defendants to the plaintiff; but it is a mere bill raising the debit against the defendants and is an act of the plaintiff of adjusting the amount of Rs. 1516/- in the account of the defendants out of the advances with the plaintiff. Surely, that would not be a payment by the defendant for the purposes of saving the limitation. Had the transaction been of pure sale between the parties, this type of dealing and adjustment would not have saved the limitation for the purpose of the plaintiff's claim.

16. Provisions regarding the limitation as applicable to causes provided by the Limitation Act, 1963, have to be applied in the spirit of fairness and justice. Effort should be to sustain the right and remedy of the party or the suiter. The construction that will tend to subserve this purpose as against the construction that will limit or take away the right has always

been judicially preferred, (See *Umia-shankar Lakhmiram v. Chhotalal* (1877) ILR 1 Bom 19, *Collector of Broach v. Rajaram Laldas*, (1883) ILR 7 Bom 542, *Chunilal v. Dahyabhai* (1907) ILR 32 Bom 14, *P. N. Films Ltd. v. Overseas Films Corporation Ltd.*, AIR 1958 Bom 10).

17. For application of this rule ever attendant upon the principle of limitation, firstly the controversy between the parties should be properly ascertained particularly with regard to the cause set up by the plaintiff for adjudication. It is on that cause that the law of limitation operates. In the present controversy as indicated above, the agreement between the parties is termed as 'Sanjait' or 'Sanjaiti' and it postulates a commercial relationship wherein the goods or articles of specified value are despatched or deposited with another with liberty to sell or to return the goods as unsold. Two types of relations spring forth from this arrangement. Firstly, the acceptor of the goods or the commercial articles accepts it in deposit having ascertained its value. The transaction of sale thereafter is not the concern of the sender of the goods but it is the whole and entire transaction of that of the latter, i.e., the recipient of the goods. The despatch and delivery lend to a deposit of the goods, the property in which is specifically retained by the despatcher and sender, for he has a right to get returned those goods or the cost already ascertained. No doubt, this first part of the transaction cannot be strictly called the deposit for the depositor is merely interested in getting the pre-ascertained value of the goods so deposited and not always the corpus of the goods itself. The relationship brought about by this arrangement can suitably be termed as a quasi-trust or a quasi-deposit of the goods. Lexicographically it may be called deposit of commercial articles with liberty to sell or deal with the articles at the choice and risk of other, the right to recall or return always being alive. Upon this, the liability that arises against the person receiving in deposit these goods is obvious—to make good the value which is already ascertained or to return the goods. In either case, the refusal either to pay the value or to return the goods despatched and deposited would give rise to a cause of action for the purpose of a civil suit.

18. Having noticed these basic constituents of the transaction, it is easy to turn to the Articles that may govern the cause of the person who despatched and de-

posited the goods for the purpose of other's sale.

19. Three Articles loom large for appropriate consideration. Art. 55 which is a residuary Article operating upon the causes of action on contract and its breach, will help the suiter seeking compensation for breach of the terms of such a contract when the contract itself is broken or when the breach of that contract occurs or when the contract itself ceases and a suit within three years from those dates will be within limitation. Had the present suit been only for the purpose of compensation on the basis of Sanjaiti contract, in that seeking to recover the value of the goods so supplied, it would have been possible to find out when the defendants committed the breach of the said contract and to count time within three years. But it appears, appropriate Article to apply is Art. 70 or the residuary Art. 113 to the present types of causes of action. Art. 70 deals with the recovery of the moveable property deposited and the time runs from the date of refusal after demand. If the goods are despatched and deposited under the stated understanding or arrangement wherein in case the deposited goods are sold, the deposittee would be liable to return the goods so deposited, makes it clear that though this may not be the strict case of deposit and return of the goods in corpus, this Article should govern the rights of the parties. As stated above, it is implicit in the arrangement between the parties that in case of sale, which is permitted by express agreement, the value already ascertained would be payable in lieu of the goods or otherwise the goods themselves would be returned in the same condition. The term "movable property deposited" in Art. 70 is wide enough to include such type of transaction. The term "deposit" has clearly a wide meaning. (See *Lala Gobind v. Chairman of Patna Municipality*, (1907) 6 Cal LJ 535 and *Balakrishnudu v. Narayanaswamy*, ILR 37 Mad 175 : (AIR 1914 Mad 51) and as far as the goods are concerned, wherein the right to recall the goods in specie or return the goods in specie remains intact under the Sanjaiti transaction, there does not appear to be any impediment in covering the cause by applying Art. 70 of the Limitation Act.

20. Even assuming that Art. 70 does not apply under the arrangement and agreement between the parties in cases of present type of transactions, the matter will squarely fall in the residuary Article 113 and the right to sue for return of,

the goods so sent under the Sanjaiti transactions would accrue to the plaintiff upon refusal to follow the obligations by the person receiving the goods.

21. Therefore, applying Art. 70 and Art. 113 of the Limitation Act, the cause of action arose only after the refusal or repudiation was communicated by the plaintiff to the defendant and the suit is well within time from that repudiation or refusal.

22. Thus, as the real transaction between the parties is that of deposit of goods for the purposes of appropriation by the defendants, the liability always arising at the time of appropriation and further there being a liability to return the goods unsold, it could only be said that during the period the goods are in deposit the liability remains and it is only when the liability is liquidated, the costs for the return of the goods or payment of its price would arise. As stated above, it is only by reply Exhibit 74 that the cause arose and suit was filed for the recovery of the goods. The property which the plaintiff was entitled to recover was proceeded against well within time.

23. Upon these findings the appeal must fail and the same is accordingly dismissed.

24. Turning to the cross-objections, it is difficult to take any other view of the matter. For the purpose of recording the finding with regard to 281 sarees, there was enough material before Court including the account books and entries therein produced by the defendants. No doubt, in the cross-examination of Manikchand some effort was made to indicate that the accounts were not maintained from day to day and reflected items were clubbed together for over a period. But that is no reason to take any other view of the matter. Between the period there had been seven Sanjait notes and admittedly as against five price was duly received. That left the consideration of 266 sarees and the price thereof. On the side of the plaintiff there is clear omission to show any bill and the plaintiff's witness Balgonda (Exhibit 49) clearly admits that for the items of the supply of 11th December 1963 and 20th January 1964 no bills are available. As against this, the evidence of Ilahi shows that the price for 15 sarees must have been received by cheque amounting to Rs. 191.12 and the balance by the cheque for Rs. 2747.67. The passing of these cheques has been spoken to by the defendants' witness Manikchand. His word

supported by the fact of the passing of the cheques has been accepted by the learned trial Judge. Under such circumstances, the grievance made in the cross-objections cannot be upheld and the same cross-objections too are rejected.

25. In the result, the present appeal as well as the cross-objections would stand rejected. Parties to bear their own costs.

Appeal dismissed.

AIR 1977 BOMBAY 436

(AT NAGPUR)

DIGHE, J.

Dhananjaya and others, Appellants v. Mst. Gajra and others, Respondents.

A.F.A.D. Nos. 434, 436 and 437 of 1965, D/- 18-11-1976.*

(A) Hindu Succession Act (30 of 1956), S. 4 (2) — M. P. Land Revenue Code (1954), S. 151 — Applicability — S. 151 whether embodies law providing for devolution of tenancy rights in respect of agricultural holdings.

Section 4 (2) of the Hindu Succession Act has to be so read not as providing an exception to the general application of the Hindu Succession Act but as enforcing the position that the Act could not at all have legislated on the subject of "agricultural holdings." If that is so, the result would be that devolution to such holdings would be governed by the local laws. Wherever as in the State of Maharashtra local laws exist, the net result is that the devolution to agricultural lands is in accordance with such local laws. Therefore, there is only a subtle distinction in interpreting subsection (2) of Section 4. From the practical aspect when the local laws exist, there will be no difference. (Para 14)

There is clear distinction between the persons remaining on the land from the tenure-holders and those who are on the land as Bhumiswami or Bhumidhari by their relationship with the State Government. Keeping probably this distinction in view apparently in all the States the phrase "devolution of tenancy rights in respect of agricultural holdings" as appearing in Section 4 (2) of the Hindu Succession Act was incorporated to speak

*(Against decision of V. P. Gadgil Asst. J. at Bhandara, in Civil Appeal Nos. 86 to 89 of 1964.)

about the second class of cases where the persons were on land as tenants.

(Para 16)

Without Section 151 of the M. P. Land Revenue Code or on its application by reason of the express words pointed out in Section 151 of the M. P. Land Revenue Code, 1954, it is the personal law which would govern the devolution of the land. However it is not correct to say that the personal law is indicative of the personal law which was governing the parties before the enactment of the Hindu Succession Act, 1956. Case law Discussed.

(Para 18)

(B) Hindu Succession Act (30 of 1956), S. 14 (1) — Applicability.

Sub-section (1) of Section 14 makes the limited owner a full owner. It would have application only when the heir referred to therein is not having full ownership, but is having limited ownership.

(Para 20)

Cases Referred: Chronological Paras

AIR 1974 Madh Pra 141 (FB)	18
AIR 1973 All 407	17
AIR 1970 SC 228	18
AIR 1970 All 238	14
AIR 1968 Madh Pra 247	18
AIR 1966 Bom 64	12, 13, 15, 18
1958 Nag LJ 319	13
AIR 1941 FC 72	14

A. S. Bobde and M. L. Vaidya, for Appellants; V. A. Masodkar and Abid Ali, for Respondent No. 1.

JUDGMENT:— These four appeals can be disposed of by common judgment as they raise a common question of law. That question is regarding the interest of the purchaser from a widow in the joint Hindu family.

2. The property sold in the four appeals together with certain other lands, house property, moveables etc. belonged to one Deobhau who died in the year 1954. He left behind two widows, one Malubai and the other Deokabai. Deobhau had two sons by his wife Malubai named Dhananjaya and Zankarsingh who are appellants 1 and 2 in each of the appeals. Malubai, their mother is the third appellant. Deokabai had four daughters through Deobhau by name Gangabai, Tulsabai, Jaiwantibai and Jamnabai who are party defendants as her heirs. The suit with which we are concerned in Second Appeal No. 434 of 1965 was brought by purchaser Gajrabai. The other suits were by the other three purchasers from Deokabai. Deokabai died on 11-7-1961. Prior to that but after

the commencement of the Hindu Succession Act she had alienated different properties in favour of the respondents other than her heirs in the four appeals before us.

3. During the lifetime of Deokabai, Dhananjaya, Zankarsingh and Malubai had filed Civil Suit No. 17A of 1958 against Deokabai, purchasers Rameshwardas Kanhaiyalal, Dadu Tukaram, Saji Motiram, Pito Lalji as also Gajrabai for possession of the property transferred by Deokabai. In that suit a compromise was arrived at between the parties on 5th of January 1960. According to the terms of the compromise, the plaintiffs in that suit, namely, minors Dhananjaya, Zankarsingh and Malubai were declared entitled to a decree for possession as claimed. However, the execution of such a decree was postponed for a period of 4 months, during which time the defendants excluding the third defendant who under the compromise decree was declared to have no interest were under the obligation to file a suit for general partition and the execution of the decree in favour of the plaintiffs in their suit was to remain postponed as long as the suit for general partition was pending. In case of default of bringing a suit for general partition within four months, the plaintiffs could execute the decree for possession of the suit property. There was also a declaration that the purchasers defendants Nos. 2 and 4 to 6 in that suit were each owners of the respective undivided share purchased by them from Deokabai and they were at liberty to get their ownership rights ascertained by appropriate action. These purchasers also bound themselves for not transferring or alienating the properties purchased by them; they were to maintain the status quo. Accordingly Gajrabai wife of Hagaruji Kalar and the three purchasers Rameshwardas, Mst. Saji and Pitto son of Lalji filed suits for general partition which came to be heard together.

4. Dhananjaya, Zankarsingh and Malubai were the first three defendants. On their behalf various contentions were raised opposing the relief claimed by the plaintiffs in each of the suits. Pending the suit Deokabai died and thereafter a contention was raised by amending the written statement that the interest of the deceased Deokabai had passed to Dhananjaya, Zankarsingh and Malubai by survivorship under Section 151 of the Madhya Pradesh Land Revenue Code.

As such the question of partitioning the property did not arise and that was on the basis that Deokabai could only transfer her life interest. The trial Court negated this contention. The trial Court determined the share. However, it was not considered equitable to make an order for general partition and hence only a declaration in favour of the different plaintiffs maintaining their possession was granted.

5. Aggrieved heirs of Deokabai, Dhananjaya, Zankarsingh and Malubai filed appeals against that order. The Assistant Judge, Bhandara who tried these appeals confirmed the order passed by the lower Court by common judgment delivered on 5th of April 1965. Questions agitated related to the law of succession to be applied and the interest of Deokabai in the property, so that whether she had or had not become the absolute owner of the suit property since 17th of June 1956, the date on which the Hindu Succession Act, 1956 came into operation. It was contended that Deokabai, in the circumstances, remained a limited owner and as such, after her lifetime her vendees could not remain in possession.

6. A perusal of the judgment of the learned Assistant Judge shows that the contention that Deokabai had a limited interest was negated on the interpretation of the various provisions of law. The learned Judge also felt that the plaintiffs who were appellants before him were bound by the consent decree which was the contract between the parties solemnly as entered into. While deciding Civil Suit No. 17A of 1958 the parties had legislated for themselves and under the compromise the vendees had become full owners. The learned Judge also held that the plaintiffs were estopped from saying that full interest did not pass to the purchasers.

7. Mr. Bobde appearing for the appellants Dhananjaya, Zankarsingh and Malubai, heirs of Deokabai, has toed the same line as in the lower appellate Court. He maintains that although under Section 14 of the Hindu Succession Act, 1956, the property of a female Hindu acquired before or after the commencement of the Act becomes her absolute property, the alienations made by Deokabai were in respect of agricultural lands and on the interpretation of Section 4 (2) of the Hindu Succession Act, 1956 that Act did not apply to agricultural holdings. According to him, the matter was

governed by Section 151 of the Madhya Pradesh Land Revenue Code, so that the interest on death of Deokabai would pass by inheritance, survivorship or bequest as the case may be but subject to the personal law. He contended that after the year 1951 proprietary rights in agricultural lands almost in any form came to be abolished and on the background of such abolition the word "tenure holder" appearing in Section 151 of the M. P. Land Revenue Code ought not to be given the restricted meaning, but ought to cover any type of tenancy inclusive of the holding by an individual from the State. By way of a further limb of his argument, he contends that where the Hindu Succession Act, 1956 does not apply, the personal law applicable to Deokabai would be the law other than the Hindu Succession Act, namely, the principles of Hindu Law, under which normally she would have inherited only the life estate and as such after her death the interest would devolve upon the heirs of the original owner.

8. As against this Mr. Masodkar for the respondent No. 1 has contended that by reason of Section 14 of the Hindu Succession Act, Deokabai became full owner. The sale deeds were passed after the Act was applicable. Section 4 (2) of the Hindu Succession Act refers to the application of laws for the time being in force providing for the devolution of tenancy rights. As such on a reference to Section 151 of the Code, the personal law inclusive of the full effect of Section 14 would apply and hence on the date of the transfer, Deokabai was the full owner so that she could pass full title to the purchasers.

9. Alternatively he relied upon the terms of the compromise which according to him show the acceptance by the present appellants of the full interest remaining in the transferor Deokabai as well as the acceptance of the position that full interest passed on to the purchasers and hence according to him, the appeals ought to fail. As a branch of the same argument, he also stated that on the background of the compromise the case would fall under Section 14 (1) of the Hindu Succession Act wherein Deokabai would be getting the full title to the property of which she could not be looked upon as a limited owner and hence the purchasers would be the full owners.

10. Section 4 of the Hindu Succession Act, 1956 deals with the overriding effect

of the Act. Sub-section (1) provides for such overriding effect in spite of any text, rule or interpretation of Hindu Law or any custom or usage as part of that law in force immediately before the commencement of this Act, namely, Hindu Succession Act, 1956. Sub-section (2), on which long discussion proceeded runs as follows:

"For the removal of doubts it is hereby declared that nothing contained in this Act shall be deemed to affect the provision of any law for the time being in force providing for the prevention of fragmentation of agricultural holdings or for the fixation of ceiling or for the devolution of tenancy rights in respect of such holdings."

This sub-section comes in the section which is providing an overriding effect of the Act and as the opening words show, it has been enacted "For the removal of doubts." It apparently envisages "provisions of any law for the time being in force providing for the prevention of fragmentation of agricultural holdings or for the fixation of ceilings or for the devolution of tenancy rights in respect of such holdings."

11. Section 151 of the Madhya Pradesh Land Revenue Code, 1954 runs as follows:

"Subject to his personal law, the interest of a tenure-holder shall on his death pass by inheritance, survivorship or bequest, as the case may be."

The question for consideration therefore arises whether this section embodies the law providing for devolution of tenancy rights in respect of agricultural holdings.

12. A reference must be made to the Division Bench Ruling reported in *Smt. Indubai v. Vyankati* (AIR 1966 Bom 64), where similar questions came for consideration. As per the facts of that case, the property holder Balaji died leaving two sons as members of the joint family. One of them died leaving behind two sons who were defendants 1 and 2. The other died in 1941 leaving behind his widow Sarubai and daughter Indubai. That daughter was married. Sarubai had filed a suit for partition. She appears to have also executed a will in favour of her daughter. After her death her daughter Indubai claimed alternatively under the will as well as by reason of Section 15 of the Hindu Succession Act, 1956 looking upon Sarubai as having become the full owner of the suit property. Negating the question

of adverse possession by the other heirs on the interpretation of Section 4 (2) of the Hindu Succession Act and the application of the M. P. Land Revenue Code, 1954, Section 151, the observations contained in placitum (c) are as follows: (At pp. 68 and 69 of AIR)

"In order that the exception created by S. 4 (2) of the Hindu Succession Act, 1956 can apply, the legislation must provide for devolution of tenancies. The M. P. Land Revenue Act is not, however, a tenancy Legislation and consequently exception made in S. 4 (2) cannot apply to it.

Section 151 of the M. P. Land Revenue Act merely defines the classes of tenures, their liabilities and privileges. The section prescribes the conditions under which a tenure holder occupies the land. It is clear from the section that the rights of the tenure holders are permanent and heritable. However, no particular law of devolution in respect of tenancies is laid down in the section. The holdings of tenure holders are not tenancies. However, while S. 151 of M. P. Land Revenue Act provides that the holdings of tenure holders are heritable as per their personal law, there are no words in it to mean the personal law on a particular date. The normal rule of construction is that the language of a statute is generally extended to new things which are not known and could have been contemplated by the legislation when it was passed. The personal law contemplated by the section therefore only means the law as applicable to the tenure holder when the succession opened. It does mean the law prevailing at the time that the L. R. Act was enforced. Consequently, the question of S. 4 (2) of the Hindu Succession Act saving the rights of survivors does not arise in such a case. There is no need to interpret the words "any law for the time being in force" in S. 14 (2) of the Hindu Succession Act to mean "any law which came into force" once it is held that S. 151 of the M. P. Land Revenue Act merely recognises that the tenure is heritable and will pass according to the law applicable to the tenure holder and it does not prescribe the law regarding devolution of tenancy rights in respect of agricultural holdings amongst the Hindus."

The first proposition as obtained therein and discussed in more particulars in paragraph 14 of the judgment, shows

that for the application of S. 4 (2) of the Hindu Succession Act, the Legislature must provide for devolution of tenancies. In other words, the section is read as showing exception depending upon the existence of the local laws providing for devolution of tenancy rights.

13. The second proposition obtainable from the Division Bench ruling is that the M. P. Land Revenue Code, S. 151 in particular, is not a tenancy legislation. Mr. Bobde for the appellants is taking an exception to both these propositions. Deciding the matter as a Single Judge in normal circumstances the Division Bench ruling would be binding upon me. It is, however, necessary to appreciate the points made out by Mr. Bobde. Incidentally it may be noted that in an earlier ruling *Sitabai v. Kothulal*, (1958 Nag LJ 319) the Single Judge of this Court has held in similar circumstances that S. 151 of the M. P. Land Revenue Code, 1954 would apply, that being the law providing for the devolution of tenancies. That view stands superseded by AIR 1966 Bom 64 *Indubai's* case.

14. Initial objection of Mr. Bobde proceeds on the basis that the Central Government could not legislate on the subject of agricultural holdings. In that context, he wants to read in the opening words of sub-section (2) of S. 4, namely, "For the removal of doubts" an emphasis that the Central Legislature could not intervene to legislate on the subject of agricultural holdings, the same is kept untouched and hence it is indicated that the succession to such lands would be governed by the local laws existing in each of the States. He relies upon the ruling reported in *Premadevi v. Joint Director, Consolidation*. (AIR 1970 All 238) where the matter was looked into in connection with the tenancy law, namely, U. P. Zamindari Abolition and Land Reforms Act, 1950 and the relevant observations are as follows:— (At p. 240 of AIR)

"In the first place, we are of the opinion that the Hindu Succession Act, 1956, cannot be made applicable to agricultural plots. This Act was passed by the Central Legislature in 1956 and the only entry under which the Central Legislature had the jurisdiction to pass the Act, was entry No. 5 in the third list of the Seventh Schedule of the Constitution. This entry is as follows:

"5. Marriage and divorce, infants and minors, adoption, wills, intestacy and succession, joint family and partition;

all matters in respect of which parties in judicial proceedings were immediately before the commencement of this Constitution subject to their personal law." This entry obviously relates only to personal law and laws passed under this entry do not apply to any particular property. They merely determine the personal law. In List 2, Entry No. 18 is as follows: "Land, that is to say, right in or over land, land tenures including the relation of landlord and tenant, and the collection of rents, transfer and alienation of agricultural lands, land improvement and agricultural lands; colonization." The entry which is in the exclusive jurisdiction of the State Legislature is in the widest term. All laws relating to land and land tenures are therefore, within the exclusive jurisdiction of the State Legislature. Even personal law can become applicable to land tenures if so provided in the State Law, but it cannot override State Legislation.

It is noteworthy that in List 3 wherever the entry relates to rights in land 'agricultural land has expressly been excluded. For instance, Entry No. 6 is as follows: "Transfer of property other than agricultural land." Entry No. 7 is as follows:—

Contracts, including partnership, agency, contracts of carriage, and other special forms of contracts, but not including contracts relating to agricultural lands." No such exception was expressly mentioned in Entry No. 5 because this entry related only to matters personal to individuals and did not relate directly to any property. While legislating in respect of such general subject the Legislature must be assumed to pass law only affecting property which it had jurisdiction to legislate about. Gwyer, C. J. while delivering the judgment of the Federal Court in a reference on the Hindu Women's Rights to Property Act, 1937 reported in AIR 1941 FC 72 observed as follows:—

"There is a general presumption that a Legislature does not intend to exceed its jurisdiction. When a Legislature with limited and restricted powers makes use of a word of such wide and general import as "property," the presumption must surely be that it is using it with reference to that kind of property with respect to which it is competent to legislate and to no other."

The Hindu Succession Act, 1956 was passed merely to alter the personal law of succession applicable to Hindus. It had

no reference to any kind of property in particular and was not meant to govern rights in agricultural tenancies. Sub-s. (2) of S. 4 of the Act runs as follows:—

"For the removal of doubts it is hereby declared that nothing contained in this Act shall be deemed to affect the provisions of any law for the time being in force providing for the prevention of fragmentation of agricultural holdings or for the fixation of ceilings or for the devolution of tenancy rights in respect of such holdings." This sub-section indicates that it was only for the removal of doubts that this provision, had been included. Even without this provision, the Act could not apply to agricultural holdings.

Under the U. P. Zamindari Abolition and Land Reforms Act which regulated the tenancy rights, there is no provision applying personal law to any of the tenures created under that Act and thus the provisions of the Hindu Succession Act are wholly inapplicable to the land tenures under the U. P. Zamindari Abolition and Land Reforms Act."

In terms, therefore, it has been said that the Hindu Succession Act could be looked upon as having been passed under Entry No. 5 of the Third List of the Seventh Schedule giving power to regulate the personal law. But under Entry No. 18 of the Second List 'agricultural holdings' is exclusively the State subject. The Central Government, therefore, could not legislate on that subject. Hence what has been legislated cannot be made applicable to agricultural holdings. Mr. Bobde is thus making a valid point that S. 4 (2) of the Hindu Succession Act has to be so read not as providing an exception to the general application of the Hindu Succession Act but as enforcing the position that the Act could not at all have legislated on the subject of "agricultural holdings." If that is so, the result would be that devolution to such holdings would be governed by the local laws. Incidentally, it may be noticed that whether on the interpretation put forward by Mr. Bobde or whether upon looking the sub-clause as a conditional clause, wherever as in the State of Maharashtra local laws exist, the net result is that the devolution to agricultural lands is in accordance with such local laws. Therefore, there is only a subtle distinction in interpreting Sub-s. (2) of S. 4. From the practical aspect when the

local laws exist, there will be no difference.

15. The further question canvassed is regarding the Madhya Pradesh Land Revenue Code and in particular S. 151 thereof, on which reliance is placed being a piece of legislation providing for devolution of tenancy rights. Our Division Bench in Indubai v. Vyankati (AIR 1966 Bom 64) (Cit. sup), has held that it does not so regulate the devolution of the agricultural tenancies.

16. In this connection if we have a look at the M. P. Land Revenue Code, 1954, we find that S. 151 comes under Chapter XII dealing with 'tenure-holders.' Chapter XIII of that Code consisting of one S. 164, deals with Government lessees laying down that every person who holds land from the State Government or to whom a right to occupy land is granted by the State Government or the Collector and who is not entitled to hold land as a tenure-holder shall be called a Government lessee in respect of such land. Quite a distinction is drawn, therefore, between tenure-holders and a person not a tenure-holder. It is Chapter XIV which now stands repealed by the Bombay Tenancy and Agricultural Lands (Vidarbha Region and Kutch Area) Act, 1958. That provided for "Tenants" and obviously the repealing Act elaborately provides for the status and the character of tenants. In this context if we refer to sub-s. (20) of S. 2, 'tenure-holder' is defined as follows:

"'Tenure-holder' means a person holding land from the State Government as a Bhumiswami or Bhumidhari."

"Tenant" is defined in Sub-s. (19) of S. 2 as follows:

"'Tenant' means a person holding land from a tenure-holder as an ordinary or an occupancy tenant under Chapter XIV."

Section 145 of the Code indicates the two types of tenure-holders namely, Bhumiswami and Bhumidhari and by reason of the definition contained in sub-sec. (19) of S. 2, the tenant would be the person holding land from a tenure holder. The Act, therefore makes a clear distinction between the persons remaining on the land from the tenure-holders and those who are on the land as Bhumiswami or Bhumidhari by their relationship with State Government. Keeping probably this distinction in view apparently in all the States the phrase "devolution of tenancy rights in respect of agricultural holdings" as appearing in

[S. 4 (2) of the Hindu Succession Act was incorporated to speak about the second class of cases where the persons were on land as tenants.

17. Mr. Bobde, however, takes exception to this line of interpretation. He invites me to understand the background that after 1951 almost all proprietary rights in land were abolished and so-called tenure-holders in a sense became the tenants from Government. He is supporting his reasoning by adverting to this decision reported in *Uma Shanker v. Deputy Director of Consolidation*. (AIR 1973 All 407). That was a case under the U. P. Zamindari Abolition and Land Reforms Act and the question was regarding the devolution in case of a Bhumidar under the provisions of the Hindu Succession Act. S. 4 (2) of the Act came in for discussion and in paragraph 5 it is observed by the learned Judges that the Hindu Succession Act does not define the term "tenancy rights." It was, therefore, said that it must be deemed to have been used in its ordinary meaning. After looking into the various meanings given in different Dictionaries, it was held that the terms "tenancy" and "tenure" were clearly interchangeable words and they connote one and the same thing.

18. For adopting this construction my attention was also invited to the earlier Supreme Court ruling reported in *Indu Bhusan v. Rama Sundari Debi*, (AIR 1970 SC 228) where the occasion was to consider the scope and effect of Entry No. 3 in the matter of houses acquired, requisitioned or allotted for military purposes etc. Entry No. 18 in List II of the Seventh Schedule was also under discussion. That is in respect of the rights over the land, land tenures including the relationship of landlord and tenant and the collection of rents. In this context the observations are made in paragraph 12 as follows:

".....the relation of landlord and tenant is mentioned as being included in land tenures and the expression "land tenures" would not, in our opinion, appropriately cover tenancy of buildings or of house accommodation. That expression is only used with reference to relationship between landlord and tenant in respect of vacant lands."

No doubt the observations are made for comprising the land on which houses are put up, but the interpretation on Entry No. 18, as it stood, is taken as inclusive

of relationship between landlord and tenant including the land tenures. Obviously however the observations are made to recite the subject on which there could be Legislation; it includes undoubtedly 'Land tenures' and ought not to be of much assistance to Mr. Bobde. However, in support of the construction he has put forth regarding the initial interpretation of Sub-s. (2) of S. 4 of the Hindu Succession Act and the interpretation of the words 'devolution of tenancy rights in respect of agricultural holdings,' Mr. Bobde relied upon a recent Full Bench decision of the Madhya Pradesh High Court reported in *Nahar Hirasingsh v. Mst. Dukalhin*. (AIR 1974 Mad Pra 141) (FB). The observation in this case has to be appreciated on the background that the Madhya Pradesh High Court had till then followed the Division Bench decision of the Bombay High Court in *Indubai v. Vyankati* (AIR 1966 Bom 64). (cit. sup.) It has now been dissented from; the relevant observations can be taken from the brief note resting upon paragraph 22 of the judgment, which runs as follows. (At p. 149 of AIR).

"Provisions of the M. P. Land Revenue Code (1959) contemplate a tenure holder to mean not only a plot proprietor, but also a tenant, who previously was considered as such and on whom better rights are intended to be bestowed by this new enactment. The distinction is not very real but imaginary and that the Parliament while using the phrase 'devolution of tenancy rights' in S. 4 (2) of the Hindu Succession Act, 1956, meant to use it in the broadest possible sense so as to include all rights of devolution in relation to agricultural lands not only confined to tenancy rights, but also to tenure holder's rights. However, the actual effect of this would be that where a tenancy or a land tenure legislation makes a special provision for devolution of rights to lands, that provision will prevail and in that event S. 4 (2) of the Hindu Succession Act, 1956, will make the provisions of the Hindu Succession Act, 1956, inapplicable to such devolutions provided by the tenancy or the land tenure legislations. But, if the land tenure legislation itself makes the personal law of the parties applicable, in that event certainly the Hindu Succession Act, 1956 or any other personal law will be applicable."

In view of the discussion contained in *Indu Bhusan's* case (AIR 1970 SC 228) and the decision in *Nahar Hirasingsh's*

case (AIR 1974 Madh Pra 141 (FB)), it must be said that the two propositions made in the Division Bench ruling of our High Court in *Smt. Indubai v. Vyankati* (AIR 1966 Bom 64), require reconsideration. I do not think, however, that I am called upon in these appeals to ask for any such directions because I feel that on consideration of the other material, the appellants must fail in their contention. Ultimately the points made on behalf of the appellants is the application of the personal law. Without S. 151 of the M. P. Land Revenue Code as considered in *Smt. Indubai v. Vyankati* (AIR 1966 Bom 64) or on its application by reason of the express words pointed out in S. 151 of the M. P. Land Revenue Code, 1954, it is the personal law which would govern the devolution of the land. I, however, cannot appreciate Mr. Bobde's argument that the personal law is indicative of the personal law which was governing the parties before the enactment of the Hindu Succession Act, 1956. It is only if that proposition is accepted that Deokabai could be said to have had Women's Estate or Widow's estate and it is only then that the appellants would be able to non-suit the plaintiffs in the four appeals. If on the other hand, personal law as applicable on the date succession opened is to be applied, it will take in its full stride the effect of S. 14 of the Hindu Succession Act by virtue of its application as a canon of personal law and at the time the different alienations were made by Deokabai she would be taken as having passed on the full interest which she herself possessed by reason of her personal law to which she was subject, namely, under S. 14 of the Hindu Succession Act. The very decision of the Full Bench of the Madhya Pradesh High Court upon which reliance is placed does not support Mr. Bobde on the line he has chosen to canvass. The relevant observations are in paragraph 24 of that decision which runs as follows: (At p. 150 of AIR).

"This brings us to the other question as to which personal law would govern the matter of devolution. In this connection we would affirm the view of the Division Bench of this Court in AIR 1968 Madh Pra 247 (supra), which has followed the view of the Bombay High Court in AIR 1966 Bom 64 (supra). In our opinion, the said two Division Bench cases had taken the correct view and the personal law applicable will be the law as amended from time to time upto the

stage when the relevant question of devolution comes to be considered. If we were to accept the untenable view of Vyas J., it will imply as pointed out in one of the Single Bench decisions of this Court that the question of succession will have to be considered with reference to the point of time when a person is alive. That will clearly be absurd and such an interpretation cannot be permitted as was put on S. 151 of the M. P. Land Revenue Code, 1954 by Vyas J., of the Bombay High Court and by K. L. Pandey, J., of this Court."

In fact on this aspect of the application of personal law the observations in paragraph 16 of the Division Bench decision in *Indubai v. Vyankati*, (AIR 1966 Bom 64) (sup.) would also provide an able guide.

"What Mr. Khare contends is that the words "subject to his personal law" meant the personal law as it existed when the statute was passed, that is, in 1954. He contends that S. 151 (of Land Revenue Code) is a reproduction of S. 11 of the Central Provinces Tenancy Act 1920, as amended in 1941, and the words "subject to his personal law" must be confined only to the law as then obtaining. The history of the legislation does not justify the contention. It may be that the Tenancy Act came to be repealed by the Code but that may be due to the very comprehensive recent tenancy legislation. Does it mean the personal law as in force in 1928, 1941 or the personal law as in force in 1954? The purpose of S. 151 was one of applying the law of succession by which a holder was governed. It can only mean personal law by which he was governed when the succession opened. There are no words in this section to mean personal law as applicable on a particular day. The normal rule of construction is that "the language of a statute is generally extended to new things which are not known and could have been contemplated by the legislation when it was passed. (Maxwell on Interpretation of Statutes pp. 76 and 262). Until 1956 the personal law of a Hindu was the ordinary law applicable to him. By the enactment of Hindu Succession Act, his personal law was changed in supersession of all his old law and therefore, on the date when the question arose this became his personal law."

Consequently although there may be force in the contention regarding the in-

interpretation of S. 4 (2) of the Hindu Succession Act and the interpretation to be put on S. 151 of the Madhya Pradesh Land Revenue Code, the net result would work against the appellants, the purchasers from Deokabai would be having full interest and on that score the contention of the appellants ought to be negatived.

19. It is rather unnecessary on this conclusion to refer to Mr. Masodkar's argument based on the interpretation of term No. 4 in the compromise precipe in Civil Suit No. 17-A of 1958 which runs as follows:

"Defendants 2 and 4 to 6 have become the owners of the undivided share they have purchased from the defendant No. 1 and they have the right to take action for ascertaining the ownership rights of each of them."

Stress is laid by Mr. Masodkar on the words 'ownership of undivided share' (अविभक्त हिस्साचे मालीक).

He interprets this term as showing that full ownership was conceded by the opposing plaintiffs in that suit both in Deokabai and the vendees from her. The words, however, speak of the share and ownership. They do not say anything about the totality of the interest or otherwise. The words appear to me to be recognising only the alienations made by Deokabai and nothing more. It does not appear to be the acceptance of the enlarged interest. In view of it question of executing the terms of contract embodied in the consent decree or of any estoppel does not arise.

20. I am also unable to appreciate his contention regarding Section 14 (1) on the supposed interpretation of the term as giving the full rights of Deokabai under Section 14 (1). Sub-section (1) of S. 14 makes the limited owner a full owner. It would have application only when the heir referred to therein is not having full ownership, but is having limited ownership. If on the basis of the consent decree Deokabai was the full owner, then on that supposition there would be nothing upon which S. 14 (1) would act.

21. As said earlier, however the appellants ought to fail in opposing the alienations by saying that after the lifetime of Deokabai they had no interest.

22. The finding of both the courts on that aspect is maintained. However, I am unable to appreciate the ultimate decree passed by the trial Judge and

confirmed by the first appellate Court. The decree refers to the maintenance of possession by the plaintiffs in different suits, namely, the alienees and asks them to wait till the suit for general partition is filed. True it is, that a purchaser would in normal circumstances not be able to enforce the general partition against the wish of the coparceners. He would have to wait his turn. The facts of the present case, however, are different. The term of general partition was embodied in the consent decree, nay, there was risk of these plaintiffs losing their rights of ownership in case such a suit was not filed within four months. The coparceners thus had impliedly agreed for a suit for general partition, the result of which was the filing of different suits with which we are concerned in second appeals. These suits themselves would have to be looked upon as a combined action for general partition. The shares appear to have been defined, if we look to paragraph 24 of the judgment of the learned trial Judge. But a glance at the written statement would show that some more property is stated to be the joint family property which ought to be put in hotch-pot. On that there is no material to hold some way or the other. Hence the suits will have to be remanded to the trial Court for decision on the point regarding the totality of the property of which there would be partition. Of course at that time if the coparceners or some of them show their willingness to remain joint, the finding would be adjusted accordingly. As it stands, I cannot persuade myself to hold that the defendants fail on the question of general partition remaining open to the risk of not following the term of the contract and that they should wait indefinitely.

23. The appellants have virtually failed. I, therefore, feel that they will have to bear the costs of these second appeals, I pass the following order.

The finding of the two courts below that Deokabai had full interest which passed on to the defendants vendees is maintained, but the various suits are remanded to the trial Court for passing an appropriate decree of general partition in the light of the observations made above. The appellants in second appeals to bear their own costs, and pay those of the respondents.

Order accordingly.

AIR 1977 BOMBAY 445

DESHMUKH, J.

Mohit Gajadhar Ahir, Applicant v. Inderbali Rangai Ahir and others, Opponents.

Civil Revn. Appln. No. 4 of 1976, D/- 24-1-1977.*

Bombay Rents, Hotel and Lodging House Rates Control Act (57 of 1947), S. 28 — Suit by tenant for declaration of his tenancy — Defendant-rival tenant also claiming to be tenant — Jurisdiction of Court of Small Causes.

The plaintiff was originally accepted as tenant by the defendants-landlords in the earlier litigations started by the defendant-rival tenant claiming to be the lawful tenant. The defendants-landlords, however, subsequently changed their stand and accepted the defendant-rival tenant as a tenant instead of the plaintiff. Taking advantage of this position, the defendant-rival tenant filed application claiming eviction against the plaintiff as a result of which the present suit was filed by the plaintiff for declaration of his tenancy and for permanent injunction restraining the defendants-landlords from treating the defendant-rival tenant as a tenant.

Held, the Court of Small Causes had jurisdiction to try the suit. When the plaintiff was asking for a declaration from the court, he was asking for a decision on an issue between landlord and tenant. Though the target prima facie appeared to be defendant-rival tenant, it was substantially a suit against the landlords (who were cleverly remaining behind the scene) for relief which a tenant can claim under the provisions of the Rent Act. To say that it was merely a suit between two rival tenants is to exaggerate technicalities to the position of a substantial dispute.

(Paras 12, 13, 14)

M. V. Shah, for Applicant; Kishor V. Tembe, for Opponents Nos. 2, 3, 5 and 6.

ORDER:— This is a revision application by the original plaintiff against the appellate order of the Division Bench of the Court of Small Causes at Bombay. The facts of the litigation which may be noted for the purpose of appreciating the present revision application are these:

*(Against Appellate order of Sm. C. C., Bombay, D/- 15-10-1975.)

JU/JU/D987/77/MBR/RSK

2. Umer Mansion, Arthur Road, Jacob Circle, Bombay-11, is a property belonging to a trust of which original defendants Nos. 1 to 5 and present respondents Nos. 2 to 6 or 7 appeared to be the trustees. The plaintiff's case in the trial Court was that one Khodabhai was the original tenant of room No. 3 of these premises from the trustees. Khodabhai consented in writing that the tenancy be transferred in the name of the plaintiff and on the strength of that writing, the trustees not only acted upon it but actually accepted the plaintiff as a tenant of that room and issued rent bills in his name from the year 1960. In this manner as a lawful tenant of room No. 3 directly from the trustees the plaintiff is in occupation in his own right as full-fledged tenant. That occupation began in 1960 and is even continuing now.

3. Defendant No. 1, present respondent No. 1 called Inder Bali Rangai Ahir, is original defendant No. 6 in the present litigation. This defendant is playing the role, as has been described by the Appellate Court, as a rival tenant. For the convenience of reference, the plaintiff will be described as a tenant and Inder Bali as a rival tenant. According to the plaintiff, the rival tenant was merely staying with him as a licensee and had nothing to do with the premises. However, this rival tenant took into his head to claim tenancy and to challenge right, title and interest of the present plaintiff tenant. Hence he filed Suit No. 435/60 in the Court of Small Causes at Bombay for a declaration that he was the lawful sub-tenant of Khodabhai or after his demise his son Hirubhai Khodabhai. He joined the present plaintiff as well as the trustees as party defendants. However, he withdrew that suit with liberty to file another on the same cause of action. Subsequently he filed Suit No. 2327/62 in the Court of Small Causes without joining Hirubhai, the legal heir and representative of the original tenant Khodabhai, for a declaration that the tenancy created by defendants Nos. 1 to 5, the trustees, in favour of the present plaintiff is not a valid one and that in law he continues to be the lawful sub-tenant of Hirubhai and therefore a tenant of the trustees. In both these suits, viz. Suit Nos. 435/60 and 2327/62, the trustees as owners filed written statements or defences entirely supporting the present petitioner. In other words, they accepted the proposition that Khodabhai

withdrew his tenancy and the present plaintiff was accepted as a direct tenant by the trustees. They therefore supported the claim of the plaintiff in regard to his title to the tenancy and his physical possession as against the claim of the rival tenant.

4. The plaintiff says that in spite of such a defence solemnly taken by the trustees they have somehow changed their mind and have taken a complete somersault. In spite of the written statement mentioned above and during the pendency of the suit No. 2327/62 they accepted the rival tenant as their direct tenant and began issuing rent bills in his name. This fact was notified to the Court by the rival tenant on 19-8-1964 and the rival tenant withdrew his suit 2327/62. However, this new development having taken place much earlier, the rival tenant filed an application under Section 41 of the Small Causes Court Act, being No. 819/E of 1963 on 12-11-1963. He claimed eviction against the present plaintiff on the basis of the rent bills in his favour issued by the trustees.

5. When the present plaintiff became aware of these proceedings he became panicky and rushed to the same Court by filing Suit No. 5923/64 which is the subject-matter of the present revision application. In this suit, he joined all the trustees as defendants Nos. 1 to 5 and the rival tenant as defendant No. 6. By giving the history of the present litigation including the solemn written statement filed by the trustees earlier, he made an application that he is a lawful tenant of defendants Nos. 1 to 5 and not defendant No. 6. He further asserted that he was in physical possession and enjoyment of the property as a tenant through defendants Nos. 1 to 5 and he had a right to protect that tenancy as well as possession. He then alleged that defendants Nos. 1 to 5 are trying to remove him from possession and are issuing rent bills in the name of defendant No. 6, the rival tenant. Being armed with such rent bills, defendant No. 6 has approached the Small Causes Court by eviction application described above. In the circumstances, he claimed that his tenancy be upheld after giving that declaration and defendants Nos. 1 to 5 be restrained permanently by an order of the Court from treating defendant No. 6, the rival tenant, as a tenant and also a mandatory injunction of the Court directing them to treat the plaintiff as their tenant.

6. This suit was now opposed by the trustees as well as defendant No. 6, the rival tenant. One of the points raised undoubtedly was that the Small Causes Court had no jurisdiction. However, on this technical issue as also on the substantive issues based upon the pleadings of the parties, the learned trial Judge of the Court of Small Causes gave findings entirely in favour of the plaintiff. He held that the plaintiff was a tenant in physical possession. He further held that defendants Nos. 1 to 5 were the landlords who had to accept the plaintiff as a tenant. He therefore restrained defendants Nos. 1 to 5 from doing anything by way of encroaching upon the right of the plaintiff as a tenant or to affect his possession as a tenant. Incidentally of course the learned trial Judge passed an order of injunction even against defendant No. 6 the rival tenant from calling himself as a tenant.

7. Against such a decree the original defendant No. 6, the rival tenant, alone went in appeal to the Bench of Two Judges of the Court of Small Causes. That was Appeal No. 88 of 1968. By their order dated 15th October 1975 the two learned Judges allowed the appeal purely on a technical question of jurisdiction and held that the type of the suit the plaintiff has filed in this litigation is not within the special jurisdiction of the Court of Small Causes as contemplated by Section 28 of the Bombay Rents, Hotel and Lodging House Rates Control Act 1947 (hereinafter referred to as the 'Bombay Rent Act'). Their main reasoning is that this is essentially a suit between the two rival tenants who want to claim priority over each other and this is not a suit between the tenant and the landlord either relating to rent or possession as contemplated by S. 28 of the Bombay Rent Act. This being their view, the appeal was allowed and the suit was dismissed. They therefore find it unnecessary to consider the other questions of facts arising in the litigation. Being aggrieved by such an order, the plaintiff has filed this revision application. The sole point that arises for my consideration is whether looking to the facts and circumstances of the case and the claim made by the plaintiff, the Court of Small Causes, Bombay, has jurisdiction to try the suit under Section 28 of the Bombay Rent Act.

8. Though the respondents are served only the trustees appeared through their Advocate and though an appearance has

put by the rival tenant through an Advocate I have had no advantage of hearing that Advocate as he is not present today when the matter was called and heard. Mr. Tembe, the Advocate of the present trustees submits that there appears to be some more trustees other than the present trustees so far as the present suit is concerned. However, he has no definite instructions and his request for adjournment of the matter for some time to ascertain this fact was rejected by me.

9. The only question is whether the present suit can squarely fall within the provisions of Section 28 of the Bombay Rent Act. The provisions of Section 28 of the Bombay Rent Act create the Court of Small Causes, Bombay, as the Court of exclusive jurisdiction to entertain and try any suit or proceeding between a landlord and a tenant relating to the recovery of rent or possession of any premises to which any of the provisions of this part apply, and to decide any application made under this Act and to deal with any claim or question arising out of this Act or any of its provisions and subject to the provisions of subsection (2) no other court shall have jurisdiction to entertain any such suit, proceeding or application or to deal with such claim or question. Undoubtedly therefore where the claim can fall within the ambit of this section, the Court of Small Causes, alone will have jurisdiction. The Appellate Bench of the Small Causes Court was mainly influenced by the fact that this suit appears to be a suit between two rival tenants and it is not a suit between landlord and tenant. However, if the facts which I have summarised above, are examined closely, it would be apparent that though the target prima facie appears to be defendant No. 6, who is a rival tenant, the real mischief lies with the trustees, which are the landlords. They are cleverly remaining behind the scene and are putting forth defendant No. 6 as a person who could set up a claim against the present plaintiff.

10. The discussion I am making at this stage regarding the pleas taken by the trustees and their position in this litigation is not so much with a view to decide the facts and to hamper the jurisdiction of the trial Court and the Appellate Bench of the Court of Small Causes to discuss and decide those facts. I am merely referring to the history which cannot be gainsaid to point out

how the positions are being changed from time to time by the trustees. In the two earlier litigations at the instance of the present plaintiff the trustees accepted the present plaintiff as a tenant. That would prima facie make it clear that the plaintiff's allegation that Khodabhai withdrew his tenancy rights and consented to induct the present plaintiff as a tenant was accepted by the trustees and the rent bills were issued in his favour. That position continued at least till 1963, for upwards of three years. It is only when the second suit filed by the rival tenant was pending in the Court of Small Causes that the trustees made a complete volte-face and began issuing rent receipts in the name of the rival tenant. Why and how they changed so is a matter for the Court of facts to investigate. However, prima facie it does appear that the trustees first acknowledged the plaintiff as a tenant from 1960 to 1963 and thereafter changed their front.

11. Now, let us consider the consequence of the change of this front. They have not only stopped issuing rent bills to the plaintiff but have started issuing directly in favour of the rival tenant, defendant No. 6. It is this act of the landlords which has armed defendant No. 6 with a right to see that he is a tenant and he must get possession from the plaintiff, who is in unauthorised occupation of the premises. It is on that footing that an application under Section 41 of the Small Causes Court Act could be filed by defendant No. 6. The landlords therefore are directly responsible for enabling defendant No. 6, the rival tenant, to hold these proceedings. Since they are supporting him to do so, it means that they are as if prosecuting the remedy of evicting the plaintiff by remaining behind the screen.

12. When the plaintiff therefore asks for a declaration from the Court of Small Causes, which is a court of exclusive jurisdiction, that he is a tenant of the premises through the landlords, viz. the trustees, he is asking for a decision on an issue between a landlord and a tenant, which that court alone can decide. If that issue is answered in his favour, the cloud created upon his possession would be cleared and the remedy which apparently appears through the instrumentality of defendant No. 6 is in fact, in my view, a mischief of the landlords themselves. In other words, the plaintiff is asking the Small Causes Court

to protect his right as a tenant against the landlords. On these facts it is difficult for me to understand why this could not be described as a suit between a landlord and a tenant relating to the property which is a tenanted property. Tenancy as well as possession as a tenant are the issues within the exclusive jurisdiction of Small Causes Court. Those are the very issues raised by the present plaintiff in his litigation. Since defendant No. 6 is claiming to be the tenant, for once it does appear that the plaintiff is claiming substantial relief against defendant No. 6. However, as the landlords themselves are parties to the litigation, it is in my view, substantially a suit against the landlord and again substantially a suit for relief which a tenant can claim under the provisions of the Bombay Rent Act.

13. The plaintiff is not merely asking to protect his possession against the rival tenant, but he is asking for a declaration that he be declared as a tenant of the trustees and the trustees who have changed their front should be directed not to disturb the plaintiff's possession as tenant except through appropriate proceedings.

14. This being the real nature of the suit, I do not think that the Court of Small Causes could not have jurisdiction. To say on the face of the record that this is merely a suit between two rival tenants is to exaggerate technicalities to the position of a substantial dispute. A substance of the matter has to be seen and not the form. Viewed in that light, the substantial dispute is between the landlords and the position relating to the plaintiff as a tenant. In the circumstances the trial Judge of the Small Causes Court was right in holding that he had jurisdiction and the Appellate Bench was in clear error.

15. However, unfortunately the Appellate Bench has not disposed of the

matter on merits, which it could have done and the remand would have been obviated. However, since they have chosen to dispose of the appeal purely on a technical point and have further observed in paragraph 7 of the judgment that they consider it unnecessary to discuss the other issues involved in the suit, I have no alternative but to allow this revision application and restore back Appeal No. 88/68 to the Appellate Bench of the Court of Small Causes for trying it as an appeal which it has jurisdiction to decide and thereafter to dispose of on the merits of the matter.

16. Mr. Shah tells me that taking advantage of the Appellate Court's Judgment, the trustees have themselves filed a suit in the Small Causes Court, being RAE. NR. Suit No. 1070/5673 of 1976 against the rival tenant, defendant No. 6, for possession. They are treating him as a tenant already and alleging that he being in arrears they are entitled to ask for possession from him. If this litigation were to be allowed to go without finally disposing of the present litigation, the landlords would be practically entitled to evict the present petitioner-plaintiff, who calls himself a tenant. By resorting to clever means and remedies a dispute which is substantially between a landlord and a tenant cannot be allowed to appear as not between a landlord and a tenant and the machinations of such a landlord could not be allowed to succeed. I therefore direct that RAE. NR. Suit No. 1070/5674 of 1976 pending in the Court of Small Causes shall be stayed until Appeal No. 88/68 is disposed of on merits.

17. The revision application thus succeeds and the rule is made absolute with costs.

Revision allowed.

END

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CALCUTTA HIGH COURT

1977

CHIEF JUSTICE

The Hon'ble Mr. Sankar Prasad Mitra, M.A. (Cantab), Bar-at-law;

PUISNE JUDGES:

The Hon'ble Mr. Justice Syed Sadat Masud, M.A., LL.B., Bar-at-law (Retired);

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ADVOCATES GENERAL:

Shri Dipankar Prasad Gupta, Barrister-at-law.
„ Snehangsu Kanta Acharyya, Bar-at-law.

GOVERNMENT ADVOCATES:

Shri Sudhir Kumar Bose.
„ Amar Nath Banerjee.
„ Ramendra Nath Bose.
„ K. M. Yusuf.

GOVERNMENT PLEADER:

Shri Nara Narayan Gooptu, Bar-at-law.

REPORTERS:

Shri Subodh Chandra Basak, M.Sc., LL.B., Advocate.
„ Amiya Lal Chatterjee, Advocate.
„ Gauri Prasad Mukherjee, Advocate.
„ Janendra Coomar Dutta, Advocate, Supreme Court of India.

HONORARY EDITOR:

Shri S. Appu Rao, B.A., B.L., Advocate (Madras).

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1977

Calcutta High Court

**AIR 1977 CALCUTTA 1
FULL BENCH**

**SANKAR PRASAD MITRA, C. J.,
SABYASACHI MUKHARJI AND
S. K. DATTA, JJ.**

Prayag Deb Ganguly, Plaintiff v. Sm.
Rama Roy, Defendant.

Suit No. 173 of 1973, D/- 25-8-1976.

(A) Civil P. C. (1908), Order 37 — Suit filed on Negotiable Instrument for value below Rs. 5,000/- — High Court has jurisdiction to entertain. ((1) Presidency Small Cause Courts Act (1882), Section 18; (2) Letters Patent (Cal), Cl. 12; (3) Calcutta City Civil Court Act (21 of 1953), S. 5 (4) and (5) read with First Schedule, Item 17). Suit No. 1459 of 1966, D/- 7-12-1971 (Cal), Overruled.

Notwithstanding the provisions of Sections 5 (4) and 5 (5) read with Item 17 of First Schedule of Calcutta City Civil Court Act, there is no bar to the entertainment of a suit on a Negotiable Instrument which has been instituted under Order 37 of the Civil P. C. for recovery of a sum of Rs. 5,000/- by the High Court in its original side under Order 37 of the Civil P. C. and passing of a decree in the suit. Suit No. 1459 of 1966, D/- 7-12-1971 (Cal), Overruled; AIR 1960 SC 936 and AIR 1929 Cal 560, Ref.; AIR 1917 Cal 657, Approved; AIR 1969 SC 823 and AIR 1918 Low Bur 135 (1), Ref. (Para 16)

The combined effect of clause 12 of Letters Patent (Cal), Section 18 of the Presidency Small Cause Courts Act and Section 5 (4) and (5) read with item No. 17 of the First Schedule of the Calcutta City Civil Court Act is that both the Small Cause Court and the High Court have

jurisdiction to try suits above one hundred rupees and upto five thousand rupees, whereas the City Civil Court shall try suits above five thousand rupees and upto fifty thousand rupees. (Para 8)

Cases Referred: Chronological Paras
(1971) Suit No. 1459 of 1966, D/- 7-12-1971 (Cal) 2

AIR 1969 SC 823 = (1969) 3 SCR 92 15

AIR 1960 SC 936 = (1960) 3 SCR 578 3

AIR 1929 Cal 560 = 33 Cal WN 943 11

AIR 1918 Low Bur 135 (1) = 10 Bur LT 14

AIR 1917 Cal 657 = ILR 43 Cal 148 13

S. Pal with P. Choudhuri, for Plaintiff.

SANKAR PRASAD MITRA, C. J. — The question that arises in this Reference is whether the High Court has jurisdiction to entertain a suit on a Negotiable Instrument which has been instituted under Order XXXVII of the Code of Civil Procedure for the recovery of a sum below Rs. 5,000/- in view of the provisions of the Calcutta City Civil Court Act, 1953.

2. In Suit No. 1459 of 1966 (Cal), (Kamalabala Mahapatra v. Golam Khan), Mr. Justice Ghose has held that this Court has no jurisdiction to try and determine a suit under Order XXXVII of the Code of Civil Procedure when the value of the suit is below Rs. 5,000/-. This decision was given on 7-12-1971.

3. The present suit being Suit No. 173 of 1973, (Prayag Deb Ganguly v. Sm. Rama Roy) is a suit under O. XXXVII of the Code for recovery of a sum of Rs. 3,235/-. It came up for hearing before Mr. Justice Salil Kumar Roy Chowdhury on 19th September, 1973. Mr. Justice Roy Chowdhury was inclined to pass a decree but in view of the earlier decision of Mr. Justice Ghose he has referred

the matter to a larger Bench. Mr. Justice Roy Chowdhury has relied on the Supreme Court's observations in *Mahadeolal Kanodia v. Administrator General of West Bengal*, AIR 1960 SC 936 for the purpose of making this Reference. The observations are as follows:—

"If one Division Bench of a High Court is unable to distinguish a previous decision of another Division Bench, and holding the view that the earlier decision is wrong itself gives effect to that view the result would be utter confusion. The position would be equally bad where a Judge sitting singly in the High Court is of opinion that the previous decision of another single Judge on a question of law is wrong and gives effect to that view instead of referring the matter to a larger Bench. In such a case lawyers would not know how to advise their clients and all Courts subordinate to the High Court would find themselves in an embarrassing position of having to choose between dissident judgments of their own High Court."

4. In this Reference we have to consider the relevant provisions of:

(a) Clause 12 of the Letters Patent of 1865,

(b) Section 18 of the Presidency Small Cause Courts Act, 1882 as amended upto-date.

(c) Section 5 (4) and (5) of the City Civil Court Act, 1953, read with the 17th item in the First Schedule thereof.

5. Clause 12 of the Letters Patent lays down that the High Court shall not have original jurisdiction in cases falling within the jurisdiction of the Small Cause Court at Calcutta, in which the debt or damage, or value of the property sued for, does not exceed one hundred rupees.

6. Section 18 of the Presidency Small Cause Courts Act, 1882 prescribes that the Small Cause Court shall have jurisdiction to try all suits of civil nature when the amount or value of the subject-matter does not exceed five thousand rupees.

7. Sub-section (4) of Section 5 of the City Civil Court Act, 1953 lays down that the City Civil Court shall not have jurisdiction to try suits and proceedings of the description specified in the First Schedule. Item No. 17 in the First Schedule is: "Suits and proceedings triable by the Small Cause Court." Sub-section (5) of Section 5 of the City Civil Court Act, 1953 says that all suits and proceedings which are not triable by the City Civil

Court shall continue to be triable by the High Court or the Small Cause Court or any other Court, tribunal or authority, as the case may be as hereinbefore. Under this Act the City Civil Court has been given exclusive jurisdiction to try suits not exceeding fifty thousand rupees in value which were previously triable by the High Court in its original side.

8. The combined effect of the above provisions is that both the Small Cause Court and the High Court have jurisdiction to try suits above one hundred rupees and upto five thousand rupees, whereas the City Civil Court shall try suits above five thousand rupees and upto fifty thousand rupees.

9. The question that arises for our decision in this reference is whether a suit under Order 37 of the Code can be instituted in the High Court when the same suit can be instituted in the Small Cause Court. In other words, whether a suit on a negotiable instrument above one hundred rupees and upto five thousand rupees which can be instituted in the Small Cause Court can also be instituted in the High Court under Order 37 of the Code. Order 37, it is well-known, is not applicable to the Small Cause Court at all.

10. The answer to the question is that there is a difference between pecuniary jurisdiction and the procedure for enforcement of that jurisdiction. Pecuniary jurisdiction has been conferred on this Court by Clause 12 of the Letters Patent as noted above read with the other provisions we have referred to. Order 37 is a manner or method of enforcing that jurisdiction. In this view of the matter we do not see any impediment in the way of this Court entertaining a suit under Order 37 of the Code when a suit of the same value can be entertained by the Small Cause Court as well.

11. There is no direct authority on the subject, but it may be of some assistance to refer to some of the decided cases. In *Manmohan Kumar v. Abu Jafer*, AIR 1929 Cal 560, it was stated that where a suit was cognizable in the Small Cause Court and where it was instituted in the High Court the provisions of S. 22 of the Presidency Small Cause Courts Act were attracted. In cases governed by Section 22 no costs are allowable to the plaintiff unless the Judge who tries the suit certifies that it was one fit to be brought in the High Court. A party, having chosen to avail himself of O. 37 of the Code of Civil Procedure in a suit for the recovery of

a sum which is less than the amount mentioned in Section 22 (i. e., less than one thousand rupees), takes the risk of having no costs allowed to him unless he can induce the Judge to certify that it is a fit case to be brought in the High Court.

12. This decision shows that a suit under Order 37 could be entertained by the High Court even though the value of the suit was less than one thousand rupees except that the plaintiff could be deprived of costs.

13. In Mani Mohan Mondal v. Ram Ratan Mondal, ILR 43 Cal 148 at p. 152 = (AIR 1917 Cal 657) a Division Bench of this Court has said :

"The body of the Code (i. e., the Civil Procedure Code), is fundamental and is unalterable except by the Legislature; the rules are concerned with details and machinery and can be more readily altered. Thus, it will be found that the body of the Code creates jurisdiction while the rules indicate the mode in which it is to be exercised. It follows that the body of the Code is expressed in more general terms, but it has to be read in conjunction with the more particular provisions of the rules."

This is a decision which emphasises the point we have been making, namely, the distinction to be observed between the pecuniary jurisdiction and the machinery for enforcement of the jurisdiction.

14. That Order 37 is a procedural provision only has been made clear in *Wor Lee Lone v. A. Rahman*, AIR 1918 Low Bur 135 (1). A Division Bench of the Court has said :

"O. 37 lays down certain rules of procedure which are applicable only to the Chief Court, and such rules of procedure can only be applied after the plaint has been admitted. The rules do not in any way alter the nature of the suit, nor the jurisdiction of the Court. * * *"

15. We may also mention another point of relevance. In a suit under O. 37 the High Court alone has jurisdiction to pass a decree and jurisdiction depends not only on the right to entertain a suit but also to give the relief asked for. The Supreme Court in *Official Trustee, West Bengal v. Sachindra*, AIR 1969 SC 823 has said that before a Court can be held to have jurisdiction to decide a particular matter it must not only have jurisdiction to try the suit brought, but must also have the authority to pass the orders sought for. It is not sufficient that it has some jurisdiction in relation to the subject-

matter of the suit. Its jurisdiction must include the power to hear and decide the questions at issue, and the authority to hear and decide the particular controversy that has arisen between the parties.

16. For all the reasons aforesaid, we are of opinion that there is no bar to the entertainment of the present suit by the High Court in its original side under Order 37 of the Code and to the passing of a decree in the suit. We remit the matter with our opinion under Chapter 5, Rule 3 of the Original Side Rules to the learned Judge who made the report. Leave is given to the plaintiff to mention the matter before the learned Judge for early hearing. Costs of this reference would abide by the result of the suit.

SABYASACHI MUKHARJI, J.:— I agree.

S. K. DATTA, J.:— I agree.

Answer accordingly.

AIR 1977 CALCUTTA 3

R. BHATTACHARYA, J.

Kalipada Dinda and others, Petitioners v. Kartick Chandra Hait and others, Opposite Parties.

C. R. No. 4161 of 1969, D/- 16-9-1976.

(A) Civil Procedure Code (1908), Sections 115, 151, Order 41, Rule 23 — Revision application — Maintainability — Remand of case under Section 151 for fresh decision — Revision application against the remand order is maintainable.

A suit for declaration of title was dismissed by the trial Court which disbelieved the evidence. In appeal, the Court passed an order for remand for the trial Court to rehear the suit giving an opportunity to the parties to adduce further evidence. Against this order for remand, the defendants filed revision under Section 115. The preliminary objection was raised as to the maintainability of the revision application on the ground that appeal ought to have been filed against the order passed by the appellate Court below.

Held, that the trial Court decided the suit not on any preliminary point but on all issues framed considering the questions of law as raised before him and the evidence on record. Therefore, when the appellate Court sent back the case on remand for fresh decision on questions of law and fact, it cannot be an order of remand under Order 41, Rule 23. (Para 5)

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The order for remand was passed under the inherent powers under Section 151 and no appeal lies against that order. But a revision application can be filed before the High Court against such an order. AIR 1927 Pat 296 and AIR 1927 Cal 850, Rel. on. (Para 8)

(B) Civil Procedure Code (1908), Order 41, Rules 27, 28 — Additional evidence — Ground for allowing — Order of remand by appellate Court — Trial Court asked to rehear case after taking further evidence — Mere insufficiency of evidence is no ground for allowing additional evidence — Remand order held invalid.

In a suit for declaration of title the trial Court disbelieved the evidence and dismissed the suit. The Court in appeal passed order for remand for the trial Court to rehear the suit giving an opportunity to the parties to adduce further evidence.

Held, that, from the record it appears that both the parties had sufficient opportunity to prove their cases by evidence in the trial Court. The Court below allowed the parties while remanding the case to adduce further evidence on the ground that there was insufficient evidence. Mere insufficiency of evidence is no ground for allowing any party to adduce further evidence, when the dispute is lying in appeal. If there is insufficient evidence for any party to prove his case, he will suffer. For getting order to adduce further evidence, a party must come under a provision of law. AIR 1931 PC 143, Rel. on.

(Para 10)

Cases Referred : Chronological Paras

AIR 1931 PC 143 = 132 Ind Cas 721 = 35 Cal WN 786 10

AIR 1927 Cal 850 = 103 Ind Cas 864 6

AIR 1927 Pat 296 = 103 Ind Cas 723 6

Susanta Kumar Kundu, for Petitioner;
Basanta Kumar Panda, Santimoy Panda,
for Opposite Party No. 1.

ORDER :— This revisional application is by the defendants Nos. 1 to 7 of the original suit against the decision of a Subordinate Judge, Midnapur in a first appeal remanding the case back to the trial Court of the Munsif for the rehearing of the suit.

2. The opposite party-plaintiff Kartick Hait brought the original suit against several defendants for declaration of his title to some of the properties mentioned in the plaint and for partition of the suit properties, separate possession, mesne profits and permanent injunction. Of the defendants only the petitioners before

this Court filed written statements and contested the suit challenging the allegations of the plaintiff. The trial Court on consideration of the evidence disbelieved the evidence adduced on the side of the plaintiff and rejected the story that the plaintiff had any title to the disputed lands as alleged and held the contesting defendants' case as acceptable. The learned Munsif dismissed the suit. In the appeal taken by the plaintiff, the learned Subordinate Judge found insufficient evidence on the question of a previous partition set up by the defendants for any decision although he did not consider all facts and circumstances. According to him, there was no decision on issue No. 6 and the trial Court came to a decision on the question of title and possession without any issue in that respect. The learned Subordinate Judge passed order for remand for the learned Munsif to rehear the suit giving an opportunity to the parties to adduce further evidence. Against this order for remand, the present application under Section 115 of the Code of Civil Procedure has been filed.

3. I have heard Mr. Kundu, the learned Advocate for the petitioner and Mr. Panda for the plaintiff-opposite party.

4. Mr. Panda on behalf of the opposite party has raised a preliminary objection that the present revisional application is not maintainable and that an appeal ought to have been filed against the decree passed by the appellate Court below.

5. There is the provision for remand of a case by the appellate Court in Order 41, Rule 23 of the Code of Civil Procedure. When a suit is disposed of on a preliminary point and the decree is reversed in appeal the appellate Court may by order remand the case to the lower Court for determination of the suit as indicated in that Rule 23. Against that order of remand an appeal lies according to Rule 1 (u) of Order 43 of the Code. In this connection Mr. Panda has argued that in the present case the First Appellate Court drew up a formal decree and the same was signed. According to him a second appeal ought to have been filed in this Court. I cannot accept this contention. First of all, the order of remand passed by the appellate Court below was not under Rule 23 of the C. P. Code. The trial Court decided the suit not on any preliminary point but on all issues framed considering the questions of law as raised before him and the evidence on record. Therefore, when the appellate

Court sent back the case on remand for fresh decision on questions of law and fact, it cannot be an order of remand under Order 41, Rule 23.

6. Next, Rule 23 provides for an order of remand and not for any decree. "Decree" has been defined in Section 2 (2) of the Code of Civil Procedure. A decree is the formal expression of the conclusive determination of the rights of the litigants. In the appeal below there was no determination of the rights of the parties but the matter was simply sent down on remand for decision of the suit on merit. There was no occasion for the appeal Court below for drawing up of any decree. There was simply an order for remand that was passed. When the decree was formally drawn up, though not necessary, it was of no effect. Therefore, there can be no question of filing any second appeal. The decision of a Division Bench of the Patna High Court in Chandrika Prosad Singh v. Mithu Rai reported in 103 Ind Cas 722 (723) = (AIR 1927 Pat 296) may be mentioned. It was held:

"Order XLI, Rule 23, operates only when one of the preliminary issues is tried by the Court of first instance and that Court disposes of the suit on that ground and says he is not going to try the suit on any other issues."

Further the judgment says:

"A decree is defined in the Civil Procedure Code as the formal expression of the adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. Now, in this case the learned Judge in the Court below has not determined the rights of the parties either conclusively or otherwise or at all. All that he has done is to hold that the rights of the parties cannot be decided until certain important matters are decided. He has, therefore, left them very much at large. In my opinion, therefore, the order of the learned District Judge cannot be looked upon as a decree within the meaning of that term as used in Section 2 of the Code of Civil Procedure." The Division Bench decision of our Court should also be noticed in the case of Banika Behari Deb v. Birendra Nath Dutta reported in 103 Ind Cas 864 = (AIR 1927 Cal 850). Regarding Order 41, Rule 23 we find in the judgment:

"It is abundantly clear that the order of remand as made was passed without

jurisdiction, because the learned Munsif who tried the case did not determine the case upon a preliminary issue, but heard and decided the suit upon the merits. The condition precedent, therefore, to the exercise of the power of remand with which the Court is invested under Order XLI, Rule 23, was not fulfilled, and the order of remand as made could not validly have been passed under Rule 23, and was ultra vires the Court that passed it. The result is that no appeal lies from the order as made, for, under O. XLIII, R. 1 (u) an appeal only lies if the order of remand has been passed under O. XLI, R. 23."

As to the character of the order for remand the decision goes on to say:

"Again, the order for remand as made, in my opinion, did not itself finally determine all or any of the matters in controversy between the parties, and it was not a decree within Section 2 of the Code of Civil Procedure; therefore no appeal lay from this order of remand as being a decree within Section 100 of the Civil Procedure Code."

7. There is another provision in Order 41, Rule 25 of the C. P. Code for limited order for remand. According to this Rule specific issues are sent to the Court below for a finding keeping the appeal in file of the appellate Court for decision. On receiving the finding from the lower Court, the appellate Court is to determine the appeal under Rule 26 of Order 41. Against the order passed under Rule 26 for remitting certain issue or issues for decision, no appeal lies. The present order for remand under my consideration does not come under the purview of Order 41, Rule 26 of the C. P. Code.

8. An order for remand may also be passed by the appellate Court under its inherent power under Section 151 of the Code of Civil Procedure and in that case no appeal lies against that order. Of course, a revisional application may be filed before the High Court against such an order passed by the District Judge or the Subordinate Judge in the first appeal. There can be no doubt that the order for remand passed by the learned Subordinate Judge in the present case was one under Section 151 of the C. P. Code. Before passing the order for remand, the appellate Court below said, "In the circumstances to meet the ends of justice, I deem it a very fit case to be remanded to the learned Munsif for a rehearing in the light of the observations made above and

according to law." In this view of the matter, no appeal lay against the order for remand passed under the inherent power for ends of justice as felt by the learned Subordinate Judge. The present application under Section 115 of the Code of Civil Procedure against that order is quite legal. The preliminary objection as to the maintainability of the revisional application against the order for remand is rejected.

9. The main grievance of the petitioners is that the appellate Court below acted without jurisdiction or acted illegally with material irregularity by not deciding the appeal on merits on consideration of the findings and judgment of the trial Court and by sending the case for fresh hearing giving an opportunity to the plaintiff for adducing further evidence to make up the deficiency in his case. In this connection it has been contended that the learned Subordinate Judge failed to notice that issue No. 6 was decided by the trial Court. In the judgment of the trial Court the issue No. 6 has been mentioned with other ones and it has been made clear that the learned Munsif considered issues Nos. 6 and 7 together and gave his decisions thereon. The learned Court below perhaps missed the point in the judgment.

10. The learned Subordinate Judge says in his judgment that the trial Court without framing any issue found that the plaintiff had no title and possession in the suit land. It appears that several issues were framed in this suit. The plaintiff alleged his title and possession in the suit properties. The contesting defendants claim their title and possession and also referred to a former partition. Both the parties in this case knowing the cases of the adversaries led evidence to prove their own cases and to disprove the case of the opponent. One of the issues is "Is the kobala dated 16-7-1934 void, collusive and for no consideration?" This relates to the question of title. Moreover, it appears that the plaintiff brought in evidence several other deeds of conveyance to support his title and possession. It appears that both the parties attempted by producing evidence to prove their respective title and possession in the suit properties as alleged in their own pleadings. Although there was no specific issue mentioning title or possession but the issues were broad and general to embrace all the disputes between the parties. It appears also that the learned trial Court

focussed its attention to the evidence of title and possession adduced by the parties and their contentions. It was, therefore, not necessary for reconsideration by the trial Court of the suit on merit again after giving any opportunity to any party to lead further evidence. Such opportunity will give undue and improper chance to the parties to make up their weakness or deficiencies in the evidence after the discussion of the evidence by the trial Court in its judgment. The parties had sufficient opportunity to prove their cases by evidence. Moreover, in the first appeal by the plaintiff, there was no ground that the plaintiff had no opportunity to adduce evidence or that he was prevented from proving his title or possession being misled by the framing of issue. The appellate Court below should have decided the appeal on the evidence on record according to law. I do not think that in the facts and circumstances there was any valid reason to pass any order for remand as has been done in this case. The learned Court below allowed the parties while remanding case to adduce further evidence on the ground that there was insufficient evidence. Mere insufficiency of evidence is no ground for allowing any party to adduce further evidence when the dispute is lying in appeal. For additional evidence, we may consider O. 41, Rr. 27 and 28 of the C. P. Code. The present case does not come under those provisions. If there is insufficient evidence for any party to prove his case, he will suffer. For getting an order to adduce further evidence, a party must come under a provision of law. The Court must not act in such a way as to cause undue advantage against any party and contrary to law. Further evidence should not be allowed to be adduced by a litigant who has been unsuccessful in the lower Court to patch up the lacuna or the weakness in his case. This practice beyond law will result in manufactured evidence and abuses of the processes of Court. This principle of not allowing undue advantage to adduce further evidence has been indicated by the Privy Council in the case of Parsotim Thakur v. Lal Mohar Thakur reported in AIR 1931 PC 143 = 132 IC 721 = 35 Cal WN 786. Clearly, the appellate Court below illegally allowed parties to adduce further evidence in his remand order. Practically speaking, the learned Subordinate Judge refused to exercise his jurisdiction in the first appeal by sending back the case to the trial Court for rehearing and by not deciding

the appeal on evidence on record according to law. In any view, the learned Court below acted illegally and with material irregularity by passing the remand order as he did causing a grave error of law and an improper decision. It is liable to be set aside.

11. Hence, the revisional application succeeds and the Rule is hereby made absolute without any cost. The judgment with order for remand complained against is set aside and the learned appellate Court below shall dispose of the appeal in the light of this judgment and according to law. The appeal is long pending and it should be disposed of as expeditiously as possible.

12. Send down the records at once.
Revision allowed.

AIR 1977 CALCUTTA 7

N. C. MUKHERJI AND B. C. RAY, JJ.

Raipada Pramanik, Appellant v. The State of West Bengal, Respondent.

A. F. O. O. No. 319 of 1968, D/- 3-9-1976.

(A) Constitution of India, Art. 299 (1) — Applicability — Requirements of Article 299 (1) are mandatory — Contract not complying with the requirements is invalid. (Para 8)

(B) Evidence Act (1872), Section 106 — Authority to act on behalf of Government — Burden to prove — On whom lies.

The plaintiff in the instant case entered into an agreement with a Sub-Divisional Controller of Food and Supplies who executed it on behalf of the Governor of the State. A suit for money for work done was filed by the plaintiff against the State. The question was whether the Subdivisional Controller had authority to act on behalf of the Governor and on whom the onus to prove such authority lay.

Held that the evidence clearly proved that the Sub-Divisional Controller, Food and Supplies had been duly authorised to enter into the contract on behalf of the Governor by the District Magistrate. The plaintiff thus discharged the onus which lay upon him. (Para 11)

Section 106 clearly enjoins that when any fact is specially within the knowledge of any person the burden of proving that fact is upon him. The onus is, therefore, upon the defendant to prove by producing

the file containing the relevant orders, its plea that the Sub-Divisional Controller had no authority to enter into the agreement in question on behalf of the Government and, as such, the agreement was not in conformity with the mandatory requirements of Article 299 (1) of the Constitution. This case clearly falls within Illustration (b) to Section 106. The defendant has failed to prove its plea by producing the relevant papers which are in its custody and control and within its knowledge. Case law discussed. (Para 12)

Cases Referred: Chronological Paras

AIR 1967 SC 203 = (1966) 3 SCR 919 6, 7

AIR 1962 SC 110 = (1962) 1 SCR 827 6, 7

AIR 1962 SC 113 = (1962) 2 SCR 880

6, 7

AIR 1962 SC 779 = 1962 Supp (1) SCR 876 6, 7

AIR 1962 Pat 336 = ILR 41 Pat 292 (FB)

6

AIR 1961 Cal 663 = 63 Cal WN 907 7

AIR 1953 SC 225 = 1953 SCR 758 5, 12

(1950) 1 All ER 538 = (1950) 2 KB 16 6

(1948) 2 All ER 767 = (1949) 1 KB 227

5, 9

AIR 1929 PC 95 = 1929 All LJ 261 12

AIR 1917 PC 6 = 44 Ind App 98 12

R. C. Deb, S. C. Mitter and S. P. Roychowdhury, for Appellant; B. K. Roychowdhury and P. N. Palit, for Respondent.

B. C. RAY, J.:— This appeal by the plaintiff appellant is directed against the judgment and order passed in Title Suit No. 62 of 1966 and it arises out of a proceeding for passing a decree in terms of the award made by the Arbitrator and filed by him in Court.

2. The plaintiff appellant Raipada Pramanik was appointed a clearing and storing agent for C. I. Sheet, B. R. K. Coal and other relief materials for the area under the Subdivisional Controller, Food and Supplies, Krishnagar on the basis of a written agreement executed on 22nd of February, 1967 by him and the Subdivisional Controller, Food and Supplies, Krishnagar, Nadia on behalf of the Governor, State of West Bengal. In the said agreement it was stipulated that the petitioner will store the relief materials in his godown for which he will be paid commission at a certain rate mentioned therein. In Clause 21 of the said agreement it has been provided that either of the parties shall be at liberty to terminate the said agreement on giving one month's notice in writing of his intention to so terminate the agreement. In Clause 23 of the said agreement it has also been

provided that in the case of difference or dispute arising under the agreement the same shall be referred to two Arbitrators one to be nominated by the Government and other by the agent that is the plaintiff and an umpire to be appointed by the Arbitrators in writing before proceeding with the reference and the decision of the Arbitrators or the umpire as the case may be shall be final and conclusive and the provisions of the Indian Arbitration Act, 1940 and rules framed thereunder shall be deemed to apply to this contract. The State of West Bengal, the defendant neglected to pay the bills submitted by the plaintiff on account of the storage charges amounting to Rs. 52,108.13 paise in spite of repeated reminders. The plaintiff finding no other alternative had to appoint Sree Somnath Chatterji, Barrister-at-law, as his arbitrator in accordance with the provisions of Clause 23 of the said agreement and sent a notice dated 8th of January, 1962 to the Secretary, to the Government of West Bengal, Food and Supplies Department, District Magistrate and the Sub-Divisional Controller, Food and Supplies, Krishnagar, Nadia to nominate its arbitrator to settle the above disputes and differences which have arisen between them within 15 days after the service of the said notice. But in spite of the receipt of the said notice the defendant, that is, the State of West Bengal did not take any steps to nominate their arbitrator. As such in accordance with the provisions of Section 9 of the Indian Arbitration Act, the plaintiff appointed Sri Somnath Chatterji, Bar-at-law as the sole arbitrator for decision of the said dispute. The arbitrator served several notices upon the parties to the dispute and held several meetings. On 11th of August, 1962, the arbitrator made an award for a sum of Rs. 51,398.62 paise in full and final settlement of the dues of the plaintiff against the defendant under the said agreement and after due publication the said award was signed and sealed by the Arbitrator. The Arbitrator then filed this award in Court in compliance with the provisions of Section 14 of the Indian Arbitration Act. The petitioner filed an application under Section 17 of the Arbitration Act praying for passing a decree in terms of the said award. This was numbered as Title Suit No. 62 of 1966. The District Magistrate, Nadia, filed a written objection against the said award contending inter alia that the alleged agreement was not legally valid and binding upon the State of West Bengal as the

same was not executed in the manner provided under Article 299 of the Constitution of India inasmuch as Sri Narendranath Sarkar, the then Sub-Divisional Controller, Food and Supplies had no authority to enter into such a contract. The appointment of arbitrator by the petitioner was illegal as the same was not in accordance with the Clause 23 of the agreement and the alleged award filed by the arbitrator was a nullity. It was also contended that there was no difference or dispute regarding the claim between the plaintiff and the defendant and as such there had been no occasion for appointment of any arbitrator and the appointment of the sole arbitrator by the petitioner and award made by the sole arbitrator was without jurisdiction and so the same was liable to be set aside.

3. In the said suit the plaintiff examined two witnesses. P. W. 1 is the then Sub-Divisional Controller, Food and Supplies, Krishnagar, Nadia and P. W. 2, Sree Sailendranath Das, the then Head-Clerk, in the Office of the Sub-Divisional Controller, Food and Supplies and Relief, Krishnagar, Nadia. The defendant, on the other hand, examined one witness Deb Kumar Ganguly who was an employee in the Office of the Sub-Divisional Controller, Food and Supplies, Krishnagar from 1959 to 1965.

4. On April 19, 1967, the Additional Subordinate Judge, Nadia held that the onus was on the plaintiff to prove that the Sub-Divisional Controller, Food and Supplies, Krishnagar, Nadia had no (sic) authority to enter into any contract on behalf of the Government in respect of relief materials. It was also held that from the printed form of agreement it was clear that the Sub-Divisional Controller had no authority. The agreement (Exhibit 3) was thus unauthorised and as such it could not bind the defendant. It was held that the plaintiff was not ever paid in pursuance of the said agreement and the payment made, if any, could not be said to have been made with the sanction of the Government. It was therefore held that the agreement (Exhibit 3) was not legal and valid and as such the suit at the instance of the plaintiff was held not maintainable. Accordingly, the suit was dismissed. It is against this judgment and order this appeal has been filed.

5. Mr. Rathindra Chandra Deb, learned Counsel appearing on behalf of the appellant has contended that the onus was upon the defendant to show that the

Sub-Divisional Controller, Food and Supplies, Krishnagar had not been empowered by the District Magistrate, Nadia to execute the agreement on behalf of the Governor, State of West Bengal. It has also been submitted that the defendant wanted the Court to believe the fact that the Sub-Divisional Controller, Food and Supplies was not empowered by the District Magistrate and as such it was for the defendant to prove the same. It has also been submitted that the relevant file containing the order and also the agreements are in the custody of the defendant and the same being not produced the presumption for withholding the evidence would go against the defendant. It has been next contended by Mr. Deb that whether the District Magistrate has empowered the Sub-Divisional Controller, Food and Supplies, Krishnagar, to execute the agreement in respect of relief matters is within the special knowledge of the defendant and as such the onus is upon the defendant to prove the same by producing the relevant documents. The defendant has not discharged the onus and the defence plea should be held to have not been proved. In this connection, Mr. Deb referred to a decision reported in AIR 1953 SC 225. Mr. Deb has lastly contended that the judgment of the Court below was not a proper judgment inasmuch as it did not consider and assess properly the evidence on record which clearly proved that the Sub-Divisional Controller, Food and Supplies was duly empowered and had authority to execute the agreement on behalf of the Governor, State of West Bengal and as such the agreement was a valid agreement. It was also contended by Mr. Deb that the plaintiff had stored the relief materials on the basis of the said agreement executed by the Sub-Divisional Controller believing in good faith that the same was duly made on behalf of the Governor, State of West Bengal. The State of West Bengal also has enjoyed the benefit of the said agreement and as such the plaintiff is entitled to get the relief claimed on the basis of the said agreement and the defendant cannot challenge the same. In this connection Mr. Deb referred to two decisions reported in 1948 (2) All ER 767 and 1950 (1) All ER 538.

6. Mr. Birendra Kumar Roy Chowdhury, learned Advocate appearing on behalf of the respondent has, on the other hand, submitted that the agreement was not in compliance with the provisions of Article 299 (1) of the Constitution and as such it was a void contract being made

by a person not authorised and so the suit for a decree in terms of the award of the arbitrator was not maintainable. In this connection Mr. Roy Chowdhury mentioned several decisions reported in AIR 1962 SC 110, AIR 1962 SC 113, AIR 1962 SC 779, AIR 1962 Pat 336 (FB) and AIR 1967 SC 203. Mr. Roy Chowdhury further submitted that the Sub-Divisional Controller, Food and Supplies, Krishnagar, Nadia, was not empowered by the District Magistrate, Nadia to execute any agreement on behalf of the Governor, State of West Bengal in regard to storage of relief materials and as there was no order giving the officer such authority there was no question of producing any document before the Court and no adverse inference for non production of any document can be drawn against the defendant. Mr. Roy Chowdhury also submitted that the onus was on the plaintiff to prove that the agreement was duly executed, that is, the Sub-Divisional Controller, had authority to execute the said agreement on behalf of the Governor, State of West Bengal. The burden of proof lies on the plaintiff under Section 101 of the Evidence Act and the plaintiff having failed to discharge the onus the Court below rightly held that the agreement was not a legal and valid agreement.

7. The suit out of which this appeal has arisen was decided on a preliminary point i.e. whether the suit was maintainable. It was held by the Court below that the suit was not maintainable and as such the suit was dismissed without entering into the merits of the other issues raised in the said suit. The only question, therefore, that poses itself for decision in this appeal is whether the agreement (Exhibit 3) executed by the plaintiff and the Sub-Divisional Controller, Food and Supplies, Krishnagar, Nadia is a valid agreement: In other words if the Sub-Divisional Controller had been duly authorised by the District Magistrate, Nadia to execute the said agreement on behalf of the Governor, State of West Bengal. It is proper to set out hereunder the relevant provisions of Article 299 (1) of the Constitution:—

"All contracts made in the exercise of the executive power of the Union or of a State shall be expressed to be made by the President, or by the Governor of the State, as the case may be, and all such contracts and all assurances of property made in the exercise of that power shall be executed on behalf of the President or

the Governor by such persons and in such manner as he may direct or authorise."

The said provision is almost in pari materia with the provisions of Section 175 (3) of the Government of India Act, 1935. In 63 Cal WN 907 = (AIR 1961 Cal 663), *Province of West Bengal v. Mohonlal Jain* it has been observed that under Sec. 175 (3) of the Government of India, Act, 1935 any contract to be made in the exercise of the executive authority of the province should be expressed to be made by the Governor of the Province and should be executed on behalf of the Governor of the Province and further should be executed on behalf of the Governor by such person and in such manner as might be directed or authorised by him. A contract not made in accordance with the above statutory requirement has been subsequently ratified by the Government or by any appropriate authority on its behalf if clearly proved by evidence would make the contract binding on the Government. In AIR 1962 SC 110, *State of Bihar v. M/s. Karamchand Thappar Ltd.* it has been observed that a contract in order to be a valid contract under Section 175 (3) of the Government of India Act, 1935 must satisfy three conditions— (1) it must be expressed to be made by the Governor of the Province, (2) it must be executed and (3) the execution should be by such persons and in such a manner as the Governor might direct or authorise. It has also been observed that the Section does not prescribe any particular mode in which the authority must be conferred. Normally such conferment will be by notification in the official gazette, but there is nothing in the Section itself to preclude authorisation being conferred ad hoc on any person and when that is established the requirements of that Section must be held to be satisfied. The same decision has been followed by the Supreme Court in AIR 1962 SC 113, *Bhikraj v. Union of India* as well as in AIR 1962 SC 779, *State of West Bengal v. B. K. Mondal*. In the last case (AIR 1962 SC 779), *State of West Bengal v. B. K. Mondal* it has been observed by the Supreme Court that the provision is made in public interest and in enacting the provision of Sec 175 (3) the Parliament intended that the State should not be burdened with a liability based on unauthorised contracts and the plain object of the provision therefore is to save the State from spurious claims made on the strength of such unauthorised contracts. Failure to comply with the mandatory provisions of the Section

makes the contract invalid. In AIR 1967 SC 203, *K. P. Chowdhury v. State of Madhya Pradesh* it has been observed by the Supreme Court that in view of Article 299 (1) of the Constitution there can be no implied contract between the Government and another person, the reason being that if such an implied contract between the Government and another persons was allowed, they would in effect make Article 299 (1) useless, for then a person who had a contract with Government which was not executed at all in the manner provided in Article 299 (1) could get away by saying that an implied contract may be inferred by the facts and circumstances of a particular case. This is, of course, not to say that if there is a valid contract as envisaged by Article 299 (1), there may not be implications arising out of such a contract. Further, if the contract between the Governor and another person is not in compliance with the Article 299 (1), it would be no contract at all and could not be enforced either by the Government or by other person as a contract.

8. Thus it is now well-settled that a contract executed on behalf of the Governor, State of West Bengal in order to be a legal and valid contract must comply with the mandatory requirements of Article 299 (1) of the Constitution.

9. In 1948 (2) All ER 767, *Robertson v. Minister of Pensions* the fact in short was that by the Pensions (Navy, Army, Air Force and Auxiliary Services) Transfer of Power Order, 1939 (made under the Pensions (Navy, Army, Air Force and Mercantile Marine) Act, 1939, Section 1) the entire administration of disablement claims in respect of military service after September 2, 1939, was transferred to the Minister of Pensions. Mr. Robertson being injured in an accident while on military service was examined by a Medical Board and was found unfit for general service and he was graded in category B. He wrote to the War Office requesting to settle the question of attributability regarding his disability. The War Office by letter intimated him that his disability was accepted as attributable to military service without any consultation with the Ministry of Pensions. On the faith of that assurance the claimant did not take any further steps to obtain independent medical opinion. The question was whether this assurance as contained in the letter of War Office was binding on the Minister

of Pensions. It was held that his claim to attributability would be dealt with by or through the War Office. If the War Office in dealing with this matter takes on itself to assume authority on this matter with which he is concerned, the claimant is entitled to rely on it having the authority which it assumes. The department itself is clearly bound and as it is an agent of the Crown the Crown is also bound by it. In 1950 All ER 538 it was held that whenever Government Officers, in their dealings with the subject, take on themselves to assume authority in a matter with which he is concerned, the subject is entitled to rely on their having the authority which they assume. These decisions, however, have no application to the case of agreement made not in compliance with the requirements provided in Article 299 (1) of the Constitution of India in view of the decisions of the Supreme Court mentioned before.

10. It is evident from the agreement (Exhibit 3) that the said agreement was made in the revised model form for clearing and storing agreement and the same has been signed by the Sub-Divisional Controller, Food and Supplies, Krishnagar, Nadia, for and on behalf of the Governor of the Province of West Bengal being authorised by the District Magistrate Nadia at Krishnagar. Thus from the agreement itself it is clear that the agreement was made in the proper form kept by the District Magistrate, Nadia and the same was signed by the Sub-Divisional Controller, Food and Supplies, Krishnagar, Nadia.

11. The plaintiff has examined the Sub-Divisional Controller, Food and Supplies, Sri Narendra Nath Sarkar, who executed the said agreement as well as the Head Clerk in the Office of the Sub-Divisional Controller, Sree Sailendra Nath Das in order to prove that the Sub-Divisional Controller had authority to execute the agreement on behalf of the State of West Bengal. P. W. 1 Narendra Nath Sarkar stated in examination-in-chief that he signed the agreement (Exhibit 3) dated 22nd of February, 1957 on behalf of the Government of West Bengal. He denied that he had no authority to sign the agreement on behalf of the Government. He also stated that all such agreements were signed by him. In cross-examination he stated that he had authority to sign the agreement on behalf of the Government. He had written authority to sign the agreement on behalf of the Government.

He also denied the suggestion that the Sub-Divisional Controller was not authorised. He also stated that it was not a fact that he assumed his authority and signed on behalf of the Government of West Bengal. Usually Office Clerks place the agreement for his signature thereon. He also stated that it was not his concern to know if the Sub-Divisional Controller had authority. P. W. 2, Sree Sailendra Nath Das, who was the Head Clerk in the Office of the Sub-Divisional Controller, Food and Supplies and Relief, Krishnagar at that time stated that so far as he remembered the District Magistrate authorised the Sub-Divisional Controller to sign the contracts in relief matters. The letter of authority is in office. In cross-examination he stated that he saw the Collector's authority giving to Narendra Nath Sarkar in the latter part of 1956. D. W. 1, Deb Kumar Ganguly, who was an employee of the Office of the Sub-Divisional Controller, Food and Supplies stated in cross-examination that contracts in matters of food with storage agent used to be signed by the Sub-Divisional Controller, Food and Supplies. He used to sign in relief matters as well. The Court below has commented upon the deposition of P. W. 1 when he said that it was not his concern to know that the Sub-Divisional Controller had any authority. But the trial Court did not at all consider his specific statements in the cross-examination that he was duly authorised to sign the agreement on behalf of the Government. P. W. 2 has clearly stated that he saw the Collector's authority given to Sree Narendra Nath Sarkar in the latter part of 1956. D. W. 1 also stated in his cross-examination that the Sub-Divisional Controller, Food and Supplies, used to sign in relief matters as well. Thus the evidences clearly proved that the Sub-Divisional Controller, Food and Supplies had been duly authorised to enter into the contract on behalf of the Governor of West Bengal by the District Magistrate, Nadia at Krishnagar. The plaintiff thus discharged the onus which lay upon him.

12. The defendant in the written objection specifically pleaded that the Sub-Divisional Controller was not authorised by the District Magistrate, Nadia to sign the agreement in regard to relief matters on behalf of the Governor, State of West Bengal. In this case admittedly no notification empowering the Sub-Divisional Controller, Food and Supplies, Krishnagar to execute agreement on behalf of the Governor, State of West Bengal

by the District Magistrate, Nadia has been published in the Official Gazette. The defence plea is that the Sub-Divisional Controller has authority to execute agreement on behalf of the Governor in respect of matters relating to Food and Supplies Department but he had no authority to execute any agreement in relief matters. Sub-Divisional Controller, Food and Supplies, Krishnagar, was thus given such authority by order made by the District Magistrate, Nadia. The said order is in the office of the Sub-Divisional Controller, Food and Supplies, Krishnagar as is evident from the depositions of the witnesses P. W. 2 and D. W. 1 who were the employees in the office of the Sub-Divisional Controller, Food and Supplies, Nadia. It is neither feasible nor possible for the plaintiff to know of the said order and to get copy of the same and to produce it before the Court below. The file wherein the said order is kept is lying under the custody and control of the defendant respondent. Section 106 of the Indian Evidence Act, 1872 (Act 1 of 1872) clearly enjoins that when any fact is specially within the knowledge of any person the burden of proving that fact is upon him. The onus is, therefore, upon the defendant to prove by producing the file containing the relevant orders, its plea that the Sub-Divisional Controller, Food and Supplies, Krishnagar, Nadia had no authority to enter into the agreement in question for storage of relief materials with the plaintiff on behalf of the Government and as such the agreement was not in conformity with the mandatory requirements of Article 299 (1) of the Constitution. This case clearly falls within Illustration (b) to Section 106 of the said Act. The defendant has failed to prove its plea by producing the relevant papers which are in its custody and control and within its knowledge. In AIR 1917 PC 6, *Murugesam Pillai v. G. Sambandha Pandara Sannadhi* it has been observed by their Lordships of the Privy Council:—

"A practice has grown up in Indian procedure of those in possession of important documents or information lying by, trusting to the abstract doctrine of the onus of proof, and failing, accordingly, to furnish to the Courts the best material for its decision. With regard to the third parties this may be right enough — they have no responsibility for the conduct of the suit; but with regard to the parties to the suit it is in their Lordships' opinion an inversion of sound practice for those

desiring to rely upon a certain state of facts to withhold from the Court the written evidence in their possession which would throw light upon the proposition."

This view was reiterated in AIR 1929 PC 95, *Rameswar Singh v. Bajitlal Pathak*. These decisions have been relied upon in AIR 1953 SC 225, *Hiralal v. Badkulal* and it had been held by the Supreme Court that in the suit for recovery of amount due on the basis of adjustment of accounts defendant having possession of account books kept by him and from which balance could be ascertained should produce them before the Court. He cannot be heard to say, relying upon the abstract doctrine of onus of proof, that it was no part of his duty to produce them unless he was called upon to do so.

13. The contention that the judgment and order is not appealable and this appeal is incompetent is not sustainable. The order is one coming within Sec. 39 of the Arbitration Act and as such this appeal is legally competent and so valid.

14. In the premises aforesaid the contentions made on behalf of the appellant succeed. We hold that the Sub-Divisional Controller, Food and Supplies, Krishnagar, Nadia had been authorised duly by the District Magistrate, Nadia to sign the agreement on behalf of the Governor, State of West Bengal and as such the agreement (Exhibit 3) executed by him is in due compliance with the provisions of Article 299 (1) of the Constitution and so it is a legal and valid agreement binding upon the defendant. We, therefore, allow the appeal, set aside the order of the Additional Subordinate Judge directing him to decide the suit on merits with regard to other issues framed in the said suit. In the circumstances of the case there will, however, be no order as to costs. Let the records be sent down to the Court below immediately and the Court below is directed to dispose of the suit as expeditiously as possible.

N. C. MUKHERJI, J. :— I agree.

Appeal allowed.

AIR 1977 CALCUTTA 12

N. C. MUKHERJI AND B. C. RAY, JJ.

Haripore Farming Syndicate Ltd.,
Petitioners v. Union of India, Respondent.

C. R. No. 1246 of 1974, D/- 26-8-1976.

(A) Requisitioned Land (Continuance
of Powers) Act (1947), Section 5 (1) —

JT/KT/D326/76/RSV/WNG

Defence of India Act (1939), Section 19 (1) (b) — Powers of arbitrator — Necessary parties to valuation proceedings — Compensation for acquired land — Collector making award in name of recorded tenants — Petitioners also claiming compensation for the same land — Arbitrator appointed — Arbitrator ordering apportionment of compensation — In valuation proceedings, Government challenging title of petitioners — Held, that Government was necessary and proper party and, Arbitrator appointed under Section 19 (1) (b) of Defence of India Act had jurisdiction to decide title of petitioners.

The Collector made assessment of compensation in respect of the acquisition of certain plots of land in the name of recorded tenants. The present petitioners, when they came to know of the said assessment of compensation made in the name of wrong persons, applied to the Collector for reference to arbitration for determination and apportionment of compensation for the acquisition of the land. Arbitrator was appointed under Section 19 (1) (b) of the Defence of India Act, for determination of the compensation. The Arbitrator apportioned the compensation between the petitioners and the recorded tenants. The Union of India, the opposite party in valuation case taken up thereafter by the arbitrator, filed a written statement that the reference proceedings were not maintainable before the title of the petitioners in the land was proved in a Civil Court. The arbitrator passed an order upholding the objection. The present revision application was filed by the petitioners contending that the Union of India was neither a necessary nor a proper party in the said case and that the Arbitrator had no jurisdiction to decide the title of the petitioners.

Held, that the Arbitrator has jurisdiction to decide the question of title of the petitioners to receive compensation in respect of the said plots of land acquired under Section 5 (1) of the Requisitioned Land (Continuance of Powers) Act, 1947 in the valuation case and the Government is a necessary and proper party in whose presence the decision has to be made inasmuch as it is the liability of the opposite party to pay compensation to the petitioners in whose name no award was made by the Collector and so the opposite party is vitally interested in the decision on the question of title of referring claimants to receive compensation. Case law discussed. (Para 12)

Cases Referred: Chronological Paras
 (1973) Civil Rule No. 167 of 1973, D/-
 10-8-1973 (Cal) 11
 AIR 1960 Cal 506 = 64 Cal WN 514 10
 AIR 1955 Cal 398 = 59 Cal WN 757 8
 AIR 1951 Cal 392 = 55 Cal WN 133 8
 (1940) 44 Cal WN 411 9

Amarendra Nath Gupta, for Petitioners; Manon Kumar Ghosh, for Respondent.

B. C. RAY, J.:— This revisional application under Article 227 of the Constitution of India is directed against the order No. 35 dated March 26, 1973 passed in Arbitration case No. 7 of 1971 (valuation) by the Arbitrator, 24 Parganas and Calcutta.

2. C. S. plots Nos. 6, 9, 10, 11, 43 and 86 of Mouza Hariपुर, P. S. Habra, District 24 Parganas with standing structures and trees thereon had been requisitioned under Rule 75-A of the Defence of India Rules made under the Defence of India Act, 1939 on or about April 25, 1942. The said plots of lands were subsequently acquired under Section 5 (1) of the Requisitioned Land (Continuance of Powers) Act, 1947 on October 16, 1947. The Collector of 24 Parganas (North) made assessment of compensation in respect of the acquisition of the said plots of land in the name of the recorded tenants. It has been stated by the petitioners that the Collector never communicated the said assessment of compensation in respect of the said acquisition of land to the petitioners, Messrs. Hariपुर Farmers Syndicate Limited. The petitioners, however, on coming to know of the said assessment of compensation made in the name of wrong persons applied to the Collector of 24 Parganas (North) for reference to arbitration for determination and apportionment of compensation payable for the acquisition of the said portions of the said lands with trees and structures thereon. The petitioners also stated therein that they took settlement of the said lands on the basis of three registered pattas dated 16-9-1937, 21-3-1938 and 12-5-1938 from the landlords and they had been in possession of the same in Mourashi Mokarari right. The petitioners after taking settlement constructed one dwelling house with brick walls, pucca floors and corrugated roofings and also constructed a kitchen and one cow-shed. Sri S. S. Ganguly was appointed Arbitrator by the Government under Section 19 (1) (b) of the Defence of India Act, 1939 for determination and apportionment of compensation in respect of the acquisition of the said plots of lands.

The apportionment case was registered as case No. 8 of 1971 (A) for the purpose of apportionment of the compensation and the arbitration case No. 7 of 1971 (Valuation) was started for the purpose of determination of the compensation. The apportionment case being Arbitration case No. 8 of 1971 (A) was heard *ex parte* first and the petitioners were held to have taken settlement of the said lands on the basis of the said three pattas (Exhibits 1 to 1 (b)) and as such in accordance with the terms of those deeds the petitioners were entitled to six annas share of compensation and landlord was entitled to ten annas share of the compensation to be awarded in respect of the said lands. Thereafter the valuation case being Arbitration case No. 7 of 1971 (V) was heard by the Arbitrator. In the said valuation case the Union of India, the opposite party filed a written statement stating *inter alia* that before having their title established in the Civil Court the referring claimants were not entitled to make the reference and initiation of those proceedings before the Arbitrator under the Defence of India Act, 1939 at the instance of the referring claimants was invalid. The learned Arbitrator after hearing objection of the Union of India, the opposite party, passed order No. 35 holding that the opposite party could challenge the title of referring claimants in the valuation case and the referring claimants should not get any award unless they would establish their title in the amount of compensation.

3. It is against this order this application in revision has been made and the instant rule and an interim order of stay of operation of the said order No. 35 was made pending the disposal of this Rule.

4. Mr. Amarendra Nath Gupta, learned Advocate appearing on behalf of the petitioners has submitted that in the apportionment case the Arbitrator after considering the registered pattas (Exhibits 1 to 1 (b)) has held that the petitioners have acquired tenancy right to the plots in question. The said finding is conclusive and cannot be questioned in the valuation case.

5. It has next been submitted by Mr. Gupta that in the apportionment case the Union of India is neither a necessary nor a proper party. It is only the persons who are the contesting claimants in the apportionment of the compensation that are necessary and proper parties. Hence, the decision arrived at by the learned Arbitra-

tor in the said apportionment case after considering the registered pattas is final and the Union of India is not competent to challenge the title of referring claimants to receive compensation in the valuation case on the mere plea that the said question was not decided in its presence. It has lastly been contended by Mr. Gupta that the same learned Arbitrator who decided the title of the referring claimants in the apportionment case being Arbitration case No. 8 of 1971 (A) was wholly in error in holding that in deciding the amount of compensation in the valuation case he has jurisdiction to decide the title of the referring claimants which is not the subject-matter of reference in the said valuation case. The impugned order, therefore, it has been submitted, is liable to be set aside.

6. Mr. Manon Kumar Ghosh, learned Advocate appearing on behalf of the opposite parties has submitted that the Collector did not assess compensation in the name of the referring claimants, that is, the petitioners, M/s. Haripur Farmer Syndicate Limited inasmuch as their names were not recorded in the finally published record of rights. The Union of India, the opposite party has challenged the title of the petitioners to get compensation in respect of the plots of the lands acquired and as such the State is vitally interested and also a necessary and proper party in whose presence the question of title of the petitioners to get compensation is required to be decided. It has also been submitted by Mr. Ghosh that in accordance with the provisions of Rule 6 of the Rules framed under Section 19 of the Defence of India Act, 1939 by the Government of Bengal the arbitrator has been empowered to exercise the like powers of a Civil Court and also to follow the like procedure followed by the Civil Court in exercise of its ordinary original civil jurisdiction under the Code of Civil Procedure. The Arbitrator, therefore, has jurisdiction to decide the question of title of the referring claimants in deciding the valuation case.

7. It appears that the Collector made the assessment of compensation in the name of the recorded tenants and not in the name of the petitioners, i.e. the referring claimants. The petitioners, however, made an application under Rule 5 of the Defence of India Rules, 1939 to the Collector for referring the case to arbitration for apportionment of the compensation claiming that they were entitled to the entire compensation as they were

tenants of the said lands and also praying for determination of the compensation in respect of the said lands acquired on the basis of the market value at the date of the requisition. The apportionment case being Arbitration case No. 8 of 1971 (V) was decided *ex parte* as the recorded tenants in whose names the award was made by the Collector did not appear at the time of hearing and petitioners were held to have title as tenants to the said lands and, therefore, to have been entitled to get 6 annas share of the compensation. In the said apportionment case the Government was not a party. In the valuation case being Arbitration case No. 7 of 1971 (valuation) the Union of India was a party and an objection was raised on its behalf as to the title of the petitioners to the compensation in respect of the lands acquired. Now the question is whether the Arbitrator is legally competent or, in other words, has jurisdiction to decide this question in the valuation case.

8. In a bench decision of this Court reported in AIR 1951 Cal 392, *Bharat Nath v. Ramswaroop*, the fact in short was that certain plots of lands were acquired under the Land Acquisition Act, 1894. On the objection of some of the parties in whose names the award was made by the Collector the collector made a reference both as regards apportionment and as regards valuation of the lands acquired. The question was whether the order of the Land Acquisition Judge in directing the hearing of the valuation case first was correct or not. It has been held by this Court that there can be no possible injury to either the Government or the tenant, opposite party if the apportionment case is taken first. The Government obviously is not interested in the matter of apportionment at all, but the tenants opposite parties are. In another Bench decision of this Court reported in AIR 1955 Cal 398, *Naresh Chandra Bose v. State of West Bengal*, it has been held that the Government is neither interested nor is a proper party in an apportionment reference or appeal therefrom in a Land Acquisition Proceeding, but only the contesting claimants are. It is only in valuation reference that the Government is a necessary party. In this case the Government did not question the title of the referring claimants to receive compensation.

9. In (1940) 44 Cal WN 411, *Province of Bengal v. Shyamapada Banerji* the fact in short was that 5 persons including one Kalipada Banerji claimed interest in cer-

tain premises acquired under the Land Acquisition Act. The Collector did not make any award in the name of Kalipada Banerji. Application for reference for both apportionment of compensation as well as determination of compensation payable was made to the Collector and the Collector referred the same to the Tribunal whereon apportionment case and valuation case were started. Both the apportionment and valuation cases were, however, heard together. In the said proceedings a compromise was made amongst the contesting claimants to the effect that Kalipada would get the enhanced amount of compensation and the compromise petitions to that effect were filed before the Tribunal who on the basis of the said compromise petitions passed an order in the apportionment case ordering that Kalipada or his representative Shyamapada would be entitled to the enhanced compensation. The said determination was, however, questioned in appeal by Government on the ground that the said decision should be made in the valuation case in presence of the Government inasmuch as the Government was the only person who would be affected by this determination. It has been held that the only person who will be affected by this determination is the appellant (the Government) because it will have to pay the enhanced amounts. In the determination of this question in view of the facts of the present case the persons interested are the respondent who claims the money and the appellant against whom the money is claimed. It has also been held that the appellant is only the person interested in opposing the respondent's claim and as such the respondent is bound to prove his right to claim the enhanced amounts in the presence of the appellant.

10. In 64 Cal WN 514 = (AIR 1960 Cal 506), *State of West Bengal v. Kisson Chand Kocher* the fact in short was that on diverse dates certain plots of land with structures and trees standing thereon were acquired. The Collector made joint awards in favour of the landlords and tenants. Against those awards of the Collector the landlords filed application for references disputing the amount of compensation as well as claiming the entire amount of compensation payable in respect of this acquisition for themselves to the exclusion of the tenants. The tenants did not file any application challenging the compensation awarded by the Collector. In the valuation reference the Calcutta Improvement Tribunal enhanced the

valuation of the lands acquired. The tenants having not filed any application challenging the Collector's valuation were not entitled to any part of the enhanced compensation allowed. In the apportionment case to which the State of West Bengal was not a party the Tribunal held that the landlords were entitled to 13 and 1/2 annas share of the compensation and the tenants to the remaining 2 and 1/2 annas share. Against the said order the tenants filed four appeals which were disposed of by one judgment holding that the landlords were entitled to get thirty times the annual rent as compensation and the Mitra tenants would get the entire balance. Against those decrees of this Court the landlords filed appeals to the Supreme Court which were decreed on compromise. The compromise was to the effect that the enhanced award together with all costs and interests would be paid to the landlords appellants. It has been held

"the principles that the State is not a necessary party in apportionment cases is not an absolute proposition of law, but it is a rule of convenience. There may be cases of apportionment where there is neither any question of enhancement of the valuation made by the Collector nor any question as to the liability of the State to pay enhanced compensation to anybody. If there is no challenge to the compensation determined by the Collector, nor any challenge to the liability of the State to pay the enhanced compensation to anybody, the State is certainly not an interested party in the apportionment cases, but where without any dispute as to the total amount of the compensation payable by the Collector, the liability of the State to pay compensation to any person is enlarged or enhanced, the State, seems to be a necessary party."

11. It has been urged on behalf of the petitioners that in a similar case being Civil Rule No. 167 of 1973 decided on 10-8-1973 it was held by this Court that the question whether the referring claimants had title to the acquired property was no part of the case referred to the Arbitrator and did not arise for consideration directly or incidentally for deciding the controversy in the valuation case. As such the Arbitrator had no jurisdiction to enter into the question of title even collaterally. Referring to this decision it was tried to be contended that the Arbitrator has no jurisdiction to decide the question of title of the referring

claimants in the valuation case. But it must not be lost sight of that in the aforesaid case the Collector made the award in the name of the referring claimants whereas in the present case the award was not made by the Collector in the name of the referring claimants, that is the petitioners, but in the name of the recorded tenants and the Union of India, the opposite party has questioned the title of the petitioners to get compensation in respect of the land acquired.

12. On a conspectus of the decisions mentioned before the conclusion is irresistible that the Arbitrator has jurisdiction to decide the question of title of the petitioners to receive compensation in respect of the said plots of land acquired under Section 5 (1) of the Requisitioned Land (Continuance of Powers) Act, 1947 in the valuation case and the Government is a necessary and proper party in whose presence the decision has to be made inasmuch as it is the liability of the opposite party to pay compensation to the petitioners in whose name no award was made by the Collector and so the opposite party is vitally interested in the decision on the question of title of referring claimants to receive compensation.

13. In view of the above findings it is not necessary to decide the question whether the Arbitrator being vested with the like powers of the Civil Court under Rule 6 of the Defence of India Rules, 1939 has jurisdiction to decide the question of title in valuation case like any other Civil Court.

14. For the reasons stated above we overrule all the contentions raised on behalf of the petitioners. The application, therefore, fails and the Rule is discharged. The order of the learned Arbitrator is a perfectly valid order and it is within jurisdiction. There will be no order as to costs. Let the records be sent down to the Arbitrator immediately.

N. C. MUKHERJI, J.:— I agree.

Revision dismissed.

AIR 1977 CALCUTTA 17**N. C. MUKHERJI AND E. C. RAY, JJ.**

Radheshyam Basak, Petitioner v. Santosh Kumar Basak and others, Opposite Parties.

Civil Revn. No. 906 of 1974, D/- 23-8-1976.

(A) Succession Act (1925), Ss. 372, 388 (1) and 265 — Contested succession certificate — M, a District Delegate within meaning of Section 265 and also officer empowered to exercise functions of District Judge under S. 388 (1), passing order describing himself as District Delegate — Held: Order not passed without jurisdiction — (Calcutta (West Bengal) Civil Rules and Orders, Vol. I, 1935, R. 317 (1)). AIR 1940 Cal 220, (1885) 13 Ind App 134, (1886) 14 Ind App 160 (PC) and AIR 1975 SC 915, Distinguished. (Paras 6, 10, 11)

(B) Calcutta High Court (Appellate Side) Rules, Chap. IV, Br. 7, 9 — No facts stated in application — Certified copy of impugned order which contained all facts, filed along with it — Affidavit not necessary. (Civil P. C. (1908), S. 115).

Where the petitioner in a petition under Section 115, Civil P. C., did not challenge any question of fact and the only challenge was with regard to jurisdiction of lower Court. Held: the petition though it was not supported by an affidavit was maintainable. (1908) 8 Cal LJ 308 and (1936) 40 Cal WN 1408, Rel. on. (Para 5)

Cases Referred: Chronological Paras
AIR 1975 SC 915 = (1975) 3 SCR 839 10
AIR 1974 Bom 281 = 1974 Mah LJ 674 9
AIR 1940 Cal 220 = ILR (1940) 1 Cal 358 6

(1936) 40 Cal WN 1408 5

(1908) 8 Cal LJ 303 4.5

(1905) 32 Cal 146 4.5

(1886) 14 Ind App 160 = ILR 11 Mad 26 8
(PC)

(1885) 13 Ind App 134 = ILR 9 All 191 7
(PC)

(1875) 1 Ch D 426 = 45 LJ Ch 373 10

Nirmal Chandra Chakraborty and Anil Bandhu Ray, for Petitioner; Amar Prasad Chakraborty, Milan Ch. Bhattacharya, and Benoy Kr. Banerjee, for Opposite Party No. 1.

N. C. MUKHERJI, J.:— This Rule was issued on an application under Section 115 of the Code of Civil Procedure and is directed against order No. 14 dated December 8, 1973 passed by Sri A. N. Mitra, District Delegate (6th Subordinate

Judge), Alipore, in Succession Certificate Case No. 119 of 1973.

2. The facts of the case, however, cannot be gathered from the application. On going through the order it is seen that the petitioner filed an application under Section 372 of the Indian Succession Act praying for the grant of Succession Certificate in respect of the securities and debts due to the estate of the deceased Gopal Chandra Basak. The opposite parties filed a petition of objection. As such the matter became contested. The learned Court below after examining the oral and documentary evidence on record allowed the objection raised by the opposite parties and consequently the petitioner's application for grant of succession certificate was struck off. Being aggrieved by the aforesaid order, the petitioner has come up before this Court.

3. Mr. Amar Prasad Chakraborty, learned Advocate appearing on behalf of the opposite parties, takes a preliminary point to the effect that the application is not maintainable as the same is not supported by an affidavit. Mr. Chakraborty submits that according to the Appellate Side Rules every application before it is filed in Court will have to be presented before the Commissioner of Affidavits who will report as to the sufficiency of stamp and before whom the petitioner or any one authorised on his behalf will have to swear an affidavit about the correctness of the facts stated in the petition. In this case the application is not supported by an affidavit. It was not presented before the Commissioner of Affidavits. There is an endorsement at the bottom of the application by the learned Advocate to the effect that no affidavit is necessary. Mr. Chakraborty further submits that it was not within the rights of the learned Advocate to say whether an affidavit is necessary or not and as such the granting of the certificate by the learned Advocate cannot improve the matter. As the application has not been filed in accordance with the Appellate Side Rules this application should be rejected summarily.

4. Mr. Nirmal Chandra Chakraborty, learned Advocate appearing on behalf of the petitioner submits that in this application no fact has been stated. It has simply been stated that being aggrieved by the order No. 14 dated 8th December 1973 passed by Shri A. N. Mitra, District Delegate (6th Subordinate Judge), Alipore, in Succession Certificate Case No. 119 of 1973, the petitioner begs to move on the following amongst other

grounds on which the application has been moved. The petitioner has along with the application filed the certified copy of the impugned order in which all the facts of the case have been narrated in details. In such circumstances it is not at all necessary for the petitioner to swear an affidavit. In support of his contention Mr. Chakraborty first refers to a decision reported in (1908) 8 Cal LJ 308, (Mt. Kariman v. A. H. Forbes). In this case an objection was raised on behalf of the opposite party that the Rule ought not to be heard, inasmuch as the petition upon which it had been obtained is not supported by any affidavit. It is a Bench decision and Mukherjee J., who delivered a separate judgment, held "I do not think that this contention ought to prevail, for, as pointed out by this Court in the case of Zamiran v. Fateh Ali, (1905) ILR 32 Cal 146," when a petition to the High Court states facts which are matters of record and which are supported by copies of the order passed by the Court below, such a petition need not be supported by an affidavit". His Lordship further held that "The facts upon which the petition to this Court was made, appear from the judgment of the learned District Judge, and it was not necessary, therefore, for the petitioner to put in any affidavit in support of this application."

5. Mr. Chakraborty next refers to a decision reported in (1936) 40 Cal WN 1408, (Rajballav Mandal v. Rajendra Narain Mandal). In this case R. C. Mitter, J. relying on (1905) ILR 32 Cal 146 and (1908) 8 Cal LJ 308 held that "As in the present case all the facts stated in the application are supported by the certified copy of the order-sheet which is attached to the application, no affidavit is necessary". In this case also the petition of motion was not supported by any affidavit. Considering the fact that in the present application the petitioner does not challenge any question of fact and that the only challenge is with regard to the jurisdiction of the Court below. We are of the opinion in view of the decisions referred to above, that the application under Section 115 though it is not supported by any affidavit is maintainable.

6. With regard to the merits Mr. Chakraborty submits that as the matter arose on an application under Section 372 of the Indian Succession Act and the matter was a contested one the learned District Delegate had no jurisdiction to dispose of the matter. Section 265 of the

Indian Succession Act provides that "The High Court may appoint such judicial officers within any district as it thinks fit to act for the District Judge as Delegates to grant probate and letters of administration in non-contentious cases, within such local limits as it may prescribe". Sub-section (2) of the said section states that "Persons so appointed shall be called District Delegates". The District Delegate has, therefore, no authority to dispose of any application in connection with the Succession Certificate whether it is contested or not. Chapter X of the Act deals with Succession Certificate cases. Section 388 provides that "The State Government may, by notification in the official Gazette, invest any Court inferior in grade to a District Judge with power to exercise the functions of a District Judge under this Part". Sub-section (2) of the said Section provides that "Any inferior Court so invested shall, within the local limits of its jurisdiction, have concurrent jurisdiction with the District Judge in the exercise of all the powers conferred by this Part upon the District Judge, and the provisions of this Part relating to the District Judge shall apply to such an inferior Court as if it were a District Judge". Mr. Chakraborty contends with much force that it is only a District Judge or an officer empowered under Sec. 388 who can deal with the Succession Certificate cases. In the present case, the officer being a District Delegate had no jurisdiction to entertain a Succession Certificate Case. After we heard the case on 8th of July 1976 we felt it necessary to see the lower Court's records and as such we directed the office to call for the records. We further directed the learned District Judge to send a report stating whether on 8th December, 1973 Sri A. N. Mitra, Subordinate Judge, 6th Court, was empowered by any Notification of the State Government to deal with contested Succession Certificate Cases. The report of the District Judge has been obtained and by his letter dated 26th July, 1976 the District Judge writes to say that "As per Rule 317 (1) of the Civil Rules and Orders—Volume I, two senior Subordinate Judges of 24-Parganas have been invested with the functions of the District Judge under Section 388 (1) of the Indian Succession Act, 1925 within the local limits of Sadar Munsif of Alipore under the Government of West Bengal Judicial Department Notification No. 6244-J dated 13th July, 1927. On 8th of December, 1973 Shri A. N. Mitra was the Senior-most

Subordinate Judge of the district and by an administrative order he was directed to exercise the function of the District Delegate under Section 388 (1) of the Indian Succession Act, 1925 and to deal with the Succession Certificate Cases arising within Alipore Munsifi". It is further seen from Civil Rules and Orders that 2 senior Subordinate Judges of the district have been empowered by the High Court to grant probate and letters of administration in non-contentious cases. Thus it is seen that this very officer Shri A. N. Mitra was a District Delegate within the meaning of Section 265 and he was also an officer empowered to exercise the functions of the District Judge under Section 388 (1) of the Indian Succession Act. Mr. Chakraborty submits that even assuming that the learned Subordinate Judge had power to deal with the Succession Certificate Cases he did not exercise his jurisdiction in that capacity, but he exercised his jurisdiction as a District Delegate, and that being so, the order passed by the learned Subordinate Judge must be considered as having been passed without jurisdiction. Mr. Chakraborty refers to several decisions in support of his contention. The first case referred to has been reported in ILR (1940) 1 Cal 358, (Jhrighat Native Tea Co. Ltd. v. Bipul Chandra Gupta). In this case it has been held that "If a Court holds that it has no jurisdiction to entertain a case or that the case is not maintainable, then it is not open to that Court to decide any other issue in the case. In such a case the pleading on which the case was started should be returned to the party who filed the same leaving it open to the proper Court to decide the other issues in the case". We do not follow how the principle enunciated in this case applies to the present case. In the present case the Court was not of opinion that it had no jurisdiction to entertain the case.

7. Mr. Chakraborty next refers to a decision reported in (1885) 13 Ind App 134 (PC), (Ledgard v. Bull). In this case a suit was instituted in the Court of the Subordinate Judge, who was incompetent to try it, the same was transferred by consent of parties to the Court of the District Judge for convenience of trial. It was held that such transference was incompetent, and that such consent did not operate as a waiver of the plea to the jurisdiction which was taken in the defendant's written statement and subsequently insisted upon. This case also does not apply to the facts of the present case. In the

present case the question of creation of jurisdiction by consent does not arise. The petitioner never raised the question of want of jurisdiction of the Court below.

8. Mr. Chakraborty next refers to a decision reported in (1886) 14 Ind App 160 (PC), (Meenakshi Naidoo v. Subramaniya Sasty). In this case it was held that "the question of High Court's jurisdiction not having been raised before that Court, the right to raise it had not been waived. There was inherent incompetency in the High Court to deal with the question before it and consent could not confer on the High Court a jurisdiction which it never possessed". This decision is only relevant in a case where it is found that the Court below had no jurisdiction to dispose of a matter which it did.

9. Mr. Chakraborty next submits that it cannot be said that though the learned Judge described himself as District Delegate and passed the order as such it will be deemed that he passed the order as an officer empowered under Section 388 (1) of the Act. In support of his contention he refers to a decision reported in AIR 1974 Bom 281, (Shankarrao Ramchandrarao v. Chatrapal Anandrao). It has been held in this case that "A deeming fiction cannot be introduced by construction and it is the exclusive privilege of the Legislature to apply a deeming fiction in a given case." We are quite in agreement with the principle laid down in this case.

10. The last case referred to by Mr. Chakraborty has been reported in AIR 1975 SC 915, (Ramachandra Keshav v. Govind Joti). At page 918 it has been held "A century ago, in Taylor v. Taylor, (1875) 1 Ch D 426 Jessel M. R. adopted the Rule that where a power is given to do a certain thing in a certain way, the thing must be done in that way or not at all and that other methods of performance are necessarily forbidden". We do not see how this principle applies to the present case. The only point that awaits decision in the present case is whether the officer, who was admittedly empowered under Section 388 (1) of the Act to deal with the Succession Certificate Cases, acted without jurisdiction in passing an order, simply because he described himself as a District Delegate. In this case it may be noted that the letter of the District Judge dated 26th July 1976 stated that the Officer was directed to exercise the function of the District Delegate under S. 388]

(1) of the Indian Succession Act, 1925 and to deal with the Succession Certificate Cases. It should also be remembered that this very officer was also a District Delegate empowered as such under Section 265 of the Indian Succession Act.

11. For all the reasons stated above we have no hesitation to say that the order passed by the learned Court below cannot be said to have been passed without jurisdiction. The contention raised by Mr. Chakraborty fails. In the result, the application fails and the Rule is discharged. There will be however no order as to costs.

B. C. RAY, J.:— I agree.

Application dismissed.

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NIRMAL CHANDRA MUKHERJI AND
: BANKIM CHANDRA RAY, JJ.

Balsukh Refractories and Ceramics Ltd., Petitioner v. Hindusthan Steel Ltd. and others, Opposite Parties.

Civil Rule No. 251 of 1973, D/- 23-7-1976.

(A) Arbitration Act (1940), Sections 9 and 31 — Company A inviting quotations from B for supply of articles — In sending quotations B to be deemed to have accepted general conditions of contract prescribed by A — One of conditions providing for compulsory arbitration in event of dispute — A accepting B's tender — Contract held subject to arbitration clause.

Where the company A sent a letter to B inviting tenders for supply of articles and in the letter it was provided that in sending the quotations B would be deemed to have accepted the general conditions of contract prescribed by A which could be seen in A's office and one of the general conditions clearly provided for compulsory arbitration in the event of dispute arising between the parties and the tender submitted by B was accepted by A it was held that B must be taken to have submitted his tender subject to the general conditions including the arbitration clause and therefore the contract between the parties was subject to the arbitration clause. (Paras 10, 11)

(B) Arbitration Act (1940), Section 31 — Application relating to arbitration reference — Two Courts having jurisdiction — Agreement restricting jurisdiction to

one only — Validity. (Contract Act (1872), S. 28).

Where goods were sold and delivered to company A of M. P. by B at B's factory site in West Bengal within the jurisdiction of Court C and the contract between the parties provided that any legal proceeding against A shall be instituted in the appropriate Civil Court of Durg (District) in M. P. it was held that ordinarily the application under Section 31 relating to arbitration reference could be filed either in Court C or in appropriate Court in Durg but in view of the express agreement between the parties the application was not maintainable in Court C. AIR 1971 SC 740, Rel. on. (Para 13)

(C) Arbitration Act (1940), Section 9 (b) — Party appointing its employee as sole arbitrator under Section 9 (b) — Validity.

Where the arbitrator nominated by one party is appointed as sole arbitrator under Section 9 (b) his appointment cannot be held to be invalid on the mere plea that he is an employee of that party in the absence of any material to show that he is biased in favour of that party. (1894) 2 QB 667 and AIR 1965 Cal 424 and (1971) 75 Cal WN 767, Rel. on.

(Paras 14, 17)

(D) Arbitration Act (1940), Sections 9, 31 and 33 — Contract for supply of goods by B to A — Non-delivery of goods — Reference of dispute by A to sole arbitrator — Application by B challenging reference — Question whether non-delivery was due to frustration of contract held could not be gone into.

Where B entered into a contract to supply goods to A and on non-delivery of part of the goods A pursuant to the arbitration clause in the contract referred the dispute to the sole arbitrator appointed by him under Section 9 (b) and B made an application under Sections 9, 31 and 33 challenging the reference on the ground that there was no arbitration agreement and the appointment of the sole arbitrator was invalid it was held that the question whether the non-delivery of goods was due to frustration of the contract or not was a matter relating to the merits and the same could be decided in the arbitration proceeding and not in the application. AIR 1951 SC 9, Rel. on.

(Para 17)

Cases Referred: Chronological Paras
AIR 1971 SC 740 = (1971) 3 SCR 314 13
(1971) 75 Cal WN 767 16
AIR 1965 Cal 424 = 68 Cal WN 927 16

AIR 1951 SC 9 = 1950 SCR 792 17
 (1894) 2 QB 667 = 71 LT 308 14

A. C. Bhabhra, Malay Mohan Guha and Rajat Ghosh, for Petitioner; S. B. Mukherjee, Arindam Lahri and S. N. Sen, for Opposite Party No. 1.

RAY, J.:— This revisional application under Section 115 of the Code of Civil Procedure arises out of an application filed by the petitioner under Section 31 read with Section 33 and Section 9 of the Arbitration Act of 1940 and it is directed against order No. 21 dated December 6, 1972 passed in Misc. Case No. 50 of 1972 by the learned Subordinate Judge, Asansol.

2. The petitioner Company carried on business as manufacturers of and dealers in fireclay bricks and refractory goods in mouja Salanpur P. S. Salanpur, Sub-Division Asansol, District Burdwan, The opposite party No. 1 is a fully owned Government Company in public sector carrying on business as manufacturers of and dealers in Iron and Steel at Bhilai Steel Plant, Bhilai, District Durg, Madhya Pradesh. Sometime in 1966 the opposite party No. 1 sent a letter No. Expm/BM/Pur — 17 (1)/66 to the petitioner inviting tenders for supply of fireclay bricks and refractory goods of certain specifications to the opposite party No. 1. On February 24, 1966, the petitioner sent a letter to the opposite party No. 1 intimating that the petitioner could supply a certain quantity of fireclay bricks and refractory materials of the specifications mentioned therein and enclosed with it the tender No. BRCS/35/1832. The said letter contained all the terms and conditions. The opposite party No. 1 by letter dated December 31, 1966 accepted the said tender on certain terms and conditions. In the said letter there was a remark which is set out hereunder: "Subject to conditions of acceptance of tender attached."

3. In accordance with the said agreement the petitioner from time to time sold and delivered diverse quantities of goods to the opposite party No. 1 at the petitioner's works' at Salanpur after the same had been duly inspected and approved at its factory at Salanpur. The opposite party No. 1 made payments from time to time in respect of goods so sold and delivered and after deducting the amounts paid by the opposite party No. 1 a sum of Rs. 86,120.45 paise remains due from the opposite party No. 1 as the balance of price of goods sold and delivered besides other dues. The opposite party

No. 1 in spite of repeated demands failed and neglected to pay the said sum. There was serious labour unrest in the petitioner's factory. Moreover, the opposite party No. 1 did not pay the balance price of the goods supplied. For these reasons the petitioner was compelled to declare a closure of its factory on August 4, 1969 and as such the aforesaid contract became impossible of further performance and void. The notice of such closure was given to opposite party No. 1 in due time.

4. In February, 1971, the opposite party No. 1 wrongfully alleged that the petitioner had committed a breach of the said contract by not supplying the balance quantity of goods and the opposite party No. 1 had thereby suffered loss and damage. As such a dispute had arisen and the same should be referred to arbitration. It has been stated that though the said contract did not embody any arbitration clause the opposite party No. 1 by letter dated February 8, 1971, appointed the opposite party No. 2 as its arbitrator purportedly relying upon clause 23 of the General Conditions of Contract and intimated the same to the petitioner asking it to appoint a person as the second Arbitrator. It has been submitted that the said contract did not contain any arbitration agreement and the said appointment by the opposite party No. 1 is illegal and invalid and the opposite party No. 2 has no jurisdiction to act as arbitrator. On February 20, 1971, the petitioner under protest appointed one Mr. Satipati Banerjee, Advocate, as the Second Arbitrator. The petitioner, thereafter, received a letter dated September 24, 1971 from the opposite party No. 1 intimating it that the opposite party No. 3 by its letter dated May 1, 1971, requested Mr. Satipati Banerjee to intimate when he would be able to come to Bhilai to discuss matters regarding appointment of an umpire. In spite of reminders no reply was received and so the petitioner was called upon to appoint another person as arbitrator in place of Mr. Satipati Banerjee within 15 days of the receipt of the said letter. On November 1, 1971, the petitioner came to know from a copy of the letter by opposite party No. 1 to opposite party No. 2 that the opposite party No. 1 purported to appoint the opposite party No. 2 as the sole arbitrator.

5. It has been submitted that Mr. Satipati Banerjee had been suffering from cataract of both the eyes and he was advised to take complete rest in bed. It cannot be said in such circumstances that

he neglected and refused to act as arbitrator nor was he incapable of acting as arbitrator. The petitioner should be given an opportunity to appoint an arbitrator in place of Mr. Satipati Banerjee. It has been submitted that the appointment of opposite party No. 2 as the sole arbitrator will lead to substantial miscarriage of justice. It has, therefore, been prayed that the question whether there is an arbitration agreement in respect of the above mentioned contract between the petitioner and the opposite party No. 1 should be determined. There is also an alternative prayer for setting aside the purported appointment of the opposite party No. 2 as sole arbitrator and to allow further time to the petitioner to appoint its arbitrator and for stay of arbitration proceedings before opposite party No. 2 till the disposal of this application.

6. An objection to the said petition was filed by the opposite party No. 1 contending that the Court had no jurisdiction to entertain the application and the application had been made mala fide to delay the Arbitration proceeding. It has been stated that admittedly the opposite party No. 1 sent the letter No. Expn/BM/Pur 17-1-1966 to the petitioner and several others inviting quotations for supply of articles. In paragraph 10 of the said letter it has been provided that in sending the quotations the petitioner will be deemed to have read, understood and accepted the General Conditions/Special conditions of contract prescribed by the project which can be seen in the office of the General Manager on any working day and liquidated damages clause printed overleaf. Paragraph 23 of the General conditions clearly provides for compulsory arbitration in the event of a dispute arising between the parties. It has been submitted that the petitioner submitted tenders subject to the General conditions including the arbitration clause and the contract between the petitioner and the opposite party No. 1 is subject to the arbitration clause contained in the General conditions of contract. It has also been stated that the petitioner did not supply the articles as per contract nor did it make alternative arrangements for procuring the same from outside. The opposite party No. 1 had to purchase the said materials from elsewhere at higher prices at short notice in order to maintain construction schedule and thus the opposite party No. 1 had suffered considerable financial loss. A dispute has arisen between the petitioner and the opposite

party No. 1 and under the terms of the contract the same is to be settled by arbitration. The petitioner appointed Sri Satipati Banerjee, Advocate as its arbitrator and the petitioner thus accepted the position that the dispute was to be settled by arbitration. The petitioner's arbitrator did not proceed with the reference in spite of reminders and thereby neglected or refused to act as arbitrator. It has been averred that the opposite party No. 1 by registered letter dated 24-9-1971 requested the petitioner to appoint another arbitrator in place of Sri Satipati Banerjee within 15 days but as nothing was done in this respect so the opposite party No. 1 had to appoint the opposite party No. 2 as sole arbitrator by letter dated 27-10-1971. The said appointment is quite legal and valid. It has been submitted that in Clause 24 of General conditions of contract there is express provision that any legal proceeding against the plant shall be instituted in the appropriate Civil Courts of Durg (District) and this Court has no jurisdiction to entertain this application and to make any order thereon as prayed for.

7. On December 6, 1972, the Subordinate Judge, Asansol by order No. 21 dismissed the Misc. case holding that the contract as entered into by the parties to the dispute was subject to the aforesaid General Conditions providing for compulsory arbitration in the event of dispute arising between the parties. It has also been held that there is a dispute between the contracting parties and as such the matter was referable to an arbitration under the terms of the agreement. The appointment of the opposite party No. 2 as sole arbitrator was valid as the petitioner failed to appoint its new arbitrator in place of Sri Satipati Banerjee within the specified time. It was further held that this Court had no jurisdiction to entertain and decide the Misc. case in view of provisions of clause 24 of General Conditions of Contract.

8. Mr. Bhabhra, learned counsel appearing on behalf of the petitioner has submitted firstly that the contract entered into between the petitioner and the opposite party No. 1 as evidenced by the letter of offer dated February 24, 1966 and letter of acceptance dated December 31, 1966 annexed as Annexures A and B respectively to the application did not contain any arbitration agreement and as such the appointment of the opposite party No. 2 as arbitrator for decision of

the dispute is wholly illegal, invalid and unwarranted. Mr. Bhabhra has, in the second place, contended that even assuming for argument's sake that the tender had been accepted in accordance with the terms and conditions contained in the letter inviting tenders wherein there is an arbitration clause. The appointment of the opposite party No. 2 as sole arbitrator is illegal and unwarranted inasmuch as there has been no refusal or neglect on the part of the arbitrator Sri Satipati Banerjee appointed by the petitioner to act and also there was no failure on the part of the petitioner to appoint a new arbitrator in place of Sri Satipati Banerjee. It has also been submitted that in clause 23 of the General Conditions of contract containing the arbitration agreement there is a provision for appointment of an umpire. The third dimension of Mr. Bhabhra's contention is that in accordance with the terms of contract entered into between the parties the goods were sold and delivered at the factory site of the petitioner at Salanpur within Sub-Division Asansol and as such the learned Subordinate Judge, Asansol had jurisdiction to entertain the said Misc. case and to pass orders thereon. It has been further submitted that the bar to the institution of legal proceedings against the plant in any other Civil Court except in the appropriate Civil Court of Durg (District) as provided in Clause 24 of the said General Conditions of contract is not applicable to this case inasmuch as the said Court has jurisdiction to entertain the said application. It has been further submitted by the learned counsel appearing on behalf of the petitioner that the learned Subordinate Judge was wrong in not holding that the contract had become void being impossible of further performance. It has been lastly contended that the appointment of the opposite party No. 2 as the sole arbitrator is illegal and invalid inasmuch as he is an employee of the opposite party No. 1 and so he is not a disinterested person. The appointment of such a person as an arbitrator will violate the rules of natural justice.

9. Mr. S. B. Mukherjee, learned counsel appearing on behalf of the opposite party No. 1 has submitted that the contract entered into between the petitioner and the opposite party No. 1 contained an arbitration agreement and as such a dispute between the parties having arisen the appointment of the opposite party No. 2 as arbitrator is perfectly legal and valid. Mr. Mukherjee has also sub-

mitted that the petitioner after having appointed Sri Satipati Banerjee as its arbitrator for decision of the dispute by arbitration is not competent to question the existence of any arbitration agreement in the contract entered into between them. Mr. Mukherjee has next submitted that the arbitrator Sri Satipati Banerjee appointed by the petitioner having failed and neglected to proceed with the arbitration proceedings in spite of reminders the opposite party No. 1 duly asked the petitioner to appoint new arbitrator in his place within 15 days. But the petitioner failed to take any steps to appoint a new arbitrator and as such the appointment of opposite party No. 2 by the opposite party No. 1 as the sole arbitrator is quite in accordance with law. Mr. Mukherjee has further contended that in view of the express provision in clause 24 of the General Conditions of contract the said Misc. case is not maintainable and the learned Subordinate Judge, Asansol was right in rejecting the said Misc. case on that ground.

10. Admittedly the opposite party No. 1 sent a letter No. Expm/BM/Pur — 17/1/66 dated 24th February, 1966 inviting quotations from the petitioner for supply of fireclay bricks and other refractory materials mentioned therein. It also appears that the said letter inviting quotations contained several terms. Paragraph 10 of the said letter runs as follows:

"In sending your quotation you will be deemed to have read, understood and accepted the General Conditions — Special Conditions of the contract prescribed by the project which can be seen in the office of the General Manager on any working day and liquidated damages printed overleaf."

It also appears from the letter of acceptance issued by the opposite party No. 1 dated 31st of December, 1966 that the said quotations submitted by the petitioner in its tender were accepted. Cls. 23 and 24 of the General Conditions of contract are quoted below:—

"Clause 23—In the event of any question or dispute arising under these conditions or any special conditions of contract or in connection with this contract (except as to any matters the decision of which is specially provided by these conditions) the same shall be referred to the award of an arbitrator to be nominated by the purchaser and an arbitrator to be nominated by the contractor, or to an Umpire to be appointed by the arbitrators in

writing before proceeding on the reference. The decision of the arbitrators, or in the event of their not agreeing, of the Umpire appointed by them, shall be final and conclusive and the provision of the Indian Arbitration Act, 1940 and of the Rules framed thereunder and any statutory modification thereof shall be deemed to apply to and be incorporated in this contract. Upon every and any such reference, the assessment of the costs incidental to the reference and award respectively shall be at the discretion of the arbitrator or in the event of their not agreeing of the Umpire appointed by them."

"Clause 24—That in case any legal proceedings are instituted against the Plant (that is to say, the opposite party No. 1) they shall be instituted in the appropriate Civil Court of Durg (District)".

11. On a consideration of Clause 23 of the General Conditions of contract it is evident that the said clause embodies an arbitration agreement. In this case undoubtedly the petitioner failed to supply the requisite quantity of fireclay bricks and refractory materials as per contract entered into between the petitioner and the opposite party No. 1. Of course, the petitioner has stated that this failure on its part to supply the goods was due to the frustration of the contract owing to the closure of its factory on account of labour unrest and non-payment of the balance of prices of goods supplied to the opposite party No. 1. Thus a dispute has arisen between the parties and the same in accordance with the terms of the contract needs to be determined by arbitration. In such circumstances the appointment of opposite party No. 2 as arbitrator by the opposite party No. 1 is in accordance with the terms of the said arbitration clause and the petitioner also appointed Sri Satipati Banerjee as its arbitrator for this purpose. The petitioner, therefore, cannot challenge that there was no arbitration agreement in the contract for determination of any dispute arising out of contract between the petitioner and the opposite party No. 1 by arbitration.

12. It is evident from the letter dated September 24, 1971 sent by the opposite party No. 1 that the arbitrator Sri Satipati Banerjee appointed by the petitioner who was repeatedly requested to come down to Bhilai in connection with the arbitration proceeding did not send any reply to the opposite party No. 1. The petitioner also was asked by the said letter to appoint another person as arbi-

trator in place of Sri Satipati Banerjee within 15 days. It appears that the petitioner did not either appoint any new arbitrator or did not send any reply to the same. In these circumstances we have no hesitation to hold that the petitioner failed to appoint an arbitrator by way of substitution within 15 days from the date of the receipt of the said letter and as such the opposite party No. 1 was perfectly justified in appointing the opposite party No. 2 as sole arbitrator in accordance with the provisions of Section 9 (b) of the Arbitration Act. No sufficient cause has been shown to us by the petitioner for setting aside the said appointment of the opposite party No. 2 as sole arbitrator and to allow the petitioner further time to appoint an arbitrator in place of Sri Satipati Banerjee who neglected and/or refused to act as arbitrator.

13. It is evident from Clause 24 of the General Conditions of contract that any legal proceedings against the Plant, that is, the opposite party No. 1, shall be instituted in the appropriate Civil Court of Durg (District). Now the question is whether in view of this specific agreement between the parties as to the venue of bringing any action against the opposite party No. 1 the said Misc. case which was filed in the Court of the Subordinate Judge, Asansol was maintainable or not. It is apparent from the terms of the contract that the goods have been sold and delivered by the petitioner to the opposite party No. 1 at its factory site at Salanpur under Asansol Sub-Division within the jurisdiction of the Court of the Subordinate Judge, Asansol and the Asansol Court ordinarily has jurisdiction to entertain the said application filed under the provisions of the Arbitration Act. Under Section 31 an application under the Arbitration Act may be filed in any Court having jurisdiction in the matter to which the reference relates. In this case the application in question may be filed either in the Asansol Court or in the appropriate Civil Court in Durg (District). In view of the express agreement between the petitioner and the opposite party No. 1 the application was not maintainable in the Court of the Subordinate Judge, Asansol. It is pertinent to refer to the decision in AIR 1971 SC 740. *Hakam Singh v. Gammon (India) Ltd.*; it has been observed by the Supreme Court as follows:

"It is not open to the parties by agreement to confer by their agreement jurisdiction on a Court which it does not pos-

sess under the Code. But where two Courts or more have under the Code of Civil Procedure jurisdiction to try a suit or proceeding an agreement between the parties that the dispute between them shall be tried in one of such Courts is not contrary to public policy. Such agreement does not contravene Section 28 of the Contract Act."

14. It has been strenuously contended by Mr. Bhabhra that the appointment of the opposite party No. 2 who is an employee of the opposite party No. 1 as sole arbitrator is invalid and bad inasmuch as it violates the rules of natural justice. The opposite party No. 2, it has been submitted, being an employee of the opposite party No. 1 will be biased and he cannot be expected to determine the dispute disinterestedly and free from any bias. In support of his submission certain decisions were cited. In this case the arbitrators were appointed pursuant to the terms of the agreement as contained in the Clause 23 of the General Conditions of the contract which provides that the dispute shall be referred to the award of two arbitrators — one to be nominated by the petitioner and another arbitrator to be nominated by the opposite party No. 1. In Redman's Law of Arbitration and Awards Chapter VI page 56 it has been stated:

"Unless the reference is under some statute which points out the class of persons from which the arbitrator is to be selected, any person may be appointed arbitrator; and if the parties agree to choose the arbitrator by lot they may do so. Some of the older authorities except, as incompetent to be arbitrators, infants and lunatics, but if the selection is by mutual consent it is not now probable that disability of any kind in the person chosen, known at the time of appointment, would be ground for impeaching the award, for the parties choose their own tribunal and agree to abide by its decision."

"If the parties to a dispute with full knowledge of the facts select an arbitrator who is not an impartial person or who has to perform other duties which will not permit of his being an impartial person, the Court will not in general release them from the bargain upon which they have agreed; and if a party to a contract submits to the jurisdiction of a tribunal which has an interest of its own in the decision, the Court will not in general on that account release him from the bargain (however improvident it may be) so long

as the Court is satisfied that he is aware or ought to have been aware of the terms of the bargain he has entered into. To disqualify an arbitrator so appointed, it is insufficient to show that he might be suspected of partiality: it must be shown, if not that he actually is biased, at least that there is strong probability that he will be biased, and to such an extent as to be incapable of fairly and honestly giving a decision." (Russell on Arbitration Sixteenth Edition page 110).

In (1894) 2 QB 667, *Eakersley v. Mersey Docks* it has been held that the Rule which applies to a judge or other person holding judicial office — namely, that he ought not to hear cases in which he might be suspected of a bias in favour of one of the parties — does not apply to an arbitrator, named in a contract, to whom both the parties have agreed to refer disputes which may arise between them under it. In order to justify the Court in saying that such an arbitrator is disqualified from acting, circumstances must be shown to exist which establish, at least, a probability that he will in fact be biased in favour of one of the parties in giving his decision.

15. Where, however, in a contract for the execution of works, the arbitrator selected by the parties is the servant of one of them, he is not disqualified by the mere fact that under the terms of the submission he may have to decide disputes involving the question whether he has himself acted with due skill and competence in advising his employers in respect of carrying out of the contract.

16. In 68 Cal WN 927 = (AIR 1965 Cal 424), *B. K. Dhar (Private) Ltd. v. Union of India* it has been held that if the parties with full knowledge of the fact select their arbitrator who is not an impartial person, the Court will not release them from the bargain upon which they agreed and if a party in order to secure a contract has submitted to the jurisdiction of a tribunal which has an interest of its own in the decision, the Court will not on that account release them from their own bargain, however, improvident it may consider it so long as the Court is satisfied that he knew or should have known what kind of bargain he was entering into. In a bench decision of this Court reported in (1971) 75 Cal WN 767, *Union of India v. Promode Kumar Agarwalla* it has been observed

"It cannot be said that only because the sole arbitrator is nominated by the Se-

cretary, Government of India and he might be a Government servant the Court ought to conclude that he will or is likely to act as biased."

17. Thus on a consideration of the aforesaid decisions we have no hesitation to hold that the appointment of the opposite party No. 2 as sole arbitrator cannot be held to be invalid on the mere plea that he is an employee of the opposite party No. 1 in the absence of any material to show that he is biased in favour of the opposite party No. 1. The question whether there has been a frustration of contract or not cannot be decided in the instant application under Section 9 read with Section 31 and Section 33 of the Arbitration Act. The scope of the application is to decide whether there is an arbitration agreement in the contract entered into between the petitioner and the opposite party No. 1 and whether the appointment of the respondent No. 2 as the sole arbitrator is in accordance with the provision of the Arbitration Act. The petitioner failed to supply goods in accordance with the terms of the contract. The question whether the non-delivery of such goods is due to the frustration of the contract or not is a matter relating to the merits and the same is to be decided in the arbitration proceeding and not in this application. It is pertinent to refer in this connection to the decision reported in AIR 1951 SC 9, A. M. Mair and Co. v. Gordhandas Saggarmull where it has been held by the Supreme Court

"If, therefore, we come to the conclusion that both the disputes raised by the respondents fall within the scope of the arbitration clause, then there is an end of the matter, for the arbitrators would have jurisdiction to adjudicate on the disputes, and we are not concerned with any error of law or fact committed by them or any omission on their part to consider any of the matters. In this view, it would not be for us to determine the true construction of the contract and find out whether the respondents' contention is correct or not. Once the dispute is found to be within the scope of the arbitration clause, it is no part of the province of the Court to enter into the merits of the dispute."

18. In the premises aforesaid all the contentions raised on behalf of the petitioner having failed this application fails. The Rule is, therefore, discharged. There will be no order as to costs in the facts and circumstances of the case.

MUKHERJI, J.:— I agree.

Rule discharged.

AIR 1977 CALCUTTA 26

SALIL KUMAR DATTA, J.

Hari Charan Pal, Appellant v. Siddheswar Pal, Respondent.

A. F. A. D. No. 933 of 1972, D/- 30-7-1976.

(A) Bengal Money-lenders Act (10 of 1940) (as amended in 1965), Ss. 37 and 37-A — Suit after amendment for redemption alleging that the transaction was a loan secured by mortgage by conditional sale — Prior suit (between the same parties) prior to amendment for specific performance on the basis of out and out sale and agreement to repurchase — Suit dismissed for non-performance — Loan not pleaded in previous suit — Finding in prior suit operates as res judicata between the parties — Subsequent suit for reopening the transaction on the basis of loan, barred. (Paras 11, 12, 13)

Cases Referred: Chronological Paras ILR (1956) 1 Cal 59 9

Sudhis Das Gupta and Hari Charan Pal, for Appellant; Amerendra Mohan Mitra and Bijitendra Mohan Mitra, for Respondent.

JUDGMENT:— This is an appeal against a judgment of affirmance. The plaintiff instituted the connected suit on July 5, 1969 under Section 36 of the Bengal Money-lenders Act, 1940 read with Section 37-A and Section 38. The claim was for a decree reopening the transaction effected by the sale deed of February 5, 1951 and the agreement of even date treating it as a mortgage by conditional sale and also for reopening the rent decree passed against him in S. C. Suit No. 34 of 1951 as also the decree for ejectment in Title Suit No. 252 of 1960 and for other ancillary and incidental reliefs.

2. The plaintiff appellant's case is that he obtained from the defendant a loan of Rs. 300/- by mortgaging his bastu land measuring $2\frac{1}{2}$ bighas of C. S. Plot 1607, Mouja Balagarh within Hooghly-Chin-surah Municipality. To avoid the provisions of the said Act, at the instance of the defendant respondent, the plaintiff executed a sale deed in favour of the defendant in respect of the said property on February 5, 1951. On the same date an

agreement of sale was entered into between the parties whereby the defendant agreed to reconvey the property on payment of the said sum of Rs. 300/- by instalments by Magh 1362 B. S. The plaintiff who remained in possession of the property, was to pay Rs. 10/- per month as interest though it was described in the agreement as rent thereof. The property was very valuable worth Rs. 15,000/- even at the time of the loan and Rs. 90,000/- at the time of the institution of the suit. The plaintiff was forced to execute the documents aforesaid under pressure of circumstances according to the proposal of the defendant.

3. In view of the law in force at the time, the plaintiff was advised to file Title Suit No. 96 of 1959 for specific performance of the said contract against the defendant stating that though the transaction was a loan transaction it was shown as a sale to avoid rigour of the Money Lender's Act. The suit was dismissed as the amount was not paid within the time agreed upon and the said decree was ultimately affirmed by this Court.

4. The defendant filed S. C. Suit No. 34 of 1959 for rent for the suit property and the suit was decreed. Thereafter the defendant also filed Title Suit No. 252 of 1960 for ejectment of the plaintiff from the suit property which was decreed and the decree was ultimately confirmed by this Court as it now appears. The decree was put into execution but the plaintiff had always been in possession of the property although false reports as to possession had been submitted to the executing Court.

5. In view of the change of law in respect of the provisions of the Bengal Money-lenders Act by the Amendment Act of 1965, the plaintiff became entitled to establish in a Court of law the true nature of the transaction which remedy was not available to him under the existing law. The plaintiff accordingly instituted the present suit alleging that the transaction was a loan secured by the mortgage by conditional sale. Accordingly, it was prayed, the transaction as also the decrees obtained by the defendant should be reopened and a decree for accounts be passed in the circumstances as the plaintiff had already paid to the defendant double of the principal amount secured.

5-A. The suit was contested by the defendant who filed a written state-

ment denying all allegations made by the plaintiff. It was said that the transaction was a sale with a covenant for reconveyance under certain conditions. The plaintiff's attempt to enforce the agreement of reconveyance failed for his own default and the decrees impugned were passed in accordance with law and could not be reopened. The defendant was in possession of the suit property except in respect of three rooms in forcible possession of the plaintiff against which the defendant had prayed for police help and report of Nazir about possession was correct and true. The impugned decrees, it was contended, could not in law be reopened.

6. The learned Munsif on a trial on evidence dismissed the suit and the decree was affirmed in appeal; the appellate decree is now the subject-matter of appeal before us.

7. The Bengal Money-lenders Act, 1940 was amended by the Bengal Money-lenders (Amendment) Act, 1965 with effect from October 15, 1965. By that amendment, inter alia a new S. 37-A was inserted after S. 37 providing a saving as to mortgage by conditional sale. In modification of the proviso to sub-sec. (c) of S. 58 of the Transfer of Property Act, 1882 it is provided that where a mortgager ostensibly sells the mortgage property on any of the conditions of the said sub-section, the transaction notwithstanding anything contained to the contrary therein shall always be deemed to be a mortgage by conditional sale. Further by insertion of sub-section (b) of Section 40 of the Act, it has been provided that evidence adduced by the borrower of any agreement or statement varying the terms of any document creating or witnessing a loan shall be admitted.

8. The appellant's case is that prior to the promulgation of the said Act, it was not possible for him to assert the true nature of the transaction which was a mortgage by conditional sale but was recorded in two separate documents, one the ostensible sale deed which was registered while the other was the unregistered deed of an agreement for reconveyance of the same date. The present suit was instituted on July 5, 1969 well within the period of limitation for a suit for redemption for reopening the transaction. The appellant's further case is that the suit for redemption of the mortgage by conditional sale, which was the true nature of the transaction, could only be instituted when the change of law took place by the

Amendment Act of 1965. The Courts below erred in holding that the transaction was an out and out sale.

9. In *Manindra v. Narendra*, ILR (1956) 1 Cal 59, a Division Bench was considering the true nature of a transaction of an out and out sale coupled with an agreement for repurchase entered into by two separate documents of October 7, 1942 between two persons. The Court noticed that a sale and an unregistered agreement for repurchase will not be a mortgage by conditional sale under the Transfer of Property Act. Even so, in the Bengal Money-lenders Act, it was noticed, Section 2 (12) includes transactions which are loans in substance though not in form. In construing transactions under or for the purpose of special statute, substance will prevail over form. Thus though a transaction may not amount to mortgage, yet it may well come within the definition of loan under Section 2 (12) of the Act if, in substance it is a loan. Section 92 of the Evidence Act makes evidence as to intention of a document contrary to its express language inadmissible but proviso (b) lets in evidence to show in what manner the disputed transaction or the language of the document was related to existing facts. Accordingly, extraneous evidence as to the true value of the property as also possession of the property and dealings, or in other words, the conduct of the parties in relation to the transaction, are relevant and admissible under proviso (b) to Section 92 of the Evidence Act to establish that the transaction in substance was a loan.

10. It may be possible that in the attending circumstances particularly in regard to the value of the property and the possession thereof, the transaction may be considered to be a loan in substance and, after the amendment, secured by a mortgage of conditional sale. But an insurmountable difficulty has been created by the appellant's earlier Title Suit No. 96 of 1959 for specific performance of the agreement of repurchase. If the transaction was a loan, as contended, there was no impediment on the plaintiff at the time to establish that the transaction in substance was a loan in view of the judgment we have referred to above. By the institution of the suit for specific performance of the agreement for purchase, the appellant brought his doom on himself beyond reparation. The Court's decision was that though the appellant was otherwise entitled to repurchase the property which was sold to the respondent subject

to purchase as pleaded by the appellant, the claim could not be enforced as the amount due was not repaid within the stipulated period.

11. Mr. Das Gupta appearing for the appellant contended that the relief as prayed for in the connected suit was not available to the appellant at the time he instituted the suit for specific performance. It may be that the right to reopen an ostensible sale as a mortgage by a conditional sale was available only after the promulgation of the Act. But in establishing a mortgage, it also must be established that there was a loan and without establishing the loan, the transaction of mortgage by conditional sale is not conceivable in law.

12. The question now is whether the appellant was entitled in law to institute the present suit for reopening the transaction which was obviously on the basis of a loan secured by mortgage by conditional sale, as contended. The suit for specific performance proceeded on the basis that the transaction was not a loan but was an out-and-out sale. This finding cannot but operate as a *res judicata* on a future litigation amongst the parties and the question of the transaction being a loan could not further be reagitated by the appellant in view of the position taken by him in the earlier suit.

13. Mr. Das Gupta further contended that the appellant in this suit was litigating under a different title viz. as mortgagee and accordingly, no question of the bar of *res judicata* arises. This argument would be plausible if the Court was to consider the position only in the context of Small Cause Court Suits for rent and eviction suit only all instituted by the respondent, particularly when the suit for redemption was not barred by time. Unfortunately, these suits followed, as we have seen, the dismissal of the suit for specific performance when the appellant in fact gave up his case that the transaction was a loan and, on the contrary, accepted the position that the transaction was an out-and-out sale. Accordingly, there is no escape from the conclusion that the present suit is barred in law by the principles of *res judicata* as the appellant's case as a debtor was no longer available to him.

14. The appellant in his earlier suit in respect of the same property did not base his claim for the reliefs that the transaction was in substance a loan even though there was no legal impediment in

respect thereof. It is to be held accordingly that in obvious absence of any leave of Court he was not in a position to claim later on on the basis of the same transaction being a loan which had been the basis of his claim in the subsequent proceeding under Section 36 of the Act. This bar of Order 2, Rule 2 (3) seems also insurmountable.

15. For all these reasons, the appeal fails and is dismissed. There will be no order for costs in the circumstances.

16. Leave under clause 15 of the Letters Patent is prayed for and granted.
Appeal dismissed.

AIR 1977 CALCUTTA 29

R. BHATTACHARYA, J.

State of West Bengal, Appellant v. Mir Fakir Mohammad, Respondent.

Second Appeal No. 1658 of 1965, D/- 21-7-1976.

(A) Civil P. C. (1908), O. 6, R. 2 —
— Variance between pleadings and proof
— Party cannot be allowed to adduce evidence for setting up a case inconsistent with one alleged in pleadings. (Para 4)

(B) W. B. Estates Acquisition Act, 1953 (1 of 1954), Section 2 (b) — 'Agricultural land' — Definition is wide enough to include banana garden and bamboo garden. (Para 8)

(C) W. B. Estates Acquisition Act, 1953 (1 of 1954). S. 6 (1) (f) — 'Orchards' — Banana gardens or bamboo gardens are not orchards. (Para 9)

Cases Referred: Chronological Paras
AIR 1959 SC 239 = 1959 Supp (1) SCR 176

AIR 1957 SC 768 = 1958 SCR 101

AIR 1952 All 845 = ILR (1954) 1 All 17

Panchanan Pal, Sailendra Nath Dutta and Miss Jyotsna Das, for Appellant; Lala Hemanta Kumar and Manick Chandra Banerjee, for Respondent.

JUDGMENT:— The defendant, the State of West Bengal, has preferred this second appeal against the judgment and the decree passed by a Subordinate Judge, Alipore affirming those of the Munsif of the Additional Court at Sealdah in a suit brought by the respondent Mir Fakir Mohammad. The suit was brought for a declaration that the suit lands were orchards and that he was entitled to retain the same under the provision of the

West Bengal Estates Acquisition Act, 1953 amongst other reliefs. The plaintiff got the decree against the State of West Bengal and in the first appeal taken by the State, the appellant was unsuccessful.

2. The allegation of the plaintiff, in short, is that he is in possession of agricultural lands. The draft record of the recent revisional settlement prepared by the State Government was on the basis of the cadestral survey records published long ago showing the lands as agricultural. After the publication of the said C. S. records, the plaintiff converted some of his danga lands into gardens by planting fruit trees, banana plants and bamboos and he has been in possession of the same for more than 30 years as such. The suit was instituted on 20-7-1960. It is stated in the plaint that due to his mental unrest on account of promulgation of the Estates Acquisition Act, 1953 and also on account of his ignorance of law, he included the suit lands as agricultural lands in the 'B' form prescribed under the law. The inclusion of these lands was due to mistake. In fact, according to the provision of the West Bengal Estates Acquisition Act he is entitled to retain them and as such he wanted to amend the 'B' form to exert his right of retention of the lands in question. As the prayer of the plaintiff was refused, he now prays in this suit for declaration that the lands in question are orchards and non-agricultural lands so as to be retained by the plaintiff according to the law. The State appeared and contested the suit on the allegation that the lands in dispute were not gardens or orchards, but in fact, they were agricultural lands. The case of the defendant further is that those lands have already vested in the State and cannot be retained by the plaintiff under the law.

3. The only question that has been agitated before me is whether or not the disputed lands can be called orchards or non-agricultural lands as alleged by the plaintiff. Both the Courts below have held that the suit lands were not agricultural lands. The trial Court held that bamboo gardens were non-agricultural land and banana gardens were orchards. The First Appellate Court below was of the view that the suit lands were orchards. Mr. Pal, the learned Advocate appearing on behalf of the appellant has mainly attacked the findings of the Courts below on two grounds. The first point of attack is that both the Courts below failed to read the plaintiff's case as made out in the plaint which was changed at the time

of hearing and to read correctly the evidence on record. The second point is that even according to the case of the plaintiff and the materials on record, the suit lands ought to have been held to be agricultural lands and not orchards or gardens. Mr. Lala appearing on behalf of the respondent has contended that the findings of both the Courts are based on records and arrived at on proper appreciation of the case of the parties.

4. Coming to the first point raised by Mr. Pal, we find from the reading of the plaint that the suit lands were agricultural lands upto the publication of the C. S. records of right, but subsequently the plaintiff converted the suit lands into gardens by planting fruit trees, banana plants and bamboos. The plaintiff, since then, has been possessing those lands as gardens or orchards for more than 30 years. This is the specific fact pleaded by the plaintiff. It has been alleged that due to some mistake of law, he wrongly included the disputed lands in 'B' form under the wrong impression that these were agricultural lands. Later on, being aware of the fact that he was entitled to retain orchards in khas under the law, he wanted to amend the 'B' form claiming retention of the disputed lands, but, he got no relief. From the judgment of the Courts below, it appears that the plaintiff took the point at the time of hearing that the suit lands could be called non-agricultural lands because the banana plants and bamboos appearing in the suit lands grew spontaneously and the plaintiff did not cultivate the land or make any effort for the purpose of growing banana plants and bamboos. As 'agriculture' implies cultivation of land and making of some effort for culturing the plants, the plaintiff took up this position to show that lands are not agricultural relying upon certain decisions. The plaintiff examined himself during trial and examined some of his witnesses on his side. The plaintiff is P. W. 2. He says that out of 25 acres of agricultural land, he mentioned the suit properties in 'B' form wrongly. He says that those lands have been mentioned in Schedule 'A' to the plaint as orchards. According to the plaintiff's evidence, he has got bamboos and fruit trees on these lands. He says that these bamboos grew spontaneously and he wants to retain them as non-agricultural land. He further says that banana plants also grew spontaneously and that no cultivation is necessary for the growth of banana plants. Of course,

he has admitted also that some new banana plants were planted when some plants had died. He wants to retain the banana garden as orchard. He has also stated that there are some mango plants, jack trees, date trees, sajina plants and tamarind plants on some plots. From the witnesses examined on the side of the plaintiff, it appears that they wanted to say that no cultivation or manual care or effort would be necessary for the growth of banana plants or bamboo plants or to maintain the gardens. Two witnesses were examined on the side of the State of West Bengal. D. W. 1 was an Assistant Settlement Officer. According to him, an orchard consists of fruit bearing trees. D. W. 2 has stated that for cultivation of banana one is to stir the banana plants and to remove the old plants for proper growth of new plants. He has also stated that for proper growth of bamboos, the roots are to be cleared. The plaintiff has relied upon an inspection report of a Pleader Commissioner appointed by the Court to ascertain the nature of some of the suit lands. In the report we find that some of the lands were banana gardens and some were bamboo gardens. The inspection was made in presence of both the parties. From his report we get that the Commissioner found the gardens to be "cultured". He also found some trees like mango, simul and tamarind. But their number is insignificant. From the reading of the evidence of the Commissioner along with his report, Ext. 1, there can be no doubt that the banana gardens and the bamboo gardens inspected by the Commissioner were cultured. The plaintiff's case in the plaint is that he had agricultural lands and that some danga lands were converted by him into gardens by planting bamboos, banana plants and fruit trees. The evidence also shows that he sells the product of the gardens and for maintaining the garden, the plaintiff cultured them by employing efforts as evidenced by the Commissioner's report. At the time of trial when giving evidence, the plaintiff, however, changed his case and he wanted to say that the banana plants and the bamboo plants grew spontaneously and without any effort. His case at that time was that no care or effort was to be made for maintaining the garden. This is contradictory to the one appearing in the plaint. In order to get any relief in this suit, the plaintiff must prove his own case pleaded in the plaint. It appears that the learned Courts below did not pay their attention to the

pleading of the plaintiff and allowed the plaintiff unlawfully to adduce evidence at the time of trial for setting up a new and a different case. It also appears that the learned Courts below did not consider the report of the Commissioner as also the evidence adduced on the side of the defendant. They overlooked the fact that the banana and bamboo gardens were found by the Commissioner to be "cultured" and that the fruit bearing trees like mango, jack trees, tamarind, sajina were very few. The materials on record coupled with the original case of the plaintiff in the pleading clearly prove that the suit lands were banana and bamboo gardens properly grown and cultured by the plaintiff himself by his efforts. The plaintiff in evidence does not give any reasonable explanation why he made wrong statements in 'B' form. In this view of the matter when the case pleaded in the plaint was different from the case set up at the time of trial, the latter case ought to have been rejected and the suit dismissed. The first point raised by Mr. Pal is accepted.

5. Coming to the second point the question arises whether the suit lands can be retained by the plaintiff as claimed. Section 4 of the West Bengal Estates Acquisition Act, 1953 speaks about the notification vesting the estates and rights of the intermediaries in the State free from all encumbrances. Section 5 of the Act mentions the effect of notification and enumerates the rights and extent in the properties of the intermediary. Sub-section (1) of Section 6 of the Act mentions the property which the intermediary shall be entitled to retain. Clause (f) of sub-section (1) of Section 6 is relevant for our purpose because the plaintiff claims his right to retain the suit lands under this provision. The plaintiff claims himself to be an intermediary and clause (f) relied upon by him is as follows:—

"(f) Subject to the provisions of sub-section (3), land comprised in tea gardens or orchards or land used for the purpose of livestock breeding, poultry farming or dairy".

The plaintiff further relied on clause (c) which says that an intermediary is entitled to retain non-agricultural land in his khas possession under certain circumstances mentioned therein.

6. In this connexion we should note the definitions of agricultural land and non-agricultural land. In clause (b) of Section 2 of the Act "agricultural

land" is defined in the following language:—

"(b) "Agricultural land" means land ordinarily used for purposes of agriculture or horticulture and includes such land, notwithstanding that it may be lying fallow for the time being."

In Clause (j) of Section 2 we get:

"(j) "Non-agricultural land" means land other than agricultural land or other than land comprised in a forest."

According to Mr. Pal, the suit lands are all agricultural lands because according to the definition of the Act any land used for purposes of agriculture or horticulture will be agricultural land. His argument is that the plaintiff has been using the disputed lands either for banana garden or for bamboo garden, both of which require cultivation of land and human effort and care are also necessary for culturing the growth and maintenance of the banana and bamboo plants. The cultivation, culturing and the growing of banana and bamboo plants amount to agriculture and even if it is not agriculture in the narrower sense, it must be so being horticulture as mentioned in the definition of 'agriculture' in the Act. It has been contended that the banana gardens or the bamboo gardens cannot in any view be called orchards referred to in clause (f) of sub-section (1) of Section 6 of the Act on which the plaintiff relies to get retention of the same. In this connexion I will refer to the decisions relied upon by the trial Court to hold that the suit lands were not agricultural lands because bamboos and bananas on the suit land grew spontaneously. The first reference was made to the decision of the Allahabad High Court in *Pratap Singh v. Commr. of Income-tax* reported in AIR 1952 All 845. That was a case which relates to the sale of forest trees of spontaneous growth. It was a reference under the Income-tax Act made by the Income-tax Appellate Tribunal. It is no use discussing the facts of that case. I quote below the relevant portion:—

"In the Statement of the case, the Tribunal has mentioned that it was conceded before the Bench that there was no evidence on the record of the assessment proceedings that there had ever been cultivation of the soil on which the trees stood. The form in which the question was formulated also implied that the growth of the trees on the land was natural and spontaneous and without the intervention of the human agency. If, therefore, human labour and skill were

expended, they were not directed towards planting or growing of the trees. The skill and labour were directed towards regeneration and preservation of the forest trees. We are unable to hold that the use of human labour and skill merely for such purpose constitutes "agriculture," or that the land was being used for agricultural purposes".

In the case before us that decision will be of no help because this is not a case of forest trees. But, according to the plaintiff's case, he converted the lands into gardens by planting banana plants and bamboos. Moreover, there is the evidence that the gardens were cultured. This case is, therefore not relevant for the purpose of our decision.

7. The second decision of the Supreme Court relied upon by the trial Court is Commr. of Income-tax, Bihar and Orissa v. Sri Ramkrishna Deo reported in AIR 1959 SC 239. That was also a case relating to the Income-tax Act and in that case also forest trees of spontaneous growth were involved. There the Supreme Court on consideration of some other decisions of its own noted as follows:—

".....that the term "agriculture" meant, in its ordinary sense, cultivation of the field, that in that sense it would connote such basic operations as tilling of the land, sowing of the trees, plantation and the like, and that though subsequent operations such as, weeding, pruning, watering, digging the soil around the growth and removing under-growths could be regarded as agricultural operations when they are taken in conjunction with and as continuation of the basic operations mentioned before, they could not apart from those operations, be regarded as bearing the character of agricultural operations."

This case will not, in my view, support the plaintiff-respondent here before me.

8. In this connexion I think it necessary to refer to the decision of the Supreme Court in the case of Commr. of Income-tax, West Bengal, Calcutta v. Benoy Kumar Saha Roy reported in AIR 1957 SC 768. Although that case relates to the Income-tax Act, yet that decision is instructive in the sense that there has been a long discourse upon the terms "agriculture" and "agricultural purpose" used in the definition of "agricultural income" in Section 2(1) of the Income-tax Act. There the said two terms "agriculture" and "agricultural purpose" were

not defined in the Income-tax Act. In paragraph 10 of the judgment we find:

"The terms "agriculture" and "agricultural purpose" not having been defined in the Indian Income-tax Act, we must necessarily fall back upon the general sense in which they have been understood in common parlance. "Agriculture" in its root sense means sowing, a field and culture, cultivation, cultivation of field which of course implies expenditure of human skill and labour upon land. The term has, however, acquired a wider significance and that is to be found in the various dictionary meanings ascribed to it".

Bhagwati, J. while delivering the judgment on behalf of the Court considered the meaning of the word "agriculture" appearing in different dictionaries and several decisions and he says in paragraph 16 of the judgment:

"These are the various meanings ascribed to the term "agriculture" in various dictionaries and it is significant to note that the term has been used both in the narrow sense of the cultivation of the field and the wider sense of comprising all activities in relation to the land, including horticulture, forestry, breeding and rearing of livestock, dairying, butter and cheese-making, husbandry etc."

On a consideration of meanings of the word "agriculture" in different dictionaries and decisions Bhagwati, J. says:

"Whether the narrower or the wider sense of the term "agriculture" should be adopted in a particular case depends not only upon the provisions of the various statutes in which the same occurs but also upon the facts and circumstances of each case. The definition of the term in one statute does not afford a guide to the construction of the same term in another statute and the sense in which the term has been understood in the several statutes does not necessarily throw any light on the manner in which the term should be understood generally".

In view of the definition of "agricultural land" inserted in the West Bengal Estates Acquisition Act, it cannot be stated that such land has been used in the narrowest sense, but in fact, it is meant to be used in a more or less wider sense and in that view of the matter the suit lands, we are concerned with, are agricultural lands.

9. Now, the question is whether the plaintiff shall be entitled to take advantage of clause (f) of sub-section (1) of Section 6 of the Act for retaining them on the ground that they are orchards.

The word 'horticulture' appearing in the definition of "agricultural land" has not been defined in the Act. Horticulture, according to Webster's Seventh New Collegiate Dictionary means "the science and arts of growing fruits, vegetables, flowers or ornamental plants". The word according to the Pocket Oxford Dictionary means "gardening". In Chambers's 20th Century Dictionary we get the meaning of the word as "the art of gardening". If the suit lands are taken to relate to horticulture which is a species of agriculture, it is to be decided whether the suit lands can be called orchards which are connected with horticulture. "Orchard" according to the Pocket Oxford Dictionary means, enclosure with fruit trees. According to the Chambers's Dictionary it is an enclosed garden of fruit trees. Webster's Seventh New Collegiate Dictionary says that the word 'Orchard' means a planting of fruit trees or nut trees. "Tree" according to this Dictionary means a woody perennial plant having a single usu. elongate main stem generally with few or no branches on its lower parts. In Pocket Oxford Dictionary "tree" has been described as a perennial plant with single woody self supporting stem called the trunk usu. unbranched for some distance above ground. According to the Chambers's Dictionary "tree" is a large plant with a single branched woody trunk. An orchard, therefore, means a garden of trees. A question again arises whether bamboos and plantain or banana plants can be called trees. To show the nature of tree as distinguished from other kinds of plants Mr. Pal relies upon the "Text Book of Botany" by H. Mukherjee, 6th Edn. meant for college students. At page 49 of the book it is stated that nature of stem and its branches often determine the types of plants. Thus, the denomination of plants into herbs, shrubs and trees is mainly based on the woody nature and size of the stem. According to the author, herbs are low growing plants with tender stems which are usually not woody. In some perennial herbs woody tissues may develop with age. Plants which live for a number of years are called perennials. The perennial herbs send out sub-aerial shoots for vegetative and reproductive purposes once a year during the periods favourable for growth. Shrubs have been described as small, perennial woody plants without a main trunk. China rose, Gardenia, etc. are examples of this type. "Trees" are described as taller and more robust than

the shrubs. Their main axis remains unbranched for some distance above the ground and forms trunk. Mango, Tamarind, Banyan etc. are given as examples of trees. From what I have discussed above, it cannot be held that plantain or banana plants and bamboos are trees. The banana garden and the bamboo gardens referred to in the suit cannot be called orchards. In my view, therefore, the claim for retention of the said gardens by the plaintiff cannot be sustained on the basis of clause (f) of sub-sec. (1) of Section 6 of the West Bengal Estates Acquisition Act, 1953. The second point urged by Mr. Pal from the side of the appellant also succeeds.

10. Mr. Lala on behalf of the respondent filed a petition for taking note of a subsequent event after the disposal of the first appeal in support of the decree passed in favour of the plaintiff-respondent. He relies upon the judgment of a Bigh Raiyat Case No. 8 where an order was passed in favour of the plaintiff-respondent allowing him to retain several lands on the basis of the decree passed in Title Suit No. 23 of 1962 confirmed by the learned Subordinate Judge in the Title Appeal No. 1462 of 1962. Mr Lala's argument is that when in the meantime plaintiff's claim has been allowed by the Settlement Officer, the appellant, the State of West Bengal cannot challenge the character of the suit lands to deprive the plaintiff of his legitimate right of retention. The said application is opposed by the appellant. On consideration of the affidavits filed by both the parties and considering the judgment passed, I find that the application has got no merit. The order was passed by the Settlement Officer on the basis of the judgment and the decree passed by the trial Court duly affirmed by the Subordinate Judge in the first appeal below. The decisions of the lower Courts have been challenged in this second appeal before me. The decisions of the Courts below were not final and the Settlement Officer, when the said judgments were produced before him, could not disregard the said judgments of the Civil Court and pass order on the basis thereof and not on the merits of the plaintiff's claim considered independently. When in my view as indicated above, the judgments and the decrees of the Courts below were illegal, erroneous and unsustainable and also liable to be set aside, the order passed by the Settlement Officer on the basis of

those erroneous decisions is of no value and the plaintiff cannot rely upon that in support of his claim. The plaintiff gets no assistance from the said judgments and no relief can be granted to the respondent on the basis of that application. The said application is thus disposed of.

11. In the result, the appeal is allowed and the judgments and the decrees of the Courts below are hereby set aside. The plaintiff's suit is dismissed. In the facts and circumstances, however, the parties will bear their own costs in this appeal as well as in the Courts below.

Appeal allowed.

AIR 1977 CALCUTTA 34

T. K. BASU AND M. N. ROY, JJ.

Indian Mutual General Insurance Society Ltd., Appellant v. Manzoor Ashan and others, Respondents.

A. F. O. O. No. 79 of 1967, D/- 9-4-1976.

(A) Motor Vehicles Act (1939), S. 95 (1) (b) Proviso (ii) — Death in Motor accident — Liability of Insurance Company — Motor vehicle hired for carrying goods — Hirer is not a person who enters into a contract of employment with the owner of the vehicle and as such the Insurance Company is not liable.

Words in Proviso (ii) of S. 95 (1) (b) 'carried for hire or reward or carried by reason of or in pursuance of a contract of employment' go with the words 'passengers' and not the word 'vehicle'. The normal and the ordinary meaning and scope of the expression, 'a contract of employment' points to a person being employed to do something or to carry out something for another person. A hirer thus cannot be covered by 'contract of employment'. AIR 1967 Punj 486 (FB), Foll.; (1970) 74 Cal WN 879; AIR 1968 Bom 267 and AIR 1970 Mad 236, Dist.

(Para 11)

(B) Motor Vehicles Act (1939), S. 95 — Liability of insurer — Rash and negligent driving of hired truck — Death of hirer in motor accident — Truck owner ex parte in the case — Insurance Company cannot challenge evidence on rash and negligent driving.

In a claim case for accidental death, if the Truck owner is ex parte, Insurance Company cannot challenge the ex parte

evidence about rash and negligent driving. (Para 2)

Cases Referred: Chronological Paras
(1970) 74 Cal WN 879 = 1971 ACJ 156 12
AIR 1970 Mad 236 = (1970) 1 Mad LJ 542

16
AIR 1968 Bom 267 = 69 Bom LR 348 15
AIR 1967 Punj 486 = 69 Pun LR 461
(FB) 10

Sunil Krishna Dutta, for Appellant;
Rabin Mitra and Kamallesh Banerjee, for Respondents.

T. K. BASU, J.:— This is an appeal from an order of the learned Judge, Motor Vehicle Accident Claim Cases Tribunal, Burdwan dated the 31st August, 1966. The petitioners before the Tribunal were the sons, daughters and the widow of one Mohammad Ahsan who had died in an accident on the 11th January, 1966. The case of the petitioners was that the truck No. BRN 4761 was being driven rashly and negligently as a result of which it met with an accident near Rani Bundh on the Grand Trunk Road as a result of which the said Mohammad Ahsan received severe injuries. He was removed to Rani Bundh Primary Health Centre and he died on the same date. It was the case of the petitioners that the deceased was a contractor by occupation and his monthly earnings came to about Rs. 500 which was the only source of maintenance for his family. The petitioners claimed Rs. 30,000 by way of compensation before the Tribunal.

2. The owner of the truck did not appear or contest the claim. The claim was however contested by the appellant with whom the truck was insured. The learned Tribunal rightly held that since the owner of the truck did not contest the claim, the evidence on the question of rash and negligent driving was necessarily ex parte and the Insurance Company was not entitled to challenge that evidence.

3. The only question that the appellant before us could and did agitate before the Tribunal was that it was not liable under the policy of insurance for the claim on behalf of the deceased. The learned Tribunal however came to the conclusion that the petitioners were to get a sum of Rs. 12,000 as compensation and the appellant was to pay the amount.

4. It is against this order that the appellant Insurance Company has come before us on appeal.

5. Mr. Sunil Krishna Dutt, the learned advocate on behalf of the appel-

lant contended that the Insurance Company was not liable to the deceased or his heirs for the accident resulting in the death of the deceased. This contention was based on the provisions of Section 95 of the Motor Vehicles Act, 1939 (IV of 1939) (hereinafter referred to as the Act). Section 95, in so far as it is material for our purpose, is in the following terms:—

"95. (1)

(b)

Provided that a policy shall not be required—

(i)

(ii) except where the vehicle is a vehicle in which passengers are carried for hire or reward or by reason of or in pursuance of a contract of employment, to cover liability in respect of the death of or bodily injury to persons being carried in or upon or entering or mounting or alighting from the vehicle at the time of the occurrence of the event out of which a claim arises: or....."

6. According to Mr. Dutta Proviso (ii) of Section 95 (1) (b) exonerates the appellant from any liability in respect of the accident or the death of the deceased in the present case. It is clear from a reading of the Proviso (ii) to Section 95 (1) (b) of the Act but it deals with the cases where the Insurance Company shall not be liable on the policy. Proviso (ii) however engrafts an exception to this exemption from liability. The first part of the Proviso (ii) speaks of a vehicle in which passengers are carried for hire or reward. This would obviously refer to passenger transport or what is otherwise known as stage carriages where passengers are carried from place to place for a consideration. The truck in the instant case clearly did not answer to that description. The next part of the Proviso speaks of a vehicle in which passengers are carried 'by reason of or in pursuance of a contract of employment'. If the deceased was being carried as a passenger by reason of or in pursuance of 'a contract of employment' the appellant Insurance Company would clearly be liable for the accident.

7. Mr. Rabin Mitra, the learned advocate appearing on behalf of the respondents, who are the heirs of the deceased, contended that the deceased was being carried on the vehicle under a contract of employment and as such the Insurance Company was liable. Mr. Mitra contended that the deceased had hired the truck for the purpose of carrying

timber for a sum of Rs. 70. This according to Mr. Mitra amounted to a 'contract of employment' within the meaning of Proviso (ii) to Section 95 (1) (b) of the Act.

8. That the deceased was a hirer in respect of the vehicle in question cannot possibly be disputed and indeed was not disputed. This is clear from the evidence of witness No. 5, on behalf of the petitioner before the Tribunal. It may be mentioned that witness No. 6 was the sister's husband of the deceased. The material portion of his evidence is as follows:—

"On the morning of the day of accident we went to Gorpara to hire a truck. I accompanied him. He hired the truck for carrying wood to Khatra to a timber depot. Truck No. BRN 4761 was hired for Rs. 70. He boarded the truck there and I returned home".

9. It is thus clearly established that the deceased was a hirer from the owner of the truck. The question therefore which arises for consideration in the present appeal is whether a hirer can be said to be under 'a contract of employment' within the meaning of Proviso (ii) to Section 95 (1) (b) of the Act, in order to make the appellant liable on the Insurance Policy.

10. Mr. Dutta, the learned advocate appearing on behalf of the appellant placed strong reliance in this connection on a Full Bench decision of the Punjab High Court in the case of Oriental Fire and General Insurance Co. Ltd., New Delhi v. Smt. Gurdev Kaur, reported in AIR 1967 Punj 486. The facts of that case were somewhat similar to the facts of the present case. In the case before the Punjab High Court, a goods truck which was insured, was hired by some persons for carrying their goods. The truck was driven by an employee of the truck owner. The owners of the goods were also sitting in the truck when it met with an accident, as a result of which some of them died. The dependents of the deceased were awarded compensation by the Tribunal. On an appeal by the Insurance Company, it was held that the deceased persons as hirers-cum-owners of the goods did not come under Clause (ii) of the Proviso to Section 95 (1) (b) and as such the Insurance Company was not liable on the policy. Dealing with the expression 'contract of employment' in that proviso, Mehar Singh C. J. observed as follows:

"The words in clause (ii) of the Proviso to clause (b) of sub-section (1) of Section 95 are 'carried for hire or reward or are carried by reason of or in pursuance of a contract of employment' go with the word 'passengers' and not with the word 'vehicle'. If those words were to be read with the word 'vehicle' the reading of this clause of the Proviso does not make correct grammatical sense or any other sense. This is one consideration which negatives completely the second argument that in this case there was 'a contract of employment' of the truck or the motor vehicle of Benarsi Das or that there was 'a contract of employment' of Benarasi Das as a carrier. Then it has not been shown by reference to any judicial opinion that the expression 'a contract of employment' can have reference to a contract of carriage of goods whether in relation to the carriage itself or the owner of such carriage. The normal and the ordinary meaning and scope of the expression 'a contract of employment' points to a person being employed to do something or to carry out something for another person. It has the element of rendition of some service in one shape or another for the employer. So it cannot refer to the hiring of a goods carried as a contract of employment or to the owner of such a carrier as the person with whom a contract of employment has been made."

11. This according to Mr. Dutta is a clear authority for the proposition that a hirer of a vehicle is not a person who enters into 'a contract of employment' with the owner of the vehicle and as such the Insurance Company is not liable.

12. Mr. Mitra, the learned Advocate on behalf of the respondents sought to rely on a decision of a Division Bench of this Court in the case of *Hukum Chand Insurance Co. Ltd. v. Subashini Roy*, reported in (1970) 74 Cal WN 879. In that case, it was held that in an action for compensation in respect of the accident involving the death or fatal injury of a person arising out of using a motor vehicle, all possible defences are not open to the Insurer. The Insurer is not entitled to avoid his liability except on the grounds specified in Section 96 (2) of the Act. There can possibly be no dispute with the proposition laid down in the above judgment of this Court. Where the liability is otherwise covered by the policy, the Insurer is confined to the defences laid down in Section 96 (2) of the

Act. But this does not and cannot possibly preclude the Insurance Company from disputing the very basis of its liability under the policy. In such a case, it seems to us that Section 96 (2) of the Act does not come into the picture at all.

13. We are fortified in this view by the above-mentioned decision of the Full Bench of the Punjab High Court in the *Oriental Fire and General Insurance Co. Ltd., New Delhi v. Smt. Gurdev Kaur* reported in AIR 1967 Punj 486. While dealing with this question, the Court observed as follows:—

"Sub-section (2) of Section 96 refers to a sum payable by an insurer under sub-section (1) of that section and sub-section (6) of that section debars any other defence than those mentioned in sub-section (2). But this only happens when the judgment is in respect of liability as is required to be covered by a policy under clause (b) of sub-section (1) of Section 95. Where no liability is required to be covered by that provision, it is obviously open to the insurer to prove that in a particular case the liability is not required to be covered by that provision, and, when the insurer shows that, it has no liability to pay to the person who is entitled to the benefit of the decree and judgment of the Tribunal. In such a case the question of the other defences under sub-section (2) of Section 96 never arises."

14. We may mention that this particular question of whether the Insurer challenge its liability did not come up before the Division Bench of this Court in the case mentioned above and was not dealt with.

15. Mr. Mitra, learned advocate on behalf of the respondents referred to a decision of the Bombay High Court in the case of *Abdulkadar Ebrahim v. Kashinath Moreswar*, reported in AIR 1968 Bom 267. This case only deals with the mode of assessment of the damages and does not appear to have any relevance to the issue before us. Indeed Mr. Dutta for the appellant did not raise any contention on the quantum of damages awarded by the learned Tribunal.

16. Reference is also made by Mr. Mitra to a decision of the Madras High Court in the case of the *Vengard Insurance Co. Ltd. v. Chinnammal*, reported in AIR 1970 Mad 236. In that case it was held by Alagiriswami, J. that the expression 'a contract of employment' occurring in Proviso (ii) of Section 95 (1) (b)

would cover not only such persons as were under a contract of employment with the owner of the vehicle but also persons who are on the vehicle in pursuance of a contract of employment with the owner of the goods carried in it. This decision also, in our view, is of no assistance to the respondents as it does not directly deal with the question whether a hirer comes within the expression 'a contract of employment'. With respect, we are inclined to agree with and follow the decision of the Full Bench of the Punjab High Court and hold that the deceased being a hirer was not under 'a contract of employment' within the meaning of Proviso (ii) to Section 95 (1) (b) of the Act and as such the appellant was not liable on the policy in respect of his accidental death.

17. Unfortunate as the result is, the findings of the learned Tribunal must be held to be erroneous in law and must be set aside.

18. In the result, the appeal succeeds and is allowed. The order of the learned Tribunal is set aside. The claim of the respondents petitioners before the Tribunal is dismissed. There will be no order as to costs of this appeal.

M. N. ROY, J.:— I agree.
Appeal allowed.

AIR 1977 CALCUTTA 37

MURARI MOHAN DUTT AND
RAMKRISHNA SHARMA, JJ.

Ram Kumar Shew Chandrai, a Firm,
Appellant v. Dominion of India now The
Union of India, Respondent.

A. F. O. D. No. 523 of 1963, D/- 9-4-1976.

(A) Partnership Act (1932), S. 69 —
Registered firm dissolved — Suit by such
dissolved firm against third party is not
barred by this section. (Para 7)

(B) Partnership Act (1932), S. 69 (2)
— Suit by firm against third party —
Names of all partners must be shown in
register of firms — Name of one person
who was partner on date of suit not
shown in register — Suit is not maintain-
able. AIR 1970 Mys 299, Dissented from.
(Paras 8, 9)

Cases Referred: Chronological Paras
AIR 1970 Mys 299 = (1970) 2 Mys LJ 27 9

AIR 1961 SC 325 = (1961) 1 SCR 982 8

GT/IT/C191/76/JHS

Janendra Coomer Datt, for Appel-
lant; Ajoy Kumar Basu, for Respondent.

M. M. DUTT, J.:— This appeal is at
the instance of the plaintiff and it arises
out of a suit for recovery of the price of
goods.

2. On June 29, 1948, the appel-
lant alleged to be a dissolved partnership
firm, booked 150 bales of piece goods at
Wadi Bander on the G.I.P. Railway for
carriage by the said railway and also by
the E. N. Railway and for delivery of the
same to the appellant at Shalimar. It was
alleged that on July 17, 1948, the B. N.
Railway delivered 140 bales of piece
goods and failed and neglected to deliver
the remaining 10 bales and/or lost the
same and thereby caused loss and dam-
age to the appellant. The appellant ac-
cordingly, claimed Rs. 10,183-4-6 on ac-
count of the value of 10 bales and Rupees
1,018-6-3 for loss of commission at the
rate of 10 per cent of the value of the
goods. The total amount claimed by the
appellant is Rs. 11,202-4-9. It was alleged
that the statutory notices under Section
77 of the Indian Railways Act and Sec-
tion 80 of the Code of Civil Procedure
were duly served.

3. Initially, the appellant institut-
ed the suit claiming the said amount in
the Original Side of this Court being suit
No. 3934 of 1949. On September 16, 1957,
Lacminarayan Poddar, one of the part-
ners of the appellant-firm died. On Janu-
ary 4, 1957, the High Court dismissed the
suit for want of jurisdiction. On January
7, 1957, the present suit was filed in the
third Court of the Subordinate Judge,
Howrah. It was contended that the period
during which the High Court suit was
pending should be excluded in computing
the period of limitation of the present
suit.

4. The respondent Union of India
representing the B. N. Railway contested
the suit by filing a written statement. The
claim of the appellant in respect of two
bales only was admitted and the remain-
ing claim was denied by the respondent.
The receipt of the notices under Section
77 of the Indian Railways Act and Sec-
tion 80 of the Code of Civil Procedure
and the legality and validity thereof were
denied. It was also denied that the appel-
lant was entitled to claim the benefit of
Section 14 of the Indian Limitation Act,
1908 as the plaintiff did not prosecute the
High Court suit bona fide and with due
diligence.

5. The learned Subordinate Judge came to the findings that the notice under Section 80 of the Code of Civil Procedure was duly served and that the suit was not barred by limitation. Regarding the notice under Section 77 of the Indian Railways Act, he held that no copy of the alleged notice had been filed and that if the correspondence between M/s. Santa Singh & Co. and the claims of the respondent-Railway be construed as constituting a notice under Section 77, it was illegal and invalid. Further, he took the view that as the G.I.P. Railway which was the contracting railway was not made a party to the suit, the onus lay on the appellant to prove loss during carriage by the respondent-Railway, and the appellant failed to discharge the said onus. He held that the appellant-firm having been dissolved on the death of the said Lachminarayan Poddar was not entitled to sue. Upon the said findings, he dismissed the suit. Hence, this appeal.

6. We may first of all consider the maintainability of the suit. On behalf of the respondent, the maintainability of the suit has been challenged on two grounds, namely, (1) the appellant-firm is a dissolved firm and (2) the name of Durga Prosad Poddar who became a partner of the appellant-firm in 1956 before the institution of the present suit is not shown in the Register of Firms. The relevant provision is Section 69 of the Indian Partnership Act, 1932. Sub-sections (1) and (2) and clause (a) of sub-section (3) are as follows:—

"69. (1) No suit to enforce a right arising from a contract or conferred by this Act shall be instituted in any Court by or on behalf of any person suing as a partner in a firm against the firm or any person alleged to be or to have been a partner in the firm, unless the firm is registered and the person suing is or has been shown in the Register of Firms as a partner in the firm.

(2) No suit to enforce a right arising from a contract shall be instituted in any Court by or on behalf of a firm against any third party unless the firm is registered and the persons suing are or have been shown in the Register of Firms as partners in the firm.

(3) The provisions of sub-sections (1) and (2) shall apply also to a claim of set-off or other proceeding to enforce a right arising from a contract, but shall not affect—

(a) the enforcement of any right to sue for the dissolution of a firm or for

accounts of a dissolved firm, or any right or power to realise the property of a dissolved firm, or."

7. It has been already noticed that the learned Subordinate Judge was of the view that as the appellant-firm was a dissolved firm, the suit was not maintainable. We are, however, unable to agree with him. Sub-sections (1) and (2) give a clear indication that a suit at the instance of a dissolved firm is maintainable. Moreover, under sub-section (3) a dissolved firm has the right or power to realise its property and, in that case, the provisions of sub-sections (1) and (2) will not apply. But in other cases including a case to enforce a right arising from a contract, the conditions under sub-sections (1) and (2) must be fulfilled. The learned Subordinate Judge was in error in holding that the suit was not maintainable at the instance of the appellant-firm alleged to be a dissolved firm.

8. The second ground which has been raised on behalf of the respondent was not taken in the Court below, but as it is a pure question of law and all the facts required to determine the question are on record, we propose to consider the same. Under Section 69 (2), two conditions must be fulfilled before a suit can be said to be maintainable. The said conditions are: (1) the firm must be a registered one and (2) the persons suing are or have been shown in the Register of Firms as partners in the firm. There is no dispute that the first condition is satisfied, for the appellant-firm is a registered firm. There is, however, a serious dispute between the parties as to whether the second condition is fulfilled. It is now necessary to state certain facts. The appellant has examined one Durga Prosad Poddar. Durga Prosad has stated in his evidence that he became a partner of the firm in 1956 after the death of his father Lachminarayan Poddar. In paragraph 12 of the plaint, it has been stated that one of the partners Sri Lachminarayan Poddar having died on September 16, 1956, the plaintiff-firm has been dissolved. The suit was instituted on January 7, 1957 and before the institution of the suit Durga Prosad Poddar was taken in as a partner. So it is not correct to say that on the date of the suit the firm stood dissolved. When a firm consists of more than two partners, it is dissolved on the death of one of the partners unless the partnership agreement provides for its continuance in spite of the death of a

partner. In the instant case, no partnership agreement has been produced by the appellant. But as stated by Durga Prosad he became a partner of the firm in 1956 after the death of Lachminarayan. From this fact, it may be reasonably presumed that the firm did not dissolve, but continued to carry on its business as before. The statement in paragraph 12 of the plaint does not seem to be correct. The second condition under Section 69 (2) is that the persons suing are or have been shown in the Register of Firms as partners in the firm. The entries in the Register of Firms do not, however, include the name of Durga Prosad as one of the partners of the firm. It is argued on behalf of the appellant that as the cause-of-action for the suit arose before Durga Prosad was taken in as a partner it is quite immaterial whether or not his name appears in the Register of Firms, and the second condition is fulfilled as the names of the partners who were at the time of the accruing of the cause-of-action have been shown as partners in the Register of Firms. In support of this contention, reliance has been placed on behalf of the appellant on the provision of Order 30 of the Code of Civil Procedure. The provision of Order 30, is an enabling one which permits partners constituting a firm to sue or be sued in the name of the firm (*Purushottam v. M/s. Manilal & Sons*, AIR 1961 SC 325). Sub-rule (1) of Rule 1 of the Order 30 enables two or more persons to sue or to be sued in the name of the firm of which such persons were partners at the time the cause of action arose. A firm's name is merely a compendious mode of describing the partners constituted in the firm. When a suit is instituted in the name of the firm, it is really a suit by all the partners of the firm. In such a case, "the persons suing" within the meaning of Section 69 (2) of the Partnership Act, are all the partners on the date of the suit. The partners during whose time the cause-of-action arose may also sue in the firm name, but the names of those partners must appear on the face of the plaint so that they can be said to be the "persons suing". If the firm is only shown as the plaintiff, in that case, all the partners of the firm on the date of the suit must be held to be the persons suing and not only those partners during whose time the cause-of-action arose. Under sub-rule (1) of Rule 2 of Order 30, where a suit is instituted in the name of the firm, plaintiffs or their pleader shall, on

demand in writing by or on behalf of any defendant forthwith declare in writing the names and addresses of all the persons constituting the firm. In the instant case, the plaintiff is the firm, that is, all the partners of the firm as on the date of the suit. In other words, all the partners of the firm on that date were the persons suing within the meaning of Section 69 (2) and, as required by the second condition of that section, their names must be shown in the Register of Firms as partners in the firm. Admittedly, Durga Prosad Poddar was a partner of the firm on the date of the suit, but his name is not or has not been shown in the Register of Firms and, accordingly, the second condition is not fulfilled.

9. On behalf of the appellant, the following observation of the learned single Judge of the Mysore High Court in *M. A. Hussain v. M/s. Panchmal*, AIR 1970 Mys 299, has been relied on:

"..... persons suing may establish either that they are partners on the date of the suit or that they are persons whose names are shown in the register of firms as partners in the firm. As already observed, the second alternative, namely, the fact that the names of the persons suing have been shown in the register of firms as partners of the firm can be established either by producing relevant Register of firms or a certified copy of the same and not by adducing oral evidence. But there is no legal bar to prove the first alternative, namely, that the persons suing are partners of the firm by adducing evidence other than the register of firms or its certified copy."

It follows from the said observation that the second condition will be fulfilled if it is proved that he is a partner in the firm notwithstanding that his name does not appear in the Register of Firms. With respect, we are unable to agree with this view as expressed by the learned Judge. Both the conditions under Section 69 (2) are mandatory. In our opinion, the second condition will be fulfilled only when the names of the persons suing are or have been shown in the Register of Firms as partners in the firm. In the instant case, as the second condition of Section 69 (2) has not been fulfilled, it must be held that the suit is barred by that section.

10. The next question that requires consideration relates to the notice under Section 77 of the Indian Railways Act. The appellant has placed reliance

on a letter dated August 18, 1948, [Ext. 3 (c)], and it is contended that the said letter constitutes a notice under Section 77. Ext. 3 (c) was written by Santa Singh & Co. to the Claims Officer, B. N. Railway, claiming refund in respect of the short certificate for 10 bales granted by that railway. The receipt of this notice is not denied, and in the subsequent letters, the Claims Officer has acknowledged the receipt of Ext. 3 (c). On behalf of the respondent, however, it has been strenuously urged that Ext. 3 (c) cannot be relied on by the appellant as a notice given on their behalf. Section 77 provides that a person shall not be entitled to refund of an overcharge in respect of animals or goods carried by railway or to compensation for the loss, destruction or deterioration of animals or goods delivered to be so carried, unless his claim to the refund or compensation has been preferred in writing by him or on his behalf to the Railway Administration within six months from the date of the delivery of the animals or goods for carriage by railway. It is clear from Section 77 that the notice must be in writing by the owner of the goods or on his behalf. Ext. 3 (c) does not indicate on whose behalf it was sought to be given. It is, however, the case of the appellant that Santa Singh & Co. was its clearing agent and, as such, it should be inferred that Ext. 3 (c) was written on behalf of the appellant. In order to prove the same, the appellant examined P.W. 2 Audh Pathak who stated that Santa Singh & Co. was a clearing agent. He did not, however, say that the said company was a clearing agent of the appellant. Moreover, the firm of Santa Singh & Co. under which P.W. 2 served had been dissolved, and it was admitted by him that there was no paper to show that the company was a clearing agent. He could not also give any other particular. The learned Subordinate Judge has held that the appellant has failed to discharge the onus that Santa Singh & Co. was its clearing agent. According to the respondent, Santa Singh & Co. made a claim and its claim was satisfied. It appears from Ext. 3 (c) that a sum of Rs. 1,063-15-6 was given to Santa Singh & Co. in full and final settlement of its claim in connection with the consignment in question. In these circumstances, it must be held that Ext. 3 (c) cannot be held to be a notice given by Santa Singh & Co. on behalf of the appellant. Even assuming that Santa Singh & Co. was the clearing agent of

the appellant, the claim preferred by him having been settled finally, the said notice spent its force and the appellant cannot rely on the same. As there is no other notice given by the appellant under Section 77, the suit must fail on that ground. The learned Subordinate Judge was, therefore, right in holding that the plaintiff failed to prove service of any notice under Section 77 by or on its behalf. In these circumstances, it is not necessary to consider whether the appellant has been able to prove loss of goods on the defendant railway.

11. In the result, the judgment and decree of the learned Subordinate Judge are affirmed and this appeal is dismissed, but in view of the facts and circumstances of the case, there will be no order for costs.

SHARMA, J.:— I agree.

Appeal dismissed.

AIR 1977 CALCUTTA 40

NIRMAL CHANDRA MUKHERJI AND
BANKIM CHANDRA RAY, JJ.

Netai Chandra Ghose and others, Petitioners v. Phani Bhushan Biswas and another, Opposite Parties.

Civil Rule No. 1885 of 1972, D/- 12-2-1976.

(A) Civil P. C. (1908), S. 115 — "And in which no appeal lies thereto"—Breach of order for temporary injunction issued under O. 39, Rr. 1 and 2 — Order under O. 39, R. 2 (3) for sale of properties for breach of injunction — Order appealable — Application under S. 151 to set aside sale does not lie — Court entertaining such application and setting aside the sale — Order can be revised. AIR 1952 Cal 577 and AIR 1917 Cal 44 (FB), Ref.; AIR 1953 SC 23; AIR 1962 SC 527 and AIR 1975 Cal 80 (FB), Dist. (Para 9)

Cases Referred: Chronological Paras
AIR 1975 Cal 80 = 78 Cal WN 1045 (FB)

8
AIR 1962 SC 527 = (1962) Supp (1) SCR 450 8

AIR 1953 SC 23 = 1953 SCR 136 6

AIR 1952 Cal 577 = 56 Cal WN 531 5

AIR 1917 Cal 44 = 21 Cal WN 877 (FB) 5

Chandi Das Ray and Rabindra Nath Dutta, for Petitioners; S. K. Biswas, for Opposite Parties.

HT/HT/C597/76/GGM

N. C. MUKHERJI, J.:— This is an application under Section 115 of the Code of Civil Procedure and is directed against Order No. 195 dated February 18, 1972 passed by Sri R. L. Mukherjee, Subordinate Judge, 9th Court at Alipore in Misc. Case No. 96 of 1967 arising out of Title Suit No. 100 of 1967.

2. The facts of the case may briefly be stated as follows:—

3. The petitioner instituted Title Suit No. 100 of 1967 for declaration of title, recovery of khas possession and injunction. The petitioners subsequently filed an application under O. 39, Rules 1 and 2 of the Code and the opposite parties were restrained by an order of ad interim injunction from raising any construction on the suit land. The said order was served upon them on 13th November 1967. In spite of service of ad interim injunction the opposite parties started to raise construction. Thereafter the petitioners filed an application under Order 39, Rule 2 (3) of the Code for attachment of the properties. The said application was registered as Misc. Case No. 96 of 1967 and an order of attachment was passed on 13th of July 1968. Thereafter the learned Subordinate Judge on 14th of February 1970 passed an order for sale of the attached properties under Order 39, Rule 2 (3) of the Code and it was ordered that out of the sale proceeds 3/4th thereof should be awarded to the petitioners as compensation and the balance should be paid to the opposite parties. On 18-11-1971 the opposite parties filed an application under Section 151 of the Code for setting aside the order for sale. The said application was heard in presence of both the parties and by an order No. 195 dated 18-2-1972 the learned Judge vacated the order dated 14-2-1970 and set aside the order for sale of the properties. It is stated that though the injunction order was served on 13-11-1967 the opposite parties continued construction even upto 22-4-68 which will appear from the second inspection report. As such the violation of injunction order continued for several months. Being aggrieved by the order dated 18-2-72, the petitioners have come up before this Court.

4. Mr. Chandidas Ray Chowdhury, learned Advocate appearing on behalf of the petitioners, contends that Order 39, Rule 2 (3) of the Code was an appealable order and as such the learned Subordinate Judge ought not to have entertained

an application under Section 151 of the Code. It is submitted that the learned Judge acted illegally and with material irregularity in exercise of his jurisdiction by entertaining the application under Sec. 151 of the Code and setting aside the order for sale which was passed under Order 39, Rule 2 (3) of the Code and which is an appealable order under Order 43, Rule 1 (r) of the Code.

5. In support of his contention Mr. Ray Chowdhury refers to a decision reported in AIR 1952 Cal 577 (Krishna Mohan v. Nripendranath). In this case upon an application by the judgment-debtor for relief under Section 36 of the Bengal Money Lenders Act to reopen the mortgage decree it was ordered that the preliminary and the final decree be reopened. The decree-holders filed an appeal against the said order but it was allowed to be dismissed. In the meantime the decree-holders made an application for amendment of the reopened decree and prayed for a direction in terms of Section 36 (2) (e) directing restoration of possession of the decree-holder auction-purchasers in case of default in payment of the instalments and the municipal rates and taxes as provided for in the reopened decree. The Subordinate Judge made an order directing that the decree be amended. The amendment was purported to have been made under either Section 152 or Section 151 of the Code. It was held that it could not be said that the Court while passing an order directing the decree to be reopened was not conscious of what would follow in case of a default on the part of the judgment-debtor in complying with the directions contained in that order. It was purely a case of error on the part of the Court. Such an error could be remedied by proper proceedings either by way of a review if that was allowable under the law or by an appeal against the reopened decree. The decree-holder did prefer an appeal but did not prosecute it and allowed the same to be dismissed. In the circumstances it was difficult to say that the error in the order of the Court reopening the decree was an accidental slip or omission which justified the Court in exercising its power under Section 152." It was further held that "The Court could not also exercise the inherent powers under Section 151, reason being that these powers could not be invoked where there was another remedy available to the party". Their Lordships in coming to the above conclusion relied

on the Full Bench decision reported in AIR 1917 Cal 44 (FB) (Abdul Kasim Abu Ahmad v. Allahabad Bank Ltd.).

6. Mr. Sushil Kumar Biswas, learned Advocate appearing on behalf of the opposite parties, submits that it is true that an order passed under Order 39, Rule 2 (3) of the Code is an appealable order, but in the circumstances of the case the Court must be said to have jurisdiction to entertain an application under Section 151 and to pass necessary order. In support of his contention Mr. Biswas first refers to a decision reported in AIR 1953 SC 23 (Keshardeo Chamria v. Radha Kissen Chamria). In this case on the adjourned date of hearing of an execution, the decree-holder again applied for time for giving instructions to his pleader for taking necessary steps in execution but the application for time was refused by the Court and the execution case was dismissed. The decree-holder then applied under Section 151 of the Code for restoration of the case and the Court thereupon restored the execution case under its inherent powers in order to rectify the said mistake it had committed in dismissing the execution case by the same order without giving opportunity to the decree-holder to take the necessary steps. It was held that "in the circumstances of the case the order dismissing the execution on part satisfaction was bad and the executing court was justified in correcting the same under its inherent powers".

7. The facts of this case are completely different from the facts of the present case and the principle laid down in this case has no application to the present case.

8. Mr. Biswas next refers to a decision reported in AIR 1962 SC 527 (Manohar Lal Chopra v. Hiralal). In this case it was held by the majority view that "It is well settled that the provisions of the Code are not exhaustive, for the simple reason that the Legislature is incapable of contemplating all the possible circumstances which may arise in future litigation and consequently for providing the procedure for them. The effect of the expression 'if it is so prescribed' in Section 94 is only this that when the rules in Order 39, Civil Procedure Code prescribe the circumstances in which the temporary injunction can be issued, ordinarily the Court is not to use its inherent powers to make the necessary orders in the interests of justice, but is merely to

see whether the circumstances of the case bring it within the prescribed rule. If the provisions of Section 94 were not there in the Code, the Court could still issue temporary injunctions, but it could do that in the exercise of its inherent jurisdiction. It is in the incidence of the exercise of the power of the Court to issue temporary injunction that the provisions of Section 94 of the Code have their effect and not in taking away the right of the Court to exercise its inherent power". The principle laid down in the above case also does not apply to the facts of the present case. In the present case the question is if there is an express provision of appeal against an order whether an application under Section 151 is maintainable? To support his contention that in some circumstances such an application is maintainable Mr. Biswas refers to the Full Bench decision of this Court reported in 78 Cal WN 1045 = (AIR 1975 Cal 80) (FB) (Bimala Devi v. A. C. Mallick). In this case "An application under Order 21, Rule 90 was dismissed for default. Then the petitioner filed an application under Section 151 of the Code. It was held by the Full Bench that "Though an appeal lies under Order 43, Rule 1 (j) of the Civil Procedure Code from an order dismissing an application under Order 21, Rule 90 such an appeal will however be useless and ineffective inasmuch the appellate court would have no materials on the record when no evidence has been adduced to come to a decision whether the appellant was prevented by sufficient cause from appearing in court when his application under Order 21, Rule 90, was dismissed". It was further held that "In such a case although an appeal has been provided under the Civil Procedure Code, the Court will have jurisdiction to entertain an application under Section 151 of the Code for setting aside the order of dismissal for default". But the position in the present case is not such as was in the case before the Full Bench. In this case an order was passed for sale of the properties under Order 39, Rule 2 (3) of the Code. The Court was satisfied that there was violation of the order of injunction. Aggrieved parties could have very well preferred an appeal against the said order. In such circumstances it cannot be said that without preferring an appeal the aggrieved parties can file an application before the same Court under Section 151 of the Code for setting aside its earlier order.

9. For all the reasons stated above we are of the opinion that the learned court below ought not to have entertained the application under Section 151 of the Code when there is a clear provision in the Code for preferring an appeal against the order passed under Order 39, Rule 2 (3) specially in view of the facts and circumstances of the case.

10. In the result this application succeeds and the Rule is made absolute. The Order No. 195 dated February 18, 1972 passed by the learned Subordinate Judge in Misc. Case No. 96 of 1967 be set aside. There will be however no order as to costs.

B. C. RAY, J.:— I agree.
Petition allowed.

AIR 1977 CALCUTTA 43

N. C. MUKHERJI AND B. C. RAY, JJ.

Taramoni Dasi, Petitioner v. Kalidasi Majhi and others, Respondents.

Civil Revn. No. 2154 of 1974, D/- 3-12-1976.

(A) Bengal, Agra and Assam Civil Courts Act (12 of 1887), S. 21 — Appeal — Forum — Pecuniary jurisdiction of District Judge raised from Rs. 10,000 to Rs. 15,000 by Amendment Act — Suit filed before Amendment Act — Appeal arising out of such suit — Forum of appeal — Determination of — Right of appeal — Vested right — (i) Civil P. C. (1908), S. 96; (ii) Interpretation of Statutes — Retrospective effect).

A right of appeal is vested in the parties as soon as a suit is instituted, and the forum of appeal would be determined with regard to law as existing on the date of the commencement of the suit. The Legislature can take away such vested right by way of amendment and if such vested right is taken away then the forum will be changed and the forum will be determined according to the provisions of the Amendment Act. The Bengal, Agra and Assam Civil Courts (Amendment) Act which raised the pecuniary jurisdiction of the District Judge from Rs. 10,000 to Rs. 15,000 does not contain any provision which has in any way taken away the vested right of appeal. That being so, the forum of appeal arising out of a suit filed before the Amendment Act and valued at Rs. 12,000 will not be the District Judge but the High Court. AIR

1957 SC 540 and AIR 1970 All 201 (FB).
Rel. on. (Para 5)

(B) Court-Fees Act (1870), Sch. I, Art. 1 — Appeal — Court-fee — Determination of.

There is no doubt that the valuation of an appeal for the purpose of jurisdiction and the valuation of the same for the purpose of payment of court-fees may be different. The payment of court-fees depends on the claim as made by a party. The relief claimed in the memorandum of appeal thus determines the value of the appeal for the purpose of court-fees." AIR 1953 SC 28, Rel. on.

(Para 6)

Cases Referred: Chronological Paras
AIR 1970 All 201 = 1969 All LJ 537 (FB)

5
AIR 1957 SC 540 = 1957 SCR 488 4

6
AIR 1953 SC 28 = 1953 SCR 197 6

AIR 1928 All 437 = 26 All LJ 998 (FB)

3
1905 AC 369 = 74 LJ PC 77 3

Ashutosh Ganguly, for Petitioner.

N. C. MUKHERJI, J.:— This Rule was issued on an application under Section 115. of the Code of Civil Procedure and is directed against Order No. 18 dated 25th May, 1974 passed by Sri A. N. Mitra, Additional District Judge, 4th Court, Alipore, in Title Appeal No. 530 of 1973. By the above order the learned Additional District Judge held that the appeal was maintainable in his court and directed the appellant to pay the deficit court-fees. Being aggrieved, the appellant has come up before us.

2. The facts of the case may briefly be stated as follows:—

The opposite parties 2 to 4 brought a suit. The plaint case is that the suit property comprising 13 decimals of land with pucca building thereon belonged to Ambika Charan Pramanik, now deceased, the husband of the defendant No. 1 and Gurupada Pramanik in equal shares. Ambika died leaving behind the defendant No. 1 as his widow who inherited 8 annas share and continued to possess the same in ejmali with Gurupada Pramanik who owned the remaining eight annas share. The defendant No. 1 thereafter by a kobala sold her above share in respect of the suit land and other properties to the plaintiffs Nos. 2 to 4 who thereafter on amicable partition with Gurupada began to possess the property separately. The defendant No. 1 filed Title Suit No. 48 of 1950 for setting aside the above kobala and got a decree. The decision was affirmed upto this Hon'ble

Court. On the basis thereof the present defendant No. 1 obtained an order of joint possession with Gurupada Pramanik. During the pendency of the aforesaid suit the plaintiff No. 2, since deceased, with the permission of the said Gurupada raised a residential pucca building on the suit land and the plaintiffs had been residing in such building and possessing land thereunder. The present defendant No. 1 by way of execution got possession of the property except the present suit land measuring 13 decimals. The plaintiffs being in possession of the above building, the defendant No. 1 did not get any possession in respect of such building. The plaintiffs Nos. 2, 3 and 4 filed objection in Title Execution Case No. 37 of 1958 for obtaining possession in respect of the suit land, as a result of which the defendant No. 1 did not get possession. Against such decision the defendant No. 1 filed F. M. A. 55 of 1960 in which it was decided that the defendant No. 1 would be entitled to get back possession of the above 13 decimals of land on removal of the structures. On 22nd of July, 1959 Gurupada transferred his 8 annas interest in favour of the plaintiff No. 1 Kalidasi, who was not a party to the above suit brought by the defendant No. 1. The defendant No. 1 Taramoni filed Title Suit No. 33 of 1960 for partition and in such suit the present plaintiff No. 1 was declared to have 8 annas share on the strength of the deed of gift. The above order of delivery of possession on the removal of structures is highly prejudicial to the plaintiffs, and as such the plaintiff has filed the present suit for confirmation of possession in respect of the suit property upon declaration of title and for permanent injunction. For the purpose of jurisdiction and court-fees the plaintiffs valued the suit under Section 7 (iv) (c) of the Court-Fees Act at Rs. 12,000. The learned court below decreed the suit on declaring the eight annas share of the plaintiff No. 1 in the suit land and confirming her joint possession therein and restraining the defendants from disturbing the plaintiffs' possession of the disputed property in any way till the final partition of the disputed property between the plaintiff No. 1 and the defendant No. 1 by metes and bounds either amicably or by the decree of a competent court. Against such judgment and decree an appeal was filed by the defendant No. 1. The appeal was filed on 16th of June 1973 and the appeal was valued for the purpose of court-fees

at Rs. 160 on the basis of the valuation made by the Pleader Commissioner. An objection was taken by the respondents Nos. 1 to 4 that since the plaintiffs have valued the suit under Section 7 (iv) (c) of the Court-Fees Act at Rs. 12,000 and as the appellant wants to have the entire decree set aside, the instant appeal has to be valued at Rs. 12,000 for the purpose of court-fees.

3. Though the appeal was filed before the District Judge, it was urged on behalf of the appellant that the appeal was wrongly filed before the District Judge and the appeal ought to have been filed before the High Court as the suit out of which the present appeal arises was instituted long before the Amendment of the Bengal, Agra and Assam Civil Courts Act. By such amendment the pecuniary jurisdiction of the District Judge to entertain an appeal was raised from Rs. 10,000 to Rs. 15,000. It was urged on behalf of the appellant that this amendment will not determine the forum in respect of the appeals arising out of suit instituted before the commencement of the amendment. It was contended that the amendment had no retrospective effect and as such the vested right of preferring an appeal in a particular forum could not be taken away. The same argument has been advanced before us most ably by Mr. Ganguly, learned Advocate for the petitioner. In support of his contention he cites before us several decisions including 1905 AC 369 (Colonial Sugar Refining Co. Ltd. v. Irving). Mr. Ganguly next refers to a Full Bench decision of the Allahabad High Court reported in AIR 1928 All 437 (FB) (Ram Singha v. Shankar Dayal). In this case their Lordships relying on the Privy Council decision referred to above laid down:

"An appeal is a mere continuance of the original proceeding initiated by the filing of the plaint, and the right to continue that proceeding cannot be affected by a new Act, unless it expressly says so."

In this case a suit was filed for arrears of rent for less than Rs. 200 in the Court of the Assistant Collector when the old Agra Tenancy Act was in force. Before it could be decided, the new Act came into force on the 7th of September 1926. The suit was decreed on 23rd of December 1926. It was held

"That the right to appeal to the Court of the District Judge was govern-

ed by the law prevailing at the date of the institution of the suit and not by the law that prevailed at the date of its decision, or at the date of the filing of the appeal."

4. The next case referred to by Mr. Ganguly has been reported in AIR 1957 SC 540 (Garikapati Veeraya v. N. Subbiah Choudhury). This is a decision of 5 Judges and 4 of the Judges held

"The legal pursuit of a remedy suit, appeal and second appeal are really but steps in a series of proceedings all connected by an intrinsic unity and are to be regarded as one legal proceeding. The right of appeal is not a mere matter of procedure but is a substantive right. The institution of the suit carries with it the implication that all rights of appeal then in force are preserved to the parties thereto till the rest of the career of the suit. The right of appeal is a vested right and such a right to enter the superior court accrues to the litigant and exists as on and from the date the lis commences and although it may actually be exercised when the adverse judgment is pronounced such right is to be governed by the law prevailing at the date of the institution of the suit or proceeding and not by the law that prevails at the date of its decision or at the date of the filing of the appeal. This vested right of appeal can be taken away only by a subsequent enactment, if it so provides expressly or by necessary intendment and not otherwise."

We have gone through the provisions of Bengal, Agra and Assam Civil Courts (Amendment) Act and we do not find that there is any provision by which the vested right of appeal has been taken away either expressly or by necessary intendment.

5. The last case referred to by Mr. Ganguly is another Full Bench decision of the Allahabad High Court reported in AIR 1970 All 201 (FB) (Behari Lal v. Keshri Nandan). In this case their Lordships found as follows:

"On examining the language of Cl. (a) of sub-section (1) of Section 21 of Civil Courts Act and sub-section (1-A) of Section 21, Civil Courts Act (as inserted by the U. P. Civil Laws Amendment Act) it becomes clear that the Legislature was anxious to give retrospective effect to the amended Section 21 of the Civil Courts Act. The amendment is effective even as regards a suit instituted before

the commencement of the U. P. Civil Laws Amendment Act."

Their Lordships further held

"It is true that litigants have got vested right of appeal the moment a suit is instituted. But it is open to the appropriate Legislature to take away such vested right."

Thus it is clear that the legal position is that a right of appeal is vested in the parties as soon as a suit is instituted and the forum of appeal would be determined with regard to law as existing on the date of the commencement of the suit. The Legislature can take away such vested right by way of amendment and if such vested right is taken away then the forum will be changed and the forum will be determined according to the provisions of the Amendment Act. As has already been stated there is no provision in the Amendment Act which has in any way taken away the vested right of appeal, and that being so, we fully agree with Mr. Ganguly that in the present case the forum would be determined with reference to the law as it existed on the date of the commencement of the suit and that being so, the appeal was wrongly presented before the learned District Judge and the same ought to have been presented before this Court. This being the legal position, we further find that as the learned Additional District Judge had no jurisdiction to entertain the appeal he was wrong in directing the appellant to pay deficit court-fees. The proper order which the learned Additional District Judge could have passed was to return the Memorandum of Appeal to the learned Advocate for the appellant for presentation of the same to the proper court.

6. With regard to the payment of court-fees Mr. Ganguly submits that the learned court below was wrong to hold that the appellant was required to pay ad valorem court-fees at Rs. 12,000. As the suit was valued at Rs. 12,000 the appeal was also valued at Rs. 12,000 for the purpose of jurisdiction. There is no doubt that the valuation of an appeal for the purpose of jurisdiction and the valuation of the same for the purpose of payment of court-fees may be different. The payment of court-fees depends on the claim as made by a party. It is contended by Mr. Ganguly that the appellant having disclaimed any interest in the structure, the court below misdirected itself in taking

the value of the structure for the determination of court-fees. In this connection it is further submitted that the relief which the appellant claimed was only in respect of undivided one-half share of 13 decimals of land which was valued by the Pleader Commissioner at Rs. 160 and as such the appellant paid court-fees on the said amount. In support of his contention that the court-fee was properly paid Mr. Ganguly refers to a decision reported in AIR 1953 SC 28 (Nemi Chand v. The Edward Mills Co. Ltd.). It has been held in this case

"A memorandum of appeal as provided in Article 1 of Schedule 1, Court-Fees Act, has to be stamped according to the value of the subject-matter in dispute in appeal: in order words, the relief claimed in the memorandum of appeal determines the value of the appeal for the purpose of court-fees."

Considering the facts and circumstances of the case and the relief claimed in the appeal we agree with Mr. Ganguly that the court-fee paid on the appeal is sufficient.

7. In the result, the application succeeds and the rule is made absolute. The Order No. 18 passed by the learned Additional District Judge on 25th May 1974 is set aside. The learned Additional District Judge is directed to return the Memorandum of Appeal to the learned Advocate for presentation of the same to the proper court. Let the records go down immediately.

B. C. RAY, J.:— I agree.

Application allowed.

AIR 1977 CALCUTTA 46

NIRMAL CHANDRA MUKHERJI AND
BANKIM CHANDRA ROY, JJ.

Durga Charan Sonar and others, Petitioners v. Kaliprosad Sonar and others, Opposite Parties.

Civil Rule No. 912 of 1974, D/- 9-8-1976.

(A) Civil P. C. (1908), S. 151 and O. 9, R. 9 — Inherent powers — Exercise of — When express provisions in statute exist — Dismissal of suit for default — Application to set aside — Court disbelieving reasons therefor — Inherent powers cannot be exercised for granting it.

The suit of the plaintiffs having been dismissed for default due to absence of the plaintiffs, application was made under O. 9, R. 9 read with O. 17, R. 2 and Section 151 for setting aside the dismissal. The trial court disbelieved the reasons for plaintiffs' absence but allowed the application to meet the ends of justice. On appeal by defendant it was contended that trial court had no jurisdiction to pass an order under Section 151 the reasons having been disbelieved by it. Held that the orders could not be upheld as in an application under O. 9, R. 9 the Court cannot exercise inherent jurisdiction under S. 151. AIR 1930 Cal 387; AIR 1930 Cal 488; AIR 1959 Cal 389 and (1962) 66 Cal WN 810, Foll.; AIR 1919 Cal 979 (2), Not Followed; (1912) ILR 34 All 426 and (1913) ILR 35 All 331 (PC) and AIR 1933 Cal 20, Dist. (Para 8)

Cases Referred: Chronological Paras

(1962) 66 Cal WN 810	6
AIR 1959 Cal 389 = 63 Cal WN 300	5, 6
AIR 1933 Cal 20 = 36 Cal WN 869	8
AIR 1930 Cal 387 = 34 Cal WN 222	3, 5, 6
AIR 1930 Cal 488 = 34 Cal WN 419	4, 5, 6
AIR 1919 Cal 979 (2) = 48 Ind Cas 961	7
(1913) ILR 35 All 331 = 10 Ind App 151 (PC)	7
(1912) ILR 34 All 426 = 9 All LJ 666	7
(1906) ILR 33 Cal 327 = 3 Cal LJ 67	5

R. K. Bhattacharya and M. M. Ghosh, for Petitioners; Saktinath Mukherjee and Debaprasad Mukherjee, for Opposite Parties.

N. C. MUKHERJI, J.:— This is an application under Section 115 of the Code of Civil Procedure and is directed against Order No. 374 dated 8th December 1973 and Order No. 375 dated 22nd December 1973 passed by Shri A. N. Mitra, Subordinate Judge, 6th Court at Alipore in Misc. Case No. 22 of 1973.

2. The facts of the case may briefly be stated as follows:—

The opposite parties Nos. 1 to 3 instituted a Title Suit No. 7 of 1964 for partition of accounts against the petitioners and Manki Shaw, since deceased, the mother of the petitioner No. 1 and the opposite parties Nos. 1 and 4. On 12th of June 1973 when the suit was fixed for further hearing, no one appeared on behalf of the plaintiffs and as such the suit was dismissed for default. Thereafter the plaintiffs filed an application under Order 9, Rule 9 of the Code of Civil Procedure read with Order 17, Rule 2 and Section

151 of the Code for setting aside the order of dismissal. On the said application Miscellaneous Case No. 22 of 1973 was started. The petitioners contested the application by filing objection. Evidence was adduced by both the parties. The learned Subordinate Judge after considering the evidence on record and the facts and circumstances of the case found "that the plaintiffs have miserably failed to prove that they had any sufficient cause for preventing them from attending the court when the suit was called on for hearing". The learned Judge, however, allowed the Miscellaneous Case and restored the suit to file on condition that the petitioners would pay some costs to the opposite parties. The learned Subordinate Judge observed

"But as the hearing of the suit on contest already proceeded to a great length and since, in my opinion, the opposite parties should not feel shy of the disposal of the suit on contest, I, to meet the ends of justice, give an opportunity to the petitioners on terms as hereunder, on the points being thus disposed of." Being aggrieved by the aforesaid order, the defendants have come up before this Court.

3. Mr. Radhakanta Bhattacharya, learned Advocate appearing on behalf of the petitioners, submits that when the plaintiffs filed an application under Order 9, Rule 9 and when the case as made out by the plaintiffs was completely disbelieved by the learned Judge, the learned Judge acted without jurisdiction to pass any order under Section 151 of the Code. Mr. Bhattacharya adds that though the learned Judge has not said that he allowed the application under Section 151 of the Code, it must be presumed that he did so because he disbelieved the plaintiffs' case as made out in the application under Order 9, Rule 9. Mr. Bhattacharya submits that there being a specific provision in the Code for seeking relief by a party whose suit has been dismissed for default, the learned Court was in error in exercising its jurisdiction under Section 151 of the Code. In support of his contention Mr. Bhattacharjee first refers to a decision reported in 34 Cal WN 222 = (AIR 1930 Cal 387) (Haridas Mukherjee v. Bijay Krishna Das). In this case an application was filed under Order 9, Rule 13 of the Code for setting aside an ex parte decree. The learned Munsif held that no sufficient cause was shown for the non-appearance of the defendant on the

date of hearing, but even then he restored the suit on certain terms. It was held by the Division Bench of this Court

"That in making the order in the circumstances of the case the Munsif acted without jurisdiction and it would not have been open to him to apply the provisions of Section 151 of the Code where there is a specific provision in the Code applicable to the case."

4. Mr. Bhattacharya next refers to another Bench decision reported in 34 Cal WN 419 = (AIR 1930 Cal 488) (K. B. Dutt v. Shamsuddin Shah). In this case an ex parte decree was set aside by the Court on an application under Rule 13, Order 9 and the Court also invoked the inherent jurisdiction under Section 151 of the Code. It was held that

"It was an instance of a decree being set aside irregularly and the lower court purported to exercise powers which it did not possess and the order was liable to be set aside."

It has been laid down in this case that

"Rule 13, Order 9 deals not with a person who has no excuse for not being present or who as a reason for not having all his witnesses asks for an adjournment for the purpose of calling further evidence and such adjournment being refused, takes no further part in the proceedings."

5. Mr. Bhattacharya next relies on a decision reported in 63 Cal WN 300 = (AIR 1959 Cal 389) (Tulsiram Bhagwandas v. Sitaram Srigopal). It has been held in this case by Chakraborty, C. J. and Lahiri, J. at p. 309 (of Cal WN) = (at p. 394 of AIR) that

"It was contended on behalf of the respondent in the second place that even assuming that Order 17, Rule 2 read with Order 9, Rule 8 did not apply and consequently Order 9, R. 9 also would not, the learned Judge had nevertheless power to make the order he did under Section 151 of the Code. I do not consider that contention to be tenable. The essence of the Code, as is well known, is to be exhaustive so far as it goes and as respects matters for which the Code expressly provides, there is no room for the exercise of any additional jurisdiction under Section 151."

Their Lordships relied on the well known case of Hookam Chand Singh v. Kamalanand Singh, (1906) ILR 33 Cal 327; 34 Cal WN 222 = (AIR 1930 Cal 387); 34 Cal WN 419 = (AIR 1930 Cal 488) and on other cases.

6. The last case referred to by Mr. Bhattacharya has been reported in (1962) 66 Cal WN 810 (Gour Mohan Sen v. Ganesh Chandra Sen). This is also a Bench decision and in this case their Lordships relied on 34 Cal WN 222 = (AIR 1930 Cal 387); 34 Cal WN 419 = (AIR 1930 Cal 488) and 63 Cal WN 300 = (AIR 1959 Cal 389) and held

"this Court has in the past clearly expressed itself as to the scope and contents of Section 151. That section, it has been held, cannot be invoked to override the specific provisions of law. The question has not infrequently been raised in connection with application under Order 9, Rule 13 where it is found that no sufficient cause exists for non-appearance on a date of hearing involving the consequence that the suit is decreed ex parte; such ex parte order cannot be set aside by resorting to Section 151."

7. Mr. Saktinath Mukherjee, learned Advocate appearing on behalf of the opposite parties, in the first place submits that the Court allowed the application under Order 9, Rule 9 for ends of justice considering the fact that the suit progressed to a great extent and evidence was also adduced. Mr. Mukherjee also reminds us that the suit was one for partition and if the plaintiffs' application for restoration is dismissed, there will be no bar for the plaintiffs to institute a fresh suit any day. Thus, in order to prevent multiplicity of proceedings, the learned Judge was quite right in exercising his jurisdiction under Section 151 of the Code and that being so, this Court would refuse to interfere with the said order. In support of his contention Mr. Mukherjee first refers to a decision reported in AIR 1919 Cal 979 (2) (F. P. Nalladaroo & Co. v. Hari Kissen Rathi). In this case on an appeal against an order of the primary Court refusing to restore a suit dismissed for default the appellate court restored the suit, although it found that the plaintiff could not show sufficient cause for his non-appearance within meaning of Order 9, Rule 9. It was held that the order of the appellate court was not without jurisdiction. We find that this judgment is a very short one consisting of 12 lines. Their Lordships simply relied on two decisions reported in (1912) 34 All 426 (Lalta Prasad v. Ram Karan) and (1913) ILR 35 All 331 (PC) (Debi Baksh Singh v. Habib Shah) and on a consideration of those decisions express-

ed the opinion as stated above. Mr. Mukherjee places before us the two Allahabad decisions. The facts of the case reported in (1913) ILR 35 All 331 (PC) are completely different. Here, the plaintiff's suit was dismissed for non-appearance. Dismissal was at the time when it was found that the plaintiff was dead. In such circumstances it was held that S. 151 was applicable. The facts of the case reported in (1912) ILR 34 All 426 are also different and as such the principle laid down there does not apply in the present case.

8. Mr. Mukherjee last refers to a decision reported in 36 Cal WN 869 = (AIR 1933 Cal 20) (Sheikh Hari v. Sm. Diljan Bibi). In this case a decree passed by an Additional District Judge provided that ad valorem court-fees and the costs incurred by the opposite party should be paid within a certain time and further provided that in default of the payment of the costs only within the time the suit should stand dismissed and on the application of the party concerned, the successor-in-office of the Judge who passed the order extended the time. It was held that so far as the payment of court-fee was concerned, the succeeding Additional District Judge had jurisdiction to extend the time. But so far as the payment of the costs was concerned he had no jurisdiction. But, having regard to the facts of the case, the High Court in its discretion declined to interfere. This case, also, in our opinion, does not help the plaintiffs. There being clear decisions of our High Court on the point whether in an application under Order 9, Rule 9 the Court can exercise its inherent jurisdiction under Section 151, we are of the opinion that the order passed by the learned Subordinate Judge cannot be upheld.

9. In the result, the application succeeds and the Rule is made absolute. There will be no order as to costs.

B. C. RAY, J.:— I agree.

Application allowed.

AIR 1977 CALCUTTA 49**R. BHATTACHARYA AND****A. K. JANAH, JJ.**

Jitendra Nath Das, Petitioner v. Dr. Kalyan Kr. Banerjee and another, Opposite Parties.

Civil Revn. No. 1876 of 1974, D/-3-8-1976.

(A) Civil P. C. (1908), O. 6, R. 17 — Amendment of plaint — Addition of new ground for relief — Eviction of tenant sought for on ground of default — Application for amendment by adding ground of reasonable requirement of landlord — Notice to quit not mentioning latter ground — Amendment whether permissible — (1974) 78 Cal WN 572, Overruled.

A suit was filed by a landlord against his tenant for ejection on the ground of default. The notice to quit previously served on the tenant did not mention the ground of reasonable requirement of the landlord. The landlord applied for the amendment of the plaint by the introduction of his reasonable requirement as an additional ground of relief. The trial Court allowed the amendment of the plaint. The question before the High Court was whether the amendment was permissible.

Held that the suit is one for ejection of a tenant and the amendment, if allowed, will not change the nature and character of the suit, inasmuch as it will nevertheless remain a suit for eviction of a tenant. Secondly, the cause of action in the suit is not default, but it is the determination of the tenancy by a notice to quit. Default is only one of the grounds which entitles a Court to pass a decree for eviction against the tenant. (1974) 78 Cal WN 572, Overruled; (1976) 80 Cal WN 269, Rel. on; AIR 1950 Mad 32 and AIR 1974 Cal 83 and (1974) 78 Cal WN 849, Dist. (Para 4)

There can be no quarrel with the proposition that where the landlord mentions one ground in the ejection notice but subsequently makes out a case on another ground such omission on the part of the landlord to mention the subsequent ground in the notice to quit is a relevant factor to be taken into consideration in deciding whether such ground really exists or not. But the question here is quite different. We are concerned with the question whether the application for amendment should be allowed or not. Whether the Court will decide in

favour of the plaintiff or not in so far as the new ground is concerned is a question which is to be considered at the hearing of the suit and not at this stage.

(Para 10)

Cases Referred: Chronological Paras

(1976) 80 Cal WN 269 6, 12

AIR 1974 Cal 83 = 77 Cal WN 648. 10

(1974) 78 Cal WN 572 = 1975 Ren CJ 126

3, 6

(1974) 78 Cal WN 849 = 1974 Ren CJ 878

10

AIR 1950 Mad 32 = (1949) 2 Mad LJ 421

9

Mrs. Diptikana Bose and Mrs. Aradhana Nag Choudhary (Mitra), for Petitioner; Amitava Choudhury, for Opposite Parties.

JANAH, J:— This rule has been obtained by the tenant defendant in a suit for ejection instituted by the landlord opposite party on the ground of default in payment of rent. In the said suit the plaintiff opposite party filed an application for amendment of the plaint by introducing the ground of reasonable requirement of the suit premises for his own use and occupation. This application for amendment was allowed by the trial court. Against the said order the tenant defendant has obtained the present rule.

2. The facts which are relevant for the purpose of present rule are as follows: In the year 1967 the plaintiff opposite party instituted a suit for eviction against the defendant petitioner on the ground of default. That was Title Suit No. 309 of 1967. In that suit the trial court found that the defendant petitioner was a defaulter in payment of rent for some months. In spite of this finding the suit was dismissed on the ground that there had been substantial compliance with sub-section (1) of Section 17 of the West Bengal Premises Tenancy Act, 1956 (hereinafter referred to as 'the Act'). The trial court therefore found that the defendant petitioner was entitled to protection against eviction under sub-section (4) of Section 17 of that Act and accordingly dismissed the suit. The plaintiff opposite party thereafter served a fresh notice to quit alleging default on the part of the petitioner for a subsequent period, and thereafter he filed the instant suit, being Title Suit No. 17 of 1971 for eviction of the petitioner. The defendant petitioner entered appearance in the suit and filed an application under Section 17 (2A) of the Act. There is no dispute between the parties that the defendant pe-

tioner has been depositing rent in terms of the order passed under Section 17 (2A) of the Act.

3. The present rule came up for hearing before S. K. Datta J. before whom reliance was placed on behalf of the petitioner upon the decision in Arun Kumar Chatterjee v. Karuna Rakshit, (1974) 78 Cal WN 572 wherein N. C. Mukherjee J. took the view that an amendment of the plaint should not be allowed under such circumstances as in the present case. S. K. Datta J. considered a number of decisions which had been cited before him on behalf of the parties and his Lordship was unable to accept the view taken by N. C. Mukherjee J. His Lordship accordingly referred the matter to the Division Bench. The rule has accordingly come up before us for hearing.

4. Mrs. Bose, learned Advocate for the petitioner, has contended before us that the introduction of the ground of reasonable requirement for eviction of her client would change the nature and character of the suit. She has further contended that such amendment has been prayed for on a different cause of action which cannot be joined with the cause of action upon which the present suit has been filed. This submission of Mrs. Bose cannot be accepted. The suit is one for ejectment of a tenant and the amendment, if allowed, will not change the nature and character of the suit, inasmuch as, it will nevertheless remain a suit for eviction of a tenant. Secondly, the cause of action in the suit is not default, but it is the determination of the tenancy by a notice to quit. Default is only one of the grounds which entitles a Court to pass a decree for eviction against the tenant. Section 13 of the Act provides that unless one or more of the grounds specified in sub-section (1) of that section is satisfied no Court shall pass a decree for eviction against a tenant. Default in payment of rent or reasonable requirement on the part of the landlord are merely two of such grounds which lift the bar put under Section 13 of the Act.

5. The next contention of Mrs. Bose has been that the plaintiff opposite party did not mention the ground of reasonable requirement in the notice to quit which was served by them. In the said notice, it was contended, the only ground mentioned is the ground of default. That being so, it was argued by Mrs. Bose, the

plaintiffs' application for amendment is not bona fide and it ought not to have been allowed by the trial court. Whether the plea of reasonable requirement sought to be set up by the opposite party is bona fide or not, that is to say, whether there exists any requirement on the part of the landlord or not, is a matter which is to be considered at the hearing of the suit itself. The omission to mention the ground of reasonable requirement in the notice to quit is a relevant factor to be taken into consideration at the final hearing of the suit. But at this stage it is not for us to go into that question, and upon the materials on record it cannot be said that the plaintiffs' application for amendment is not bona fide.

6. On behalf of the petitioner it was contended that the averment made in the application for amendment of the plaint by the plaintiffs is to the effect that the plaintiff No. 1 was in Military Medical Service and on retirement from the Military Medical Service he joined the West Bengal Health Service from which he ultimately retired in 1971. Mrs. Bose, therefore, contended that the plaintiff was fully aware that he would retire in 1971 and accordingly he ought to have mentioned the ground of reasonable requirement on his part in the notice to quit. The plaintiff not having done that, it was argued, the application for amendment was an afterthought, and was calculated to deprive the defendant of the benefit which had accrued to him under Section 17 (2) of the Act. In support of this contention reliance was placed upon the decision in Arun Kumar Chatterjee v. Karuna Rakshit, (1974) 78 Cal WN 572, where N. C. Mukherji J. took the view that an amendment of the plaint should not be allowed under such circumstances as it would jeopardise the defendant's right of protection against eviction which the defendant had acquired under Section 17 (4) of the Act. In that case the suit was originally brought on the ground of default in payment of rent. Subsequently, another ground was sought to be added by way of amendment of the plaint to the effect that the tenant-defendant had without the knowledge and consent of the landlord sublet a portion of the demised premises and had been creating nuisance and causing material damage to the property. In that case the tenant-defendant had complied with an order made under Section 17 (2) of the Act. His Lordship took the view that the effect of allowing the amendment would be to

take away the benefit which had accrued to the defendant on account of his having complied with the order made under Section 17 (2) of the Act. A similar point came up for decision in the case of Dwarka Prosad Mahawar v. Gopal Das Mahawar, (1976) 80 Cal WN 269. In that case also the suit was originally instituted on the ground of default in payment of rent. Subsequently the plaint was sought to be amended by introducing another ground, namely, that the defendant had made certain unauthorised constructions in the premises. My learned brother R. Bhattacharya J. had occasion to consider several decisions of the Supreme Court and also a Full Bench decision of the Delhi High Court as well as the decision reported in (1974) 78 Cal WN 572 in connection with the points which arose for determination in that case. After a careful analysis of all the decisions cited before him his Lordship came to the conclusion that the prayer for amendment was rightly allowed by the trial court in that case. I respectfully agree with the view taken by his Lordship in the said case and the reasons given in the said judgment and I am unable to subscribe to the view taken by N. C. Mukherjee J. in the case of Arun Kumar Chatterjee (1974) 78 Cal WN 572 (supra).

7. It may be mentioned here that Mr. Choudhury appearing on behalf of the landlord opposite party has drawn our attention to annexure 'X' to his affidavit-in-opposition, which is a copy of the judgment delivered in the earlier ejectment suit between the parties, namely, Title Suit No. 309 of 1967. Mr. Choudhury has pointed out that in the earlier Ejectment Suit the tenant-defendant was found to be a defaulter, but he was given protection inasmuch as he complied with sub-section (1) of Section 17. Mr. Choudhury accordingly argued that the tenant-defendant having once obtained relief under sub-section (4) of Section 17 in an earlier suit, and he having committed default within a period of twelve months, is not entitled to protection against eviction on the ground of default under the proviso to sub-section (4) of the said section. This, however, is a matter which is to be considered by the trial court at the hearing of the suit. It is not, therefore, necessary for us to express any opinion in so far as this point raised by Mr. Choudhury is concerned.

8. One thing is, however, clear from the contention which has

been raised by Mr. Choudhury on behalf of the landlord-opposite party, namely, that compliance with the provisions of the various sub-sections of Section 17 does not necessarily afford protection to the tenant against eviction on the ground of default. Even if the tenant is entitled to protection against eviction on the ground of default the amendment sought for in the instant case does not take away that right from the tenant. If the landlord fails to establish the ground of reasonable requirement and if the tenant is found to be entitled to protection against eviction on the ground of default the suit will naturally fail. If, on the other hand, the landlord succeeds in establishing the ground of reasonable requirement then a decree will be passed in his favour, even if the tenant is entitled to protection against eviction on the ground of default under Section 17 (4) of the Act.

9. On behalf of the petitioner Mrs. Bose relied upon the decision in Gopal Krishnamurthi v. Sreedhara Rao, AIR 1950 Mad. 32 and contended that when at the time of institution of the suit the plaintiff was aware of the fact that he reasonably requires the suit premises for his own use and occupation but he failed to take it as a ground for eviction in the suit the subsequent application for amendment should not be allowed. The said case is, however, completely different on facts. In that case the amendment sought for introduced completely new facts which were not pleaded in the plaint as it originally stood. The plaintiff had knowledge of those facts at the time when the plaint was filed. In our view, the decision in that case can have no application to the present case.

10. The next case cited on behalf of the petitioner is Ghaffar Haji Shakoor v. S. M. Saeed, AIR 1974 Cal 83. The observations relied on by Mrs. Bose occurring at paragraph 19 of the report have been made in connection with the final decision arrived at in the suit and not on the question of amendment of the plaint. In that case M. M. Dutt J. held that although the landlord is not required to state the grounds for eviction in the notice to quit, but if he chooses to mention one ground and subsequently tries to establish another ground at the hearing of the suit such conduct on the part of the landlord is a relevant factor to be taken into consideration in deciding whe-

ther the ground subsequently sought to be established really exists or not. The observations made in that decision does not, therefore, help the petitioner in the present case. Mrs. Bose also referred to the decision in Biswanath Gupta v. Narendra K. Tandon, (1974) 78 Cal WN 849 where a Division Bench of this Court took a view similar to the view taken by M. M. Dutt J. and held that where the landlord mentions one ground in the ejectment notice but subsequently makes out a case on another ground such omission on the part of the landlord to mention the subsequent ground in the notice to quit is a relevant factor to be taken into consideration in deciding whether such ground really exists or not. There can be no quarrel with the proposition of law laid down by their Lordships of the Division Bench. But the question here is quite different. We are concerned with the question whether the application for amendment should be allowed or not. Whether the Court will decide in favour of the plaintiff or not in so far as the new ground is concerned is a question which is to be considered at the hearing of the suit and not at this stage. The cases relied on by Mrs. Bose, therefore, are of no assistance to her.

11. I, therefore, agree with the view expressed by S. K. Datta J. and as there is no impediment in law in allowing the application for amendment of the plaint I hold that the said application was rightly allowed by the trial court. For the reasons mentioned above this rule is discharged. But in the circumstances I make no order as to costs.

R. BHATTACHARYA, J.:— 12. I fully agree with my learned brother. The case of Dwarka Prosad Mahawar v. Gopaldas Mahawar, 80 Cal WN 269 referred to in the judgment of my learned brother was decided by me but I find no reason to change my view expressed in the said judgment.

Rule discharged.

AIR 1977 CALCUTTA 52

SALIL KUMAR DATTA, J.

Kartik Chandra Bera, Petitioner v. Bhusan Chandra Guria, Respondent.

C. R. No. 4246 of 1973, D/- 10-9-1976.

(A) Civil P. C. (1908), O. 23, R. 3 —
Time made essence of contract — Sub-

KT/LT/D998/76/AS/WNG

stantial compliance of contract within stipulated time by plaintiff — Held did not entitle him to any relief — (Contract Act (1872), S. 55).

The title suit of the plaintiff was adjourned by a compromise petition to another date for passing a decree in terms of the solenama. On careful consideration of the terms thereof, it appeared that the time was made the essence of the contract of compromise. Not only was this condition mentioned in certain clause of the contract, but it was also mentioned in the subsequent clause and each clause was made the consideration of the other. The plaintiff admittedly failed to perform the acts mentioned therein, namely, the execution and registration of the Kibala and payment of the relevant amount before the stipulated date. Held that in view of the express provision of the agreement which was a material condition thereof there was no escape from the conclusion that the parties made time the essence of the contract between them providing for consequence for failure to perform the obligations therein imposed on either party. It was not possible to hold that equitable consideration should prevail for substantial compliance of the contract by the plaintiff, to modify the terms of the contract by Court against the expressed provision of the agreement and without consent of parties. AIR 1915 PC 83 and AIR 1921 Cal 356 and AIR 1970 Cal 199, Ref. (Paras 4, 7)

Cases Referred: Chronological Paras

AIR 1970 Cal 199 = 73 Cal WN 875	6
AIR 1921 Cal 356 = 33 Cal LJ 244	6, 7
AIR 1915 PC 83 = 20 Cal WN 744	5

Gopal Chandra Mukherjee, for Petitioner; Tapas Roy and Alok Chakraborty, for Opposite Party; G. N. Roy, for the State.

ORDER:— This Rule was issued at the instance of the plaintiff in Title Suit No. 357 of 1967 in the Court of 1st Munsif, Tamluk against the order No. 47 dated Sep. 21, 1973, whereby the suit was dismissed after contest in terms of Solenama which was made a part of the decree. The relevant facts are as follows: The plaintiff filed the above Title Suit for declaration of title and recovery of possession of the suit property on eviction therefrom of the defendant the opposite party No. 1 and the State of West Bengal. It was stated that the opposite party No. 1 was allowed to live in the suit property as the licensee and as he failed to vacate on demand the suit was instituted

for recovery of possession on declaration of title. The opposite party No. 1 filed a written statement stating that he was a tenant under the plaintiff's father since 1347 B. S. and his right was also perfected by adverse possession and his name was duly entered in the record of rights as a raiyat under the State. A written statement was also filed on behalf of the State of West Bengal stating that the opposite party No. 1 was a tenant under the State. The suit became ready for hearing on April 16, 1969 when both the parties namely the petitioner and the opposite party No. 1 submitted that they would file a petition of compromise. Thereafter on April 17, 1969 both parties filed a petition of compromise. The terms of Solenama in English rendering are as follows:—

"1. We the plaintiff and the defendant No. 1 on the advice of our well-wishers and considering all circumstances have decided to settle the suit amicably on compromise on the following terms.

2. We the plaintiff and the opposite party No. 1 hereby mutually admit and agree that

(i) each term of solenama is consideration of the other,

(ii) in this compromise the time is the essence of the contract,

(iii) the plaintiff within April 26, 1969 will execute as vendor on behalf of his youngest minor son Kristo Prasad Bera, a kobala for about 6 cottas of land of Rs. 1,500 and register the same and endorse the registration receipt of the kobala in the name of the defendant No. 1 and deposit it in the Court and on that account pay Rs. 1.100 to the defendant No. 1 and inform Court accordingly. If the plaintiff complies with all these he will be entitled to a decree in the suit without cost and the opposite party No. 1 will deliver amicably khas possession of the decretal property to the plaintiff,

(iv) if the plaintiff do not perform the acts mentioned above within the time aforesaid the suit will be dismissed,

(v) the suit will be dismissed against defendant No. 1,

(vi) the Solenama will be a part of the decree and if the defendant No. 1 is unable to vacate the plaintiff will be entitled to take possession with the aid of the Court and he will be liable to pay Rs. 200 as compensation,

(vii) accordingly we the plaintiff and defendant No. 1 pray that the suit be fixed for May 27, 1969 for disposal in ac-

cordance with the terms of the Solenama."

According to the plaintiff petitioner's case the Kobala was executed on April 25, 1969 and he tendered the money to the lawyer of the said opposite party and also to the opposite party; on their refusal to accept and inform the court accordingly, it became necessary that the amount should be deposited in Court. He accordingly filed an application on May 13, 1969 for deposit of money in Court. On this application the Court permitted the plaintiff to deposit the amount at his risk and thereafter it appears the amount was deposited. The plaintiff filed an application on May 27, 1969 for disposal of the suit in terms of Solenama. The opposite party No. 1 thereupon submitted that the deed should be perused and the final order be passed after few days. The suit was adjourned to June 2, 1969 and on that day the defendant No. 1 filed a petition for dismissing the suit according to the terms of the Solenama. It was stated therein that the plaintiff did not act in terms of the Solenama, he failed to endorse the registration receipt and to pay Rs. 1,100 and inform to the Court of such acts within April 26, 1969 as agreed and accordingly the suit was to be dismissed. By order dated June 5, 1969 the learned Munsif held that both execution of the kobala and the payment was to be made within April 26, 1969 and as the payment had been made beyond the time, the suit was to be dismissed in terms of the Solenama. Accordingly, the suit was dismissed.

2. The plaintiff moved this Court in revision against this order being Civil Rule No. 3342 of 1969 and it was held by this Court that the learned Munsif did not give reasons in support of his conclusion. Accordingly by order dated November 26, 1971 the impugned order was set aside and the case was sent back to the trial Court for decision in accordance with law. Thereafter the matter came up for hearing and the learned Munsif by his order No. 47 dated September 21, 1973 after considering all aspects held that the suit was liable to be dismissed in terms of the Solenama. The suit was accordingly dismissed after contest in terms of the Solenama filed on April 17, 1969. This rule as already stated, is against this decision.

3. Mr. Gopal Chandra Mukherjee, learned Advocate appearing for the petitioner, submitted that the trial court

should have held on the interpretation of the Solenama that time was not essence of the contract; further even if it were so, in view of the substantial compliance of the provisions of the contract by the plaintiff, and on equitable consideration the court should have granted the relief to the plaintiff by decreeing the suit in terms of the Solenama instead of dismissing the same. He further submitted that in any event the contract in the Solenama was a voidable one and the opposite party No. 1 did not even avoid the contract by any overt act. He was accordingly not entitled to challenge the compromise contract. For all this reasons it was submitted that the judgment challenged in the rule should be set aside and suit should be decreed in favour of the plaintiff in terms of the Solenama. Mr. Tapas Roy learned Advocate appearing for the opposite party No. 1 contended that time was the essence of the contract and the plaintiff failed to perform his part of the contract as required and was not entitled to any relief.

4. We have set out above in detail an English rendering of the Bengali Solenama. On careful consideration of the terms thereof, it appears to me that the time was made the essence of the contract of compromise. Not only was this condition mentioned in the clause (2) of the contract it was also mentioned in the subsequent clause and each clause was made the consideration of the other. The plaintiff admittedly failed to perform the acts mentioned therein namely the execution and registration of the Kobala and payment of Rs. 1,100 within April 26, 1969. It is also difficult to accept the plaintiff's case that he tendered the money within time which was denied by the opposite party No. 1 and there is no explanation for the delayed deposit in Court on May 13, 1969. In view of the express provision of the agreement which was a material condition thereof there is no escape from the conclusion that the parties made the time essence of the contract between them providing for consequence for failure to perform the obligations therein imposed on either party.

5. It has been next contended that even in such a case, the Court has power and discretion to grant adequate relief to the party on equitable consideration when substantial part of the agreement has been complied with by him. Reliance was placed on the decision in Jamshed Khodaram v. Burjorji Dhunjibhai, 20 Cal

WN 744 = (AIR 1915 PC 83). It was held in that case that Section 55 of the Indian Contract Act does not lay down any principle which differs from those which obtain under the law of England as regards contracts to sell land. Under that law, equity which governs the rights of parties in cases of specific performance of contracts to sell real estate, looks not at the letter but at the substance of the agreement in order to ascertain whether the parties notwithstanding that they named a specific time within which the completion was to take place really and in substance intended more than that it should take place within a reasonable time. This judgment, it appears, is of no assistance to the plaintiff as we have already seen the time was made essence of the contract as its material term by agreement in a protracted litigation.

6. Mr. Mukherjee has referred also to the decision in Kandarpa Nag v. Banwari Lal Nag, 33 Cal LJ 244 = (AIR 1921 Cal 356) in which Sir Ashutosh Mookerjee speaking for the Division Bench observed that in case of specific performance of contract to sell real estate, equity which governs the rights of parties looks, not at the letter but at the substance of the agreement, in order to ascertain whether the parties, notwithstanding that they named a specific time within which the completion was to take place, really and in substance, intended more than it should take place within a reasonable time. The Court further observed that in cases, where the parties intended in the first conception of the agreement to make time the essence of the contract, the court would not be competent to extend the time, except by consent of all parties concerned. In Jadabendra v. Monorama Debya, 73 Cal WN 875 = (AIR 1970 Cal 199) the Court was of the opinion that in the facts of the case, the principle of Kandarpa Nag case apply, and the relief was available to the aggrieved party on that basis. In this case the suit was decreed ex parte and thereafter the application under O. 9, Rule 13 of the Code was filed giving rise to the Misc. Case. A petition of compromise was filed therein whereby the defendant was to pay certain amount within certain time to have the Misc. Case allowed and the suit restored to file after setting aside the ex parte decree. There was also a default clause providing that if the payment was not made within the specific time the Misc. Case would stand dismissed and the ex parte decree would stand affirmed.

The petitioner did not make the deposit in time on account of his illness and as a result the Misc. Case stood dismissed and thereafter an application was made under Sections 148 and 151 of the Code of Civil Procedure. The Court was of opinion, following Kandarpa Nag's case, that it had ample power in an appropriate case to grant relief against forfeiture apart from consent of parties.

7. In the facts of this case before us it appears that time was made the essence of the contract and this was a material and essential condition of the contract. As such the time could not be extended except by the consent of all the parties concerned as was laid down in Kandarpa Nag's case (AIR 1921 Cal 356). It was a case where by the compromise petition the case was adjourned to another date for passing a decree in terms of the Solenama and the time was mentioned specifically as essence of contract which would only enable the party to claim benefit on the basis thereof. In such state of affairs, in view of express and mandatory condition of the contract, it is not possible to hold that equitable consideration should prevail to modify the terms of the contract by Court against the expressed provision of the agreement and without consent of parties. Further on merits also it is difficult to accept the case of the plaintiff when he stated that the deposit was being made only on the 14th May, 1969 in terms of the contract when such payment to the defendant No. 1 was to be made within April 26, 1969. On both aspects it seems to me that the plaintiff has failed to claim any equitable or other consideration in his favour by the Court.

8. About the contention under Section 55 of the Contract Act it is to be noted that the defendant did not accept the delayed deposit as the performance of the terms of the contract and in his application for objection he prayed for rejection of the plaintiff's prayer and also for dismissal of the suit in terms of the agreement. On this ground also I do not find that the plaintiff is entitled to any relief whatsoever. The rule accordingly fails and is discharged but there will be no order for costs. It is however, necessary to pass some consequential order and I direct that the plaintiff would be at liberty to withdraw the amount of Rs. 1,100 deposited by him in Court. Further the kobala executed in terms of the Solenama is to be treated as cancelled

and of no effect. A copy of this judgment is to be sent to the Sub-Registrar of the Registration Office where the document is stated to have been registered for necessary action.

Rule discharged.

AIR 1977 CALCUTTA 55

N. C. MUKHERJI AND B. C. RAY, JJ.

United Bank of India, Petitioner v. Prabhas Ch. Deb and others, Respondents.

Civil Revn. No. 2541 of 1974, D/- 7-9-1976.

(A) Civil Procedure Code (1908), O. 6, R. 15; O. 29, R. 1 — 'Principal Officer' — Who is — Plaintiff signed and verified by the authorised agent of Bank acquainted with the facts of case — Plaintiff held properly signed and verified.

The plaintiff was signed and verified on behalf of a bank by A who was an agent of the Bank. The defendant challenged the verification. The plaintiff was allowed time to satisfy the court that A was a competent person described in O. 29, R. 1. The Bank produced a power of attorney executed by Manager and Director of the Bank authorising B to sign the pleading on behalf of the Bank. B signed the plaintiff. The defendant again raised objections that B cannot be considered a principal officer mentioned in O. 29, R. 1. The lower Court was of the opinion that B could sign the plaintiff, but the plaintiff was directed to have the plaintiff verified by an officer enumerated in O. 29, R. 1. The plaintiff filed revision against the order of the lower Court.

Held, that the Court was not very much concerned whether B was duly authorised to sign and verify the plaintiff. From the facts of the case, A was a principal officer of the bank and was acquainted with the facts of the case and authorised to sign and verify the plaintiff. Nothing had been shown by the defendants that he was not the officer authorised to sign or verify the plaintiff. As the plaintiff was properly signed and verified by A, the order of the lower Court was liable to be set aside. (1893) 20 Ind App 139 (PC), Rel. on. (Para 5)
Cases Referred: Chronological Paras
 AIR 1958 Cal 104 = 61 Cal WN 445 5
 AIR 1927 Cal 780 = 31 Cal WN 1030 5
 (1901) 5 Cal WN 91 4

IT/KT/D145/76/RSV/WNG

(1893) 20 Ind App 139 = ILR 21 Cal 60
(PC) 4, 5

Ranjit Kumar Banerjee and Nihar Ranjan Das Gupta, for Petitioner; Gobinda Chandra Paul, for Respondents.

N. C. MUKHERJI, J.:— This Rule arises on an application under Sec. 115 of the Code of Civil Procedure and is directed against order No. 14 dated April 8, 1974 passed by Shri A. N. Saha, Additional Subordinate Judge, Nadia, in Title Suit No. 2 of 1974.

2-3. The facts of the case may briefly be stated as follows:—

The petitioner as plaintiff filed a suit against the opposite parties. The said suit was signed and verified by one Sri C. R. Sen Gupta, Agent of the Bethuadari Branch of the United Bank of India. The defendant challenged the verification. The plaintiff was allowed time to satisfy the court that Sri Sengupta fills up the character of any of the personalities described in Order 29, Rule 1 of the Code of Civil Procedure. The plaintiff, however, produced a registered power of attorney executed by the Manager and the Director of the Bank authorising one Sri Nikhil Ranjan Ghosh to sign the pleading on behalf of the company. It was the contention of the plaintiff that by the said power of attorney Sri Ghosh was authorised to sign and verify the plaint. The defendant raised an objection to the effect that Sri Ghosh cannot be considered as one of the principal officers mentioned in Order 29, Rule 1 of the Code. The learned Subordinate Judge after hearing the learned Advocates for the parties was of the opinion that Sri Ghosh could sign the plaint, but the plaintiff was directed to have the plaint verified by an officer enumerated in Order 29, Rule 1 of the Code. Being aggrieved by the aforesaid order, the plaintiff has come up to this Court.

4. Mr. Ranjit Kumar Banerjee, learned Advocate appearing on behalf of the petitioner, draws our attention to Section 435 of the Old Code, the provisions of which are similar to those in Order 29, Rule 1. Mr. Banerjee submits that Shri Sen Gupta, the Agent of the Bank, ought to have been considered as a principal officer of the bank as he was managing the affairs of the bank and it was he who on behalf of the bank advanced loan to the defendants for the non-payment of which the suit has been brought. Mr. Banerjee in this connection further submits that loan has been ad-

mitted by the defendants in their written statement and it is only to delay the matter, a baseless objection has been raised on behalf of the defendants. Mr. Banerjee submits that when the plaint was signed and verified by the local agent of the bank, it was for the other side to show that he was not a person authorised. In support of his contention Mr. Banerjee refers to a decision reported in (1901) 5 Cal WN 91 (Ram Komal Saha v. Bank of Bengal of Akyab). It has been held in this case that where a petition by the Bank of Bengal was verified by a person described as the Officiating Inspector of Branches, Bank of Bengal, and there was nothing to show that he was not the officer authorised to sue or verify the petition on behalf of the Bank at Chittagong or that he was not able to depose to the facts of the case. The petition was properly verified under S. 435, C. P. C. Mr. Banerjee very much relies on the pronouncement of the Judicial Committee in (1893) 20 Ind App 139 (PC) (Delhi and London Bank Ltd. v. Oldham). In this case one Mr. Lawson was acting under the power of attorney as Accountant to the company in Lucknow. Mr. Langdon, the manager, was away in Cashmere; Mr. Banks, whose position is not explained, but who appears to have been a leading officer of the bank, was ill with small-pox; Mr. Lawson, having the large powers expressly conferred upon him by the power of attorney was apparently the sole authority; at all events, he was conducting the chief banking business of the branch in Lucknow. Their Lordships thought that in the absence of any evidence that any one else was at the time in question doing any act of management, it was fair to presume that he was the person of all others best able to depose to the facts of the case, the action being in respect of transactions depending upon documents which would necessarily be accessible to him at the time. Their Lordships further found that Mr. Lawson was then as he described himself acting manager of the Bank of Lucknow and that as such he was a 'principal officer of the corporation', entitled to subscribe and verify the plaint within the meaning of Section 435 of the Code, and that the suit was properly instituted. Mr. Banerjee submits that the facts of the present case are identical with the facts of the case cited above. Here Sri Sen Gupta was the agent of the bank. It was he who advanced loan on behalf of the bank to the defendants. That being so, he was a prin-

cial officer of the bank and it was he who was most able to depose about the facts of the case. In such circumstances it must be held that the plaint was signed and verified by Sri Sen Gupta properly.

5. Mr. Gobinda Chandra Paul, learned Advocate for the opposite parties, submits that the petitioner gave up a go-by to its earlier case that Sri Sen Gupta was the proper person to sign and verify the plaint and produced a power of attorney showing that one Mr. Ghosh was authorised to sign and verify the plaint. Then again Mr. Paul submits that Clause 11 of the said power of attorney empowers Shri Ghosh to sign the plaint but it does not authorise him to verify the plaint. Clause 11 of the said power of attorney runs as follows:—

"United Bank of India Ltd. do hereby nominate, constitute and appoint Sri N. R. Ghosh to commence, prosecute, defend, answer and oppose any suit or legal proceeding..... and to make, sign execute, present and file all applications, plaints, petitions, written statements, memorandum of appeals, vakalatnama, muktarnama, and any other powers or any other papers expedient or necessary, to be made, signed, executed, presented or filed in any court of law."

Mr. Banerjee contends that a wide power has been given to Shri Ghosh by which he has been authorised to present a plaint in the court and that being so, it must be said that he was authorised to sign the plaint as well as to verify the same and for that no separate authority is required. Mr. Paul joins issue and contends that whether a person is competent to verify a pleading on behalf of a company or a corporation an affidavit of competency is required to be filed. In support of his contention he refers to a decision reported in 31 Cal WN 1030 = (AIR 1927 Cal 780) (International Continental Caoutchoue Compagnie v. Mehta & Co.). Mr. Paul also refers to a decision reported in 61 Cal WN 445 = (AIR 1958 Cal 104) (Raj Kumar Dhar v. A Stuart Uwis). In this case it has been held that

"Whenever a verification is sought to be made by an agent either under a power of attorney or under some other document or by somebody on behalf of another, that verification must be justified under the latter part of the Order 6. Rule 15 of the Civil Procedure Code, namely, that the person verifying must be proved to the satisfaction of the court to be acquainted with the facts of the cases."

In this case we are not very much concerned whether Sri Ghosh was duly authorised to sign and verify the plaint. From the facts of the case and relying very much on the Privy Council decision reported in (1893) 20 Ind App 139 (PC) we have no hesitation to hold that in this case Sri Sen Gupta is a principal officer of the bank and he is acquainted with the facts of the case and nothing has been shown by the defendants that he was not the officer authorised to sue or verify the plaint. We are mindful of the fact that on the objection being raised by the defendants the plaintiff got the plaint signed by Sri Nikhil Chandra Ghosh. For the reasons stated above we are of the opinion that the plaint was properly signed and verified by Shri C. R. Sen Gupta, the Agent of the Bank. That being so, we set aside the order passed by the learned Subordinate Judge.

6. In the result, the application succeeds and the Rule is made absolute. There will be no order for costs. As the suit is pending for a long time we direct the learned Subordinate Judge to dispose of the suit as early as possible. Let the records go down to the court below immediately.

B. C. RAY, J.:— I agree.

Revision allowed.

AIR 1977 CALCUTTA 57

P. K. CHANDA AND S. BASU, JJ.

Shyam Sundar Jalan and another, Petitioners v. The State and others, Opposite Parties.

Criminal Revn. Cases Nos. 271 to 273 and 275 to 276 of 1975, D/- 5-7-1976.

(A) Constitution of India, Article 134

(1) (c) — Final order — Proceedings still remaining to be tried after passing of order — Inherent powers refused to be invoked — Such refusal, though final, does not render the order a final order — Certificate not granted.

In the instant case it was argued that though the orders passed by the High Court were interlocutory in nature, the refusal by the High Court to invoke its inherent powers was final and hence a certificate of fitness should be granted.

Held, that even after the orders, the proceedings still remained to be tried and the rights in dispute could by no means be said to be determined. The order

must, therefore, be held to be an interlocutory one and a certificate of fitness for appeal could not be granted. AIR 1970 SC 1168, Foll.; AIR 1968 SC 733, Expl.

(Para 4)

Cases Referred: Chronological Paras

AIR 1970 SC 1168 = (1969) 2 SCR 699 4

AIR 1968 SC 733 = 1968 Cri LJ 876 3, 4

N. C. Banerjee, A. K. Dhar and A. K. Mukherjee, for Petitioners; J. N. Ghosh, N. L. Pal and Anjan Kr. Mukherjee, for Opposite Parties; B. C. Sen, for the State.

SUDHAMAY BASU, J.:— This is an application under Article 134 (1) (c) of the Constitution of India for a certificate of fitness for leave to appeal to the Supreme Court.

2. It appears that complaints were filed by the Income-tax Officer, A-Ward, against the directors of the Asiatic Oxygen and Acetylene Co. Ltd. and Asiatic Oxygen Co. Ltd. and one Mr. K. C. Gangwal designated as the Principal Officer, of the said companies for failure to deduct income-tax from the salary of the employees, for failure to submit return in time, for failure to take income-tax and super tax on dividends for certain period mentioned in various sections of the Income-tax Act. On receipt of complaints the learned Chief Presidency Magistrate, Calcutta, took cognizance but transferred the cases to some other learned Magistrates for disposal. The offences related to those under Sections 276-b, 276-D and 276-B of the Income-tax Act, 1961. Six petitions in revision were filed for quashing the proceedings by way of test cases. It was represented before the Court that hundreds of similar cases were pending before the Magistrate. The principal point urged in support of the rules issued in those six petitions was that cognizance having been taken in all these cases by the learned Chief Presidency Magistrate who transferred them the transferee Magistrates were not competent to issue process. Another point urged was that a company can have only one principal officer. Directors were not principal officers. As the Sanctioning Authority in those cases accorded sanctions against Mr. K. C. Gangwal as Principal Officer and against other Directors, the same was bad. By a judgment delivered by us on the 27th of January, 1976, the six petitions Cr. Rev. 271 to 276 of 1976 were disposed of. The rules except in Cr. Rev. 274 of 1975 were discharged. On consideration of the facts and circumstances we were unable to hold that the learned Magistrate had no

jurisdiction or competence to issue process. We also held that it would be premature at that stage to quash the proceedings. In our view the point as to whether accused persons who are designated as Directors are Principal Officers or Agents could only be determined after witnesses were examined. The present application relates to the said judgment and order.

3. Although we are of the view that some of the points raised are of importance it appears that the order we passed cannot be said to be a final one. Mr. N. C. Banerjee, learned Advocate appearing in support of the petition concedes that the orders passed by the learned Magistrates which were dealt with by us in our judgment are interlocutory in nature but he argued that our refusal to invoke the inherent powers was, however, final and therefore, he was entitled to have a certificate. He relied in this connection on a judgment of the Supreme Court namely, Mohanlal Maganlal Thakkar v. State of Gujarat reported in AIR 1968 SC 733. According to him, the aforesaid judgment of the Supreme Court makes a departure from the earlier cases. We are, however, unable to agree with Mr. Banerjee in this regard.

4. In the case of Mohanlal Maganlal Thakkar, (AIR 1968 SC 733) a Magistrate ordered, after an enquiry under Section 476, Criminal P. C., that a complaint case be filed against a person in respect of offences under Sections 205, 467 and 468 read with Section 114, I. P. C. In appeal the Additional Sessions Judge held that the complaint was competent only in respect of offence under Section 205 read with Section 114, I. P. C. The High Court dismissed the revisional petition against an order of the Court of Session. The Supreme Court held that the order passed was a final one within the meaning of Article 134 (1) (c) of the Constitution since the controversy between the parties whether the complaint was competent in respect of offences under Sections 467 and 468 read with Section 114, I. P. C. was disposed of by the order of dismissal and the proceedings regarding that question was finally decided. Mr. Banerjee relied on a portion of the judgment on that case at page 738 paragraph 11 where it was observed that the finality of the order was not to be judged by correlating that order with the controversy in the complaint namely, whether the appellant had committed offence charged

against him therein. But it may be noted that the said decision of the Supreme Court was by a majority. Two of the Judges viz. Bachwat and Mitter, JJ. dissented from the majority judgment. Moreover, in the case of Tarapore and Co., Madras v. Tractors Export reported in AIR 1970 SC 1168 it was specifically held with reference to earlier judgments that:

"There is, therefore, abundant authority in support of the view that an order is final within the meaning of Art. 133 of the Constitution, under Section 109, Code of Civil Procedure or Section 205 of the Government of India Act, 1935, if it amounts to final decision on the rights of the parties in dispute in the suit or proceeding; if after the order is made the suit or proceedings still remains to be tried, and the rights in dispute have to be determined, the order is interlocutory."

Referring to the case of Mohanlal Thakkar v. State of Gujarat the Supreme Court observed that there was nothing in the said judgment which supports the contention that this Court departed from the principle of the earlier decisions or suggested a different test for determining the finality of orders. The Court held unambiguously

"In our judgment Mohanlal Thakker's case reported in AIR 1968 SC 733 makes no departure from the earlier judgments of the Judicial Committee, the Federal Court and this Court."

We are therefore, unable to accept the validity of Mr. Banerjee's submissions in this respect. Even after the order we passed the proceedings still remain to be tried and the rights in disputes can by no means be said to be determined. The order, therefore, must be held to be an interlocutory one.

5. In that view of the matter the application must fail. The same is dismissed. Liberty is granted to take back the certified copy of the judgment.

6. This judgment will govern the other cases, namely, Cri. Revns. 272, 273, 275 and 276 of 1975.

CHANDA, J.:— I agree.

Application dismissed.

AIR 1977 CALCUTTA 59

S. A. MASUD AND
S. K. MUKHERJEA, JJ.

Sm. Ajita Debi, Appellant v. Musst. Hossenara Begum and others, Respondents.

Appeal No. 4 of 1974 (Suit No. 276 of 1971), D/- 9-6-1976.*

(A) Civil P. C. (1908), O. 23, Rr. 1, 3 and O. 1, R. 10 — Withdrawal and adjustment of suit — It is not permissible unless the Court is satisfied about adjustment of suit wholly or in part against all defendants — Transposition of parties should be allowed for complete adjudication upon questions involved in the suit.

Where an application simpliciter has been made under Order 23, Rule 1, the Court cannot compel the plaintiff to proceed with the suit and the defendants cannot be allowed to complain against such order. But where there is an affinity or identity of interests between the plaintiffs and one or more of the defendants, the plaintiffs cannot be allowed to withdraw or to compromise the suit with one of the defendants if an application on behalf of other defendants having an interest in the suit is made for their transposition to the category of plaintiffs and for transposition of the plaintiffs to the category of the defendants under Order 1, Rule 10. (1957) 61 Cal WN 67 and AIR 1968 SC 111 and AIR 1931 PC 162 and AIR 1920 Mad 732, Rel. on. (Para 12)

Cases Referred: Chronological Paras

(1975) Appeal No. 106 of 1974, D/- 21-1-1975 (Cal)	6
AIR 1974 Cal 295	6
AIR 1972 SC 1181 = 1972 SCD 859	9
AIR 1971 SC 742 = (1971) 3 SCR 301	10
AIR 1968 SC 111 = (1967) 3 SCR 886	11
AIR 1966 SC 792 = (1966) 1 SCR 937	10
(1960) Appeal No. 36 of 1959, D/- 5-4-1960 (Cal)	6
(1957) 61 Cal WN 67 = ILR (1957) 3 Cal 723	11
AIR 1931 PC 162 = 58 Ind App 228	12
AIR 1920 Mad 732 = 12 Mad LW 25	12

B. C. Dutt, for Appellant; P. K. Das, for Respondents.

MASUD, J.:— This appeal has been directed against a judgment and order of A. K. Sarkar J. dated September 24, 1973,

*(Against judgment of A. K. Sarkar J. in Suit No. 276 of 1971, D/- 24-9-1973).

whereby, the learned Judge refused to record the terms of settlement, filed in suit No. 276 of 1971. The facts of the case may briefly be stated.

2. Two brothers Nawab Ali Hyder Khan and Ali Asgar Khan were the joint owners of premises No. 8/2, Palm Avenue, Calcutta. On or about March 15, 1958 they executed an agreement for sale of the said premises with one Sailaja Ranjan Chaki, respondent No. 6, on terms and conditions, set out in the agreement. Prior to the said date of agreement, Title Suit No. 284 of 1951 was pending in the Court of Subordinate Judge, Alipore, between one Indranath Nandy, the Mortgagee, and the said two brothers, the mortgagors in respect of a mortgage deed dated June 29, 1944. Ali Hyder Khan died intestate in 1963 leaving behind him Musst. Hossenara Begum, Ali Safdar Khan, Ali Sarwar Khan, Ali Dewar Khan and Mst. Sayedunessa Begum, the respondents Nos. 1 to 5. By a deed of assignment dated April 22, 1966, the said Sailaja Ranjan Chaki for a valuable consideration transferred absolutely to the appellant his right, title and interest under the said agreement for sale dated March 15, 1958 in respect of the said premises. The appellant, thereafter, instituted a suit in this Hon'ble Court being suit No. 1322-A of 1966 for specific performance of the said agreement for sale. The said suit was ultimately decreed on May 30, 1969 on compromise on the terms mentioned in paragraph 5 of the appellant's petition before the trial Judge. One of the terms of the decree in favour of the appellant is as follows:—

"The plaintiff (appellant) shall also be at liberty to release the original deed of conveyance in respect of the said premises dated June 29, 1944 in favour of the predecessors of the defendants Nos. 2 to 6 and defendant No. 7 in their joint names from Sri. B. N. Ghosh who is claiming a lien on the original deed of conveyance in respect of his dues amounting to Rs. 81,600/- against defendants Nos. 2 to 7 at the costs of defendants Nos. 2 to 7 and also out of the balance consideration money as stated in paragraph 6 (b) hereinabove retain all sum payable to or to be payable to the said B. N. Ghosh in order to make the plaintiff's title on the property, clear, absolute and perfect".

3. Pursuant to the said compromise decree, the appellant released the subsisting charge on payment of Rupees 81,600/- to Mr. B. N. Ghosh and a deed

of release was duly executed and registered on July 22, 1969. There was another term in the said compromise decree whereby the appellant is entitled to get credit for a sum of Rs. 65,000/-, being the expenses incurred, as set out in the agreement for sale dated March 15, 1958, in favour of Sailaja Ranjan Chaki. Thereafter, the appellant on or about June 30, 1969 called upon the respondents 1 to 5 and 7 to execute and register the conveyance of the said premises on receipt of the balance of the consideration money, alleged to be a sum of Rs. 48,400/-. But the vendors being respondents Nos. 1 to 5 and 7 refused to do the same. The appellant, thereafter, came to know that a mortgage decree in the said Title Suit No. 284 of 1951 was passed and in execution of the said decree the said premises were sold in auction at the instance of the mortgagee on March 15, 1952 for a sum of Rs. 2,01,000/-. The respondents Nos. 9, 10 and 11 became the auction purchasers. The date of confirmation of sale was fixed on April 16, 1962. But on April 16, 1962, the mortgagors, the said Ali Hyder Khan, since deceased, and the said Ali Asgar Khan, the respondent No. 7, deposited the entire decretal amount along with the execution cost and 5% of the bid money as compensation as required under law for setting aside the said auction sale. In view of the said deposit, the learned Subordinate Judge was pleased to set aside the auction sale and the execution case was disposed of by his order dated April 16, 1962. The mortgagee decree-holder withdrew all his dues from the Court. The said auction purchasers, however, moved this Hon'ble Court in revision whereupon the order setting aside the auction sale was reversed and the matter was remanded back to the learned Subordinate Judge with a direction for reconsideration of the matter. On remand, the matter was considered by the learned Subordinate Judge on the very day the said Alipore Court received the records i.e. on December 2, 1968 and the said subordinate Judge confirmed the sale. On July 2, 1969, Mr. Anilendra Nath Mitra a Solicitor of this Hon'ble Court, withdrew the sum of Rs. 2,11,050/- being the sale proceeds of the said premises and costs etc. on the basis of a power executed by one Dharendra Nath Acharya who is alleged to be holder of a Power of Attorney from respondents Nos. 1 to 5 and 7. The appellant, having come to know all the aforesaid facts, instituted a suit being Title Suit No. 60 of

1970 in the Court of learned Subordinate Judge, Alipore against the heirs of late Ali Hyder Khan being respondents Nos. 1 to 5, against Ali Asgar Khan, respondent No. 7 and the said auction purchasers, respondents Nos. 9, 10 and 11 for a declaration that the appellant is the owner of the said premises under the decree passed by this Court on May 30, 1969. In the said suit No. 60 of 1970 the appellant made an application for an order restraining the auction purchasers from transferring the properties in any way or from taking possession thereof or for restraining the said Anilendra Nath Mitra from making any disbursement of the amount withdrawn by him. Thereafter, the learned Subordinate Judge allowed the appellant's prayer for Injunction against the auction purchasers but refused the prayer for temporary Injunction against Anilendra Nath Mitra. The auction purchasers preferred an appeal before the learned District Judge which was allowed on December 17, 1970. Against the said order the appellant moved an application in this Court in its civil revisional jurisdiction whereupon Amaresh Roy and A. K. De, JJ. were pleased to issue a Rule and granted an interim order of Injunction restraining the auction purchasers from transferring the said premises or from taking delivery of possession of the same. During the pendency of the said Civil Rule, the heirs of late Ali Hyder Khan, the respondents Nos. 1 to 5 instituted the present suit on June 23, 1971 against the appellant, Sailaja Ranjan Chaki, Ali Asgar Khan, Amar Kr. Roy a Solicitor of this Court and the auction purchasers for a declaration that the terms of settlement dated May 30, 1969 filed in the said Suit No. 1322-A of 1966 of this Hon'ble Court (Sm. Ajita Debi v. Sailaja Ranjan Chaki) are null and void and not binding on the heirs of Ali Hyder Khan and Ali Asgar Khan and as such the said consent decree should be set aside. In the meantime, the appellant was advised to settle the present suit and in fact the terms of settlement were arrived at between the appellant and the plaintiffs in the present suit i.e. heirs of late Ali Hyder Khan. Terms of settlement are as follows:

"1. The suit is withdrawn without liberty to file a fresh suit on the same cause of action.

2. Each party to bear and pay his own costs.

3. All ad interim orders are vacated." The said terms of settlement were filed

before Sarkar, J. The learned Judge by his judgment and order dated September 24, 1973 has refused to record the said terms of settlement. The present appeal has been filed against the said order.

4. Before the trial Court, three applications were filed in the present suit. In the first application filed on April 12, 1972 in order of time the appellant prayed for filing the terms of settlement as set out above. Pending the hearing of the said application two applications were made on Master's summons dated November 20, 1972 and November 28, 1972 whereby the auction purchasers respondents Nos. 9, 10 and 11 in the second application and the respondent Ali Asgar Khan in the third application respectively prayed for their transposition to the category of the plaintiffs and transposition of the plaintiffs to the category of defendants in the said suit. By consent all the three applications were heard one after the other. It was also agreed that the final order would be passed by the trial Court after hearing all the three applications. The learned Judge delivered one judgment whereby the appellant's application for filing the terms of settlement was dismissed and the respondents Nos. 9, 10 and 11 and respondent No. 7 were transposed to the category of the plaintiffs. Three appeals have been filed by the appellant against the said judgment and order of the learned Judge.

5. The short point to be decided in the present appeal is whether the learned Judge was right in refusing to record the terms of settlement.

6. A preliminary point has been taken challenging the maintainability of the appeal. Mr. P. K. Das, Counsel for Ali Asgar Khan, has submitted that leave was granted to prefer the present appeal on the usual undertaking that in the Paper Book they would set out the list of dates relating to the question of limitation. Even the other undertaking to file a certified copy of the order under appeal had also not been complied with. But subsequently leave was granted by this Court to file a supplementary Paper Book, including the said certified copy. Thereafter the said certified copy has been duly filed. But neither in the original Paper Book nor in the supplementary Paper Book, the list of dates relating to the question of limitation has at all been given. Mr. Das has, therefore, submitted that the appellant having failed to comply with the undertaking given to

this Court, this appeal should be dismissed. Reliance has been placed upon an unreported Bench decision of this Court by Lahiri and Bachawat JJ. in *Ram Gopal Lachmi Narayan v. Bansidhar Ghan-shyam Das* delivered on April 5, 1960 in Appeal No. 36 of 1959 (Cal), *Commissioner of Income-tax v. Santosh Debi Chamaria*, AIR 1974 Cal 295 and the unreported judgment of myself and Ghose J. in Appeal No 106 of 1974, (*Prahlad Lal Saraf v. Nathmul Bhuwalka*) delivered on January 21, 1975 (Cal), where it was held that if the appellant fails to comply with the conditions on the basis of which leave was granted to file the appeal, the appeal should be dismissed.

7. Mr. B. C. Dutt, Counsel for the appellant, has submitted that the facts in the above cases are distinguishable. Although the list of dates relevant to the question of limitation has not been printed in the Paper Book, Mr. Dutt has contended that in the appeal there has been no breach of undertaking inasmuch as the appeal was placed in the list earlier than the normal time at the instance of the respondent and hearing of the appeal commenced on March 26, 1976, although the certified copy of the order was delivered by the department and filed by the appellant on March 23, 1976. We have, however, called for the records and have found the following dates:

1. Requisition for drawing up the order dated 24th September, 1973	28-9-73.
2. Requisition for certified copy of the order dated 24th September, 1973	28-9-73.
3. Order signed on	9-3-76.
4. Order filed on	10-3-76.
5. Folios for certified copy assessed by Court	12-3-76.
6. Stamp furnished on	12-3-76.
7. Date on which the copy is ready for delivery	24-3-76.
8. Date when delivery was taken	24-3-76.
9. Date of filing of certified copy of order	24-3-76.

8. We are, therefore, satisfied that the appeal in fact was filed within the period of limitation and, in the facts of the case, the breach of undertaking in omitting to furnish the dates relevant for period of limitation in the Paper Book cannot be said to be voluntary or without reason.

9. Mr. Das has next contended that the respondent No. 3 Ali Safdar Khan

has died in December, 1974 and no substitution of his heirs having been made till the date of hearing, the appeal abated against all the respondents. Reliance has been placed by him on *R. P. Gupta v. Murli Prasad*, AIR 1972 SC 1181 at p. 1185, in support of his contention.

10. In reply to this contention, Mr. Dutt, prayed for an adjournment of the hearing of the appeal to enable his client to make a formal application for putting the heirs and legal representatives of Ali Safdar Khan on record. We have, however, granted the said prayer and adjourned the hearing. A formal application has been made on April 7, 1976 which has been disposed of by us by a separate judgment today. In our judgment, we have held that as *Musst. Hossenara Begum* is an heir of Ali Safdar Khan, deceased, as his mother, under the Mohammedan Law the estate of Ali Safdar Khan has already been represented in the appeal. Relying upon *Sulaiman Sahib v. N. C. Mohd. Ismail Sahib*, AIR 1966 SC 792 and *Mahabir Prasad v. Jageram*, AIR 1971 SC 742, we have allowed to put the other heirs of Ali Safdar Khan on record in place of the deceased. For the reasons set out in the said judgment, we are of opinion that the appeal has not abated as submitted by Mr. Das and, as such, this contention of Mr. Das must also fail.

11. On merits Mr. Das has argued that the learned Judge has correctly rejected the appellant's prayer to file terms of settlement inasmuch as no such compromise or adjustment could be lawfully effected under Order XXIII, Rule 3 of the Code of Civil Procedure. Admittedly all the defendants did not sign the terms of settlement. Further no power of attorney has been filed by Amar K. Roy, since deceased, who has signed the said terms of settlement on behalf of the plaintiffs. As the compromise is unlawful it has rightly been rejected. Reliance has been placed by him on *Sadasukh Kabra v. Jugal Krishna Singh*, (1957) 61 Cal WN 67 at p. 76. He has also contended that substantial nature of the terms of settlement as set out above is that the plaintiffs in this suit i.e. respondents Nos. 1 to 5 have made the application not to proceed with the suit. The appellant's said application to file the terms of settlement, however, has been made under O. XXIII, R. 3 and not under O. XXIII, R. 1. Even assuming that the said application before the trial Court was substantially an application under Order XXIII, Rule 1, the order of the learned Judge in the facts

and circumstances of this case cannot be said to have been incorrectly made. Reference has been made to *M/s. Hulas Rai Baij Nath v. Firm K. B. Bass & Co.*, AIR 1968 SC 111 where it has been held that the plaintiffs cannot be compelled to proceed with the suit by the Court under Order XXIII, Rule 1 of the Code.

12. In our view, where an application has been made under Order XXIII, Rule 1 the plaintiff is entitled to withdraw his suit and the defendants cannot be heard to oppose such prayer. But the said legal right of the plaintiffs to withdraw the suit is not unconditional or absolute. The Court can only exercise its jurisdiction in favour of the plaintiffs where the interests of the defendants are not adversely affected in any way if the plaintiffs are allowed to withdraw the suit. To illustrate, in a partition suit by a sole plaintiff against defendants, the former cannot be allowed to withdraw the suit inasmuch as a defendant having a cause of action against such plaintiff, may be allowed to be transposed as plaintiff in the suit. Reliance may be placed on *Bhupendra Narayan Sinha v. Rajeshwar Prosad*, 58 Ind App 228 at p. 229 = (AIR 1931 PC 162). The Judicial Committee in this case held that transposition of a party under Order I, Rule 10 should be allowed where it is necessary for a complete adjudication upon the questions involved in the suit and to avoid multiplicity of proceedings. Similarly, in a suit under Section 92 of the Code a plaintiff is not allowed to withdraw the suit if one of the defendants makes an application to proceed with the suit after being transposed as a plaintiff. Reliance may be placed upon AIR 1920 Mad 732. Similar situation may arise in a suit for accounts of a firm by a Partner. We are, therefore, satisfied that where an application simpliciter has been made under Order XXIII, Rule 1, the Court cannot compel the plaintiff to proceed with the suit and the defendants cannot be allowed to complain against such order. But where there is an affinity or identity of interests between the plaintiffs and one or more of the defendants, the plaintiffs cannot be allowed to withdraw the suit if an application on behalf of such defendants having an interest in the suit is made for their transposition to the category of plaintiffs and for transposition of the plaintiffs to the category of the defendants under Order 1, Rule 10.

13. In the facts and circumstances of the present case, late Ali Hyder Khan

and Ali Asgar Khan were absolute owners of the said premises comprising more than 4 Bighas of land in a respectable locality in Calcutta. The respondent Ali Asgar Khan who was a defendant in the suit had identical interest in the said property with the interests of late Ali Hyder Khan or his heirs who happened to be the plaintiffs in this suit. If Ali Asgar is not allowed to be transposed, in such cases he would be compelled to file another suit against the heirs of Ali Hyder and the appellant which would encourage multiplicity of proceedings. It is quite possible that in a proper case if the suit is allowed to be withdrawn, the defendants' new suit might be barred by limitation. In the present case not only an application under Order XXIII, Rule 3 has been made but application for transposition of some of the defendants have been made under Order 1, Rule 10 so that the issues between the parties are finally determined.

14. It is the definite case of the appellant that one of the seven defendants, made the application to put the terms of settlement in Suit No. 276 of 1971 (Cal), (*Mst. Hossenara Begum v. Sm. Ajita Debi*) under Order XXIII, Rule 3. Relevant provisions of Order XXIII, Rule 3 read as follows:

"Provided it is proved to the satisfaction of the Court that the suit has been adjusted wholly or in part by any lawful agreement or compromise..... the Court shall order such agreement, compromise.....to be recorded and shall pass a decree in accordance therewith so far as it relates to the suit." Defendant Smt. Ajita Debi made the application for recording the terms of settlement. The defendant No. 2 Sailaja Ranjan Chaki did not enter appearance. The defendant No. 3 Ali Asgar Khan is one of the defendants in the suit filed by Smt. Ajita Debi against Ali Hyder Khan, the predecessor-in-interests of the plaintiffs. Smt. Ajita Debi, the defendant No. 1 is supposed to have entered into an agreement with Musst. Hossenara Begum, Ali Safdar Khan, deceased, Ali Sarwar Khan, Ali Dewar Khan and Mst. Sayedunessa Begum. There is nothing to show that the suit has been adjusted wholly or in part between Smt. Ajita Debi and Ali Asgar Khan. It has been submitted by the Counsel for the appellant that Ali Asgar Khan is acting in collusion and conspiracy with Smt. Ajita Debi. If this submission is correct, then Ali Asgar Khan also should have been a party to the said terms of settlement. On the contrary,

Smt. Ajita Debi has tried to file terms of settlement by excluding Ali Asgar Khan. It cannot be denied that Ali Asgar Khan and the heirs of Ali Hyder Khan have identical interests in the suit premises. It is true that respondents Nos. 5, 6 and 7 who happen to be the auction purchasers under a mortgage decree against Ali Hyder Khan and Ali Asgar Khan were not parties in the Suit No. 1322-A of 1966, that is, Ajita Debi's suit for specific performance of the agreement for sale against Ali Hyder Khan and Ali Asgar Khan; Counsel for the appellant is right in his submission that no relief has been claimed in the present Suit No. 276 of 1971 against respondents Nos. 5, 6 and 7. The fact remains that they have been impleaded as defendants by the respondents Nos. 1 to 5 who are the plaintiffs in the suit. The facts of the case also show that the respondents Nos. 5, 6 and 7 have purchased the suit premises for a sum of Rs. 2,01,000/- and paid the amount. Thus, the auction purchasers who have been impleaded in the said Suit No. 276 of 1971 are also interested in the suit premises. It is, thus, clear that the appellant who happens to be a lady instituted the said Suit No. 1322-A of 1966 for specific performance of the contract for sale and the said suit was compromised at her instance. The heirs of Ali Hyder Khan, deceased, filed the present suit for setting aside the decree for specific performance and impleaded Ali Asgar Khan as one of the defendants. Smt. Ajita Debi again persuaded the heirs of Ali Hyder Khan to withdraw the present suit and it is she who made the application for putting the terms of settlement excluding Ali Asgar Khan and the auction purchasers. Smt. Ajita Debi has therefore, failed to prove to the satisfaction of the Court that the said Suit No. 276 of 1971 has been adjusted wholly or in part against Ali Asgar Khan and the auction purchasers who are represented by different Counsel before the trial Court and this Court. The learned Judge is, therefore, right in refusing to file and record the terms of settlement by the order under appeal. Further, the suit premises No. 8/2, Palm Avenue, Calcutta, comprising of an area of about 4 Bighas 16 Cottahs together with two-storied building in a respectable locality is a very valuable property and there are several litigations relating to the said property. Ali Asgar Khan and the auction purchasers are very much interested in the suit premises. We have been told that the Custodian of Enemy Property has in-

stituted a suit against the heirs of Ali Hyder Khan, deceased, and Ali Asgar Khan for a declaration that the suit premises have been vested in the Union of India on the ground that heirs of Ali Hyder Khan, deceased, and Ali Asgar Khan are not Indian nationals. It is thus quite possible that all the parties have acted or are acting to dispose of the property at a nominal price.

15. There is another reason why the proposed compromise or adjustment cannot be allowed to be filed. The original terms of settlement have been examined by us and we have found that, Amar Kumar Roy, the respondent No. 8, has put his signature as solicitor for the respondents Nos. 1 to 5, but his power of attorney has not been filed in the suit. Thus we are satisfied that the purported terms of settlement are not based upon any lawful agreement or compromise within the meaning of Order XXIII, R. 3. We, therefore hold that the learned Judge has not erred in refusing to record the terms of settlement.

16. In the premises, the appeal is dismissed but in the facts of this case parties will bear their respective costs.

S. K. MUKHERJEA, J.:— I agree.

Appeal dismissed.

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PRADYOT KUMAR BANERJEE AND
R. K. SHARMA, JJ.

Bijoli Prova Nandy Chowdhury, Appellant v. State of West Bengal, Respondent.

A. F. O. D. No. 601 of 1971 (Analogous to A. O. D. No. 245 of 1972), D/-25-6-1976.

(A) W. B. Land (Requisition and Acquisition) Act (2 of 1948), S. 7 (2) (a) — Land Acquisition Act (1894), S. 23 (2) — Solatium under S. 23 (2) — Admissibility of — Acquisition of land — Claim for payment of statutory solatium — S. 7 (2) (a) of W. B. Land (Requisition and Acquisition) Act is ultra vires — Hence claim of statutory solatium under S. 23 (2), Land Acquisition Act is not barred.

Under the W. B. (Requisition and Acquisition) Act, it has been provided that for the purpose of compensation the market value of the land has to be decided in accordance with S. 23 of Land Acquisition Act and thereafter the Land

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Acquisition Act provides for payment of statutory compensation by way of solatium at the rate of 15% under S. 23 (2) of the said Act. However S. 7 (2) (a) W. B. Land (Requisition and Acquisition) Act provides for non-payment of statutory solatium.

Held, that S. 7 (2) (a) of W. B. Land Acquisition Act is ultra vires and hence the appellant is entitled to claim the statutory solatium under S. 23 (2) of the Land Acquisition Act. AIR 1971 SC 961, Distinguished. (Paras 2, 3)

Cases Referred: Chronological Paras
AIR 1971 SC 961 = (1971) 3 SCR 791

1, 3

S. C. Das Gupta, Nani Gopal Das, Tapan Sen Gupta and Somen Das Gupta, for Appellant; Chandidas Roy Chowdhury and Birendra Nath Ghose, for Appellant in F. A. No. 245 of 1972; Chandidas Roy Chowdhury and Birendra Nath Ghose, for Respondent; S. C. Das Gupta N. G. Das, Tapan Sen Gupta and Somen Das Gupta, for the State in F. A. No. 245 of 1972.

BANERJEE, J.:— This appeal arose out of an application for reference under Section 18 at the instance of the claimant. By notification dated 17th April, 1965, 336.27 dec. of land was acquired out of which the appellant is interested in C. S. Plots Nos. 4091, 4092 and 4095 and the Collector by his award dated 3rd September, 1968 allowed Rs. 39,263.85 p. The nature of the land in which we are interested in this application are Bill, Bhery and Bhery machchas. The Collector valued the bill and bhery lands at the rate of Rs. 1210/- per acre. Not being satisfied with the award given by the learned Collector, the appellant referring claimant made an application under Section 18 of the Land Acquisition Act and claimed compensation at the rate of Rupees 2500/- per cottah for the acquisition of the petitioner's property. She also claimed Rs. 2500/- per month for the period of requisition. The learned arbitrator however allowed at the rate of Rs. 80/- per cottah or Rs. 1616/- per bigha and he further gave 6% interest on the land and also 15% statutory allowance on the land value. The award was made on 26th April, 1971. Thereafter the State Government made an application under Order 47, Rule 1 of the Civil Procedure Code for review of the judgment passed on 26th April, 1971. On review by order dated 14th June, 1971, 15% statutory allowance was disallowed in view of

the Supreme Court judgment in AIR 1971 SC 961.

2. Mr. Das Gupta on behalf of the appellant contended that the valuations of Beel, Bhery and Bandh were too low on the material date on 26th June, 1965 or at the rate of Rs. 80/- per cottah as fixed by the arbitrator. Mr. Das Gupta contended that the appellant produced number of documents which were not considered at all by the learned arbitrator. The documents produced by the appellant are Exts. 3A, 3B and 3C. The appellant also produced two awards (Exts. 1 and 2) and gave evidence to the effect that he was earning a monthly rent of Rs. 250/- from one Bhusan Naskar before the vesting of the estate in the State of West Bengal. The evidence was given by the witness No. 1 for the claimant that the acquired bhery was about 2 miles from the Bengal Chemicals which is within the Calcutta Corporation. The terminus of the State Bus No. 14 is at the Bengal Chemicals. The V. I. P. Road is about 3/4 miles from the bhery. There was waist-deep water in the beel and that she claimed Rs. 2500/- per cottah in respect of the property in question. Ext. 3 was a document dated 3rd June, 1959 which shows a sale deed of 31 dec. land of plot No. 3558 at the rate of Rs. 3000/- per cottah. In our opinion, the Court below rightly rejected the said kobala which has no relation with the land in question and is quite long way off from the property under acquisition which is recorded as beel, bhery and bhery machchas. The next document relied upon by the claimant is Ext. 3A, that is also a small plot of garden land and the rate was Rs. 15500/- per acre in one case and Rs. 9700/- per acre in other. These plots covered by Ext. 3 are all quite a long way off from the plot acquired in the present case. Ext. 3B was a kobala dated 20th July, 1963, by which 16 cottahs 14 chittacks of land was sold for Rs. 28,000/-. Ext. 3C is also document dated 5th March, 1965 by which 2 cottahs and 15 chittacks and 31 sq. ft. of land were sold at the rate of Rs. 1500/- per cottah. Exts. 1 and 2 are certified copies of judgment and decree passed in L. A. Case No. 34 of 1969 (V). The Kobala produced by the State Government was rejected by the learned arbitrator on the ground that the said Exts. A to A-3 are not relevant for the purpose of value of beel, bhery and bandh land, inasmuch as they are in respect of transaction 10 years ago from the date. We are concerned with the material date of notifi-

cation dated 25th June, 1965. He also rejected Exts. 3, 3A and 3B as the nature of lands are of garden lands and sali lands and that cannot be a proper guide for the purpose of valuation of bhery, bhery machchas or beel lands. The learned Judge did not take into consideration the rental method of valuation because the claimant could not produce any evidence excepting the oral evidence of the rent which has been received for the bhery machchas. In the award 25.48 acre beel-cum-paddy land in plot N. 6279 as on 14th February, 1956 was fixed at Rs. 1000/- per bigha and 70 cents of beel land in plot No. 6537 at Rs. 688/- per bigha. From the Map it appears that plot Nos. 6279 and 6537 is nearest to plot Nos. 4091, 4042 and 4095. The date of notification in case No. 34 of 1969 was however 14th February, 1956 whereas in the present case the date is 24th June, 1965. At the relevant date no evidence has been produced by the parties about the sale transaction of the similarly situate land. Therefore, we are to value the land on the basis of documents and also consider the continuous rise in land value in and around Calcutta from 1941 and onwards. It appears that similar land was valued at Rs. 688/- per bigha in 1956. The said land was near to the V.I.P. Road whereas the present land is not so near the V.I.P. Road. It appears that the beel and paddy land were assessed at Rs. 1000/- per bigha and that assessment cannot be taken into consideration in view of the evidence of the appellant that the land in question was under waist deep water. In that view of the matter, the learned arbitrator was right in taking Rs. 688/- per bigha as value of the beel land on 15th February, 1956 and thereafter took into consideration of the trend of rise in the land value between 1956 to 1965 in and around Calcutta while the scheme of Salt Lake already in operation and considered the appreciation of 15% allowance per year in respect of the value of the land under acquisition and fixed the rate of Rs. 1616/- per bigha. In our opinion, nothing has been stated by Mr. Das Gupta by which we can hold that the valuation arrived at by the arbitrator was wholly inadequate. In our view, taking into consideration the fact that the petitioner, assuming for a moment was getting a rental of Rs. 250/- per month is correct even if the rental method is applied, he could not have got what has been given. The valuation fixed at the rate of 15% per bigha as on 24th June, 1965 is a cor-

rect reasonable and adequate compensation for the acquisition. Mr. Das Gupta next contended that the appellant is entitled to 15% solatium, in view of the fact, Section 7 (2) (a) of the Act, 1948 has been declared ultra vires by this Court and the learned arbitrator was wrong in refusing the 15% solatium as is entitled under Section 23 (2) of the Land Acquisition Act.

3. The learned Arbitrator referred to AIR 1971 SC 961 (S. M. Nandy v. State of West Bengal) and on the basis thereof reviewed the decision and held that the claimant is not entitled to the solatium. It appears however that the point which arose in this case is whether the requisition is ultra vires of the Constitution of India under Art. 19 (1) (f) read with Art. 19 (5) of the Constitution. The point which has been urged by the learned Advocate appearing for the appellant is to be found in paragraph 2 of the judgment which is as follows:—

"2. The learned counsel for the appellants, Shri Arun Kumar Dutta, challenges the West Bengal Land (Requisition and Acquisition) Act, 1948—hereinafter referred to as the impugned Act on the ground that it does not impose reasonable restrictions within Article 19 (5) of the Constitution. He urges three grounds in this respect. First, he says, that there is no provision for a notice to the owner or the occupier of the property before an order of requisition is passed. Secondly, there is no provision for an appeal against the order of requisition, and thirdly, a civil suit is barred under Section 11 of the impugned Act." In repelling the argument of the appellant, the Supreme Court considered the scheme of the Act and in doing so the Supreme Court only referred to the different provision of the Act. The Supreme Court had no occasion to consider whether Section 7 (2) (a) is ultra vires of the Act. In our opinion, therefore, the learned arbitrator was wrong in his reading of the effect of the Supreme Court's judgment in so far as the solatium is concerned. Under the West Bengal Act II of 1948 it has been provided that for the purpose of compensation the market value of the land has to be decided in accordance with Section 23 of the Land Acquisition Act and thereafter the Land Acquisition Act provides for payment of statutory compensation by way of solatium at the rate of 15% under Section 23 (2) of the said Act. Under Section 7 (2) (a)

however the Act II of 1948 provides for non-payment of statutory solatium or in the other words though compensation will be provided under the Land Acquisition Act, the provision for statutory solatium under Section 23 (2) will not be available. The Supreme Court had to consider the effect of such provision in respect of Nagpur Improvement Act and struck down the similar provision of the said Act as ultra vires. This Court also considered the similar provision under the Calcutta Improvement Act and struck down it as ultra vires. Following these decisions, in our opinion, Section 8 (2) (b) (7 (2) (a)?) of the Act, in so far as it provides for non-payment of statutory solatium, cannot be upheld. We, therefore, set aside the order passed by Arbitrator dis-allowing the claim for 15% statutory allowance as modified by the judgment dated 14th June, 1971.

4. The appeal is, therefore, allowed in part. The judgment dated 14th June, 1971 is set aside. The award passed by the Special Land Acquisition Judge on 26th April, 1971 is affirmed.

There will be no order as to costs.

Re:— F. A. No. 245 of 1972

5. In view of our judgment passed in F. A. No. 601 of 1971, this appeal is disposed of. There will be no order as to costs.

R. K. SHARMA, J.:— I agree.

Appeal partly allowed.

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FULL BENCH

SANKAR PRASAD MITRA, C. J., SALIL KUMAR DATTA AND SALIL KUMAR ROYCHOWDHURY, JJ.

Kamal Krishna Bhattacharya and others, Petitioners v. The State of West Bengal and others, Respondents.

Full Bench Reference No. 1 of 1974 in Civil Rule No. 6098 (W) of 1972 and Full Bench Reference No. 2 of 1974 in Civil Rule No. 7247 (W) of 1972, D/- 3-9-1976.

(A) Bengal Municipal Act (15 of 1932), S. 67-A (3) — Word 'such' — Word cannot be given restricted meaning — "Such powers" may include all the 'powers' of Chairman. AIR 1974 Cal 363, Overruled.

The word 'such' in S. 67-A (3) of the Bengal Municipal Act ought not to be

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given a restricted meaning. The words 'such powers' therefore may include all powers of the Chairman or the Commissioners. AIR 1974 Cal 363, Overruled; (1974) 78 Cal WN 988, Approved.

(Paras 17 and 21)

To ascertain the true scope and meaning of the word 'such' in Section 67-A (3), it is necessary to take into consideration the object of that section and the object of Sections 552 and 553. The object of Sections 552 and 553 is to dissolve the body of Commissioners or to supersede the body altogether. The object of Section 67-A is to keep the Chairman and the Commissioners in office, to be re-installed if thought necessary. Section 67-A gives to the State Government an emergency power for exercise in special circumstances for specified period. It does not take away the office of the Chairman or the Commissioners. They would remain in office. They have been only deprived of exercising the powers given to them under the Act which are specified in notifications under Section 67-A. This power of the State Government can be used when in its opinion either the affairs of a municipality are not properly managed or the affairs of a municipality cannot, for failure of a general election or for any other reason, whatsoever, be managed in accordance with law and if the State Govt. is of opinion that it is desirable in the public interest to exercise the power. The Executive Officer appointed under Section 67-A may be armed either with some of the powers of the Chairman and the Commissioners whether at a meeting or otherwise or all powers of the Chairman and the Commissioners. When all powers are conferred the Chairman and the Commissioners remain in suspended animation for periods specified in the notification or notifications under the sections. On the expiry of such period or periods the Chairman or the Commissioners may assume the powers they are deprived of and the municipality is allowed to function in the normal way through them. AIR 1959 SC 107, Rel. on. (Paras 13 & 14)

Cases Referred: Chronological Paras
 AIR 1974 Cal 363 = 78 Cal WN 686 2,
 (1974) 78 Cal WN 988 7, 18
 AIR 1959 SC 107 = 1959 SCR 1440 2, 7, 19 15

A. P. Chatterjee, Rabilal Maitra and Santosh Chatterjee, in F. B. Ref. Nos. 1 and 2 of 1974, for Petitioners; P. K. Sen-gupta and S. P. Roychowdhury (in F. B.

Ref. No. 1 of 1974) and P. K. Sengupta and S. B. Bakshi (in F. B. Ref. No. 2 of 1974), for Respondents.

Full Bench Reference No. 1 of 1974 in Civil Rule No. 6098 (W) of 1972:

SANKAR PRASAD MITRA, C. J.:—

This is a Reference made by a Division Bench consisting of my learned brother Mr. Justice Salil K. Roychowdhury and myself on the 2nd July, 1974 under R. 7, Chapter VII, Part II of the High Court Appellate Side Rules. The reference is restricted to the meaning of the word 'such' in Section 67-A of the Bengal Municipal Act, 1932 (hereinafter referred to as 'the Act'). No other question can be gone into or decided by this Bench.

2. On the meaning of the word 'such' there has been a difference of opinion between two Division Benches of this Court. The relevant decisions have been reported in (1974) 78 Cal WN 988 (State of West Bengal v. Surendranath Mondal) and 78 Cal WN 686 = (AIR 1974 Cal 363) (Sailendra Nath Bhowmik v. State of West Bengal). The first judgment is a judgment of the Division Bench consisting of Mr. Justice A. N. Sen and Mr. Justice S. K. Hazra delivered on February 4, 1973. The second judgment is of a Division Bench consisting of Mr. Justice A. C. Gupta and Mr. Justice S. C. Deb delivered on September 25, 1973. It appears that the first judgment was not cited before the second Division Bench.

3. Before we proceed any further it would be relevant to quote Section 67-A and Sections 552 and 553 of the Act.

4. Section 67-A reads:

"Appointment, etc. of Executive Officer by the State Government:—

(1) Notwithstanding anything contained in Section 66 or Section 67, if in the opinion of the State Government the affairs of a municipality—

(a) are not properly managed, or

(b) cannot, for failure of a general election or for any other reason, whatsoever, be managed in accordance with law, and if in its opinion it is desirable in the public interest so to do, it may, by notification, declare that the municipality shall have an Executive Officer for such period as may be specified in the notification:

Provided that the State Government may, if it thinks fit, by notification, extend such period from time to time.

(2)

(3) The Executive Officer of a municipality, appointed under this section shall, subject to such directions as the State Government may issue from time to time, exercise such powers of the Chairman or of the Commissioner whether at a meeting or otherwise as may be conferred on him by notification by the State Government and on such notification such powers shall cease to be exercisable by the Chairman or by the Commissioner, as the case may be."

5. We now come to Section 552. This section is in these terms:

"552. Power to dissolve body of Commissioners.— If, in the opinion of the State Government, the Commissioners have shewn their incompetency to perform or to have persistently made default in the performance of the duties imposed on them by or under this Act or by any other law, or have exceeded or abused their powers, the State Government may, by an order published, with the reasons for making it, in the Official Gazette, direct that a fresh general election shall be held immediately of persons to be Commissioners; and from the date on which the results of such new election and appointment of Commissioners under Section 26 (if any) are published in accordance with the provisions of Section 50 the former Commissioners shall, unless they are re-elected or re-appointed for the purpose of Section 26, vacate their offices:

Provided that the tenure of office of the Chairman of the outgoing body of Commissioners shall continue until that office is vacated in the manner provided by Section 59."

6. The next Section 553 runs thus:

"553. Power to supersede Commissioners in case of incompetency, default or abuse of powers.—

(1) If, in the opinion of the State Government, the Commissioners have shown their incompetency to perform, or has persistently made default in the performance of the duties imposed on them by or under this Act or by any other law or have exceeded or abused their powers, the State Government may, by an order published with the reasons for making it, in the Official Gazette, declare such Commissioners to be incompetent, or in default, or to have exceeded or abused their powers, as the case may be, and supersede them for a period to be specified in the order:

Provided that except in case of misappropriation of municipal funds or persistent default in the performance of duties by the Commissioners the State Government shall not ordinarily exercise power under this section until action has been taken under Section 552.

(2) The State Government may, if it considers it necessary so to do, by order extend or modify the period of supersession."

7. Both the two Division Benches referred to above are of opinion that Sections 67-A, 552 and 553 may operate in the same field. We are, therefore, unable to reopen this question although an attempt was made to do so by the learned Government pleader appearing for the State Government. The difference between the two Division Benches is that in the case of *State of West Bengal v. Surendranath Mondal* ((1974) 78 Cal WN 988), it has been held that all the powers of the Chairman and the Commissioners of a municipality may be conferred upon an Executive Officer under Section 67-A (3). In other words, 'such powers' in Section 67-A may mean all powers. In the case of *Sailendra Nath Bhowmik v. State of West Bengal* (AIR 1974 Cal 363), the other Division Bench is of the view that under Section 67-A (3), only certain powers of the Chairman and the Commissioners of the municipality as may be specified can be conferred upon the executive officer appointed under this section, that is to say, that all the powers of the Chairman and the Commissioners cannot be conferred upon such executive officer.

8. It is this difference of opinion between the two Division Benches which we have been called upon to resolve in this reference.

9. Mr. Arun Prakash Chatterjee appearing for the appellants has relied on the dictionary meaning of the word 'such' in Webster's International Dictionary, Volume III, page 2283. He has drawn our attention to the following meanings:

"(1) Of a kind or character about to be indicated, suggested or exemplified."

"(2) Having a quality to a degree to be indicated."

"(3) Having a quality already or just specified used to avoid repetition of descriptive term."

"(4) Of the same class, type, or sort, in the same category; similar."

10. Relying on the meanings aforesaid, Mr. Chatterjee contends that the

words 'such powers' in Section 67-A (3) mean powers of the character or quality indicated. The word 'such', says Mr. Chatterjee, cannot mean 'all' inasmuch as it will render nugatory Sections 53, 68 (1) and 68 (2) of the Act. The relevant provisions of these sections may be quoted at this stage. They are as follows:

"53. Delegation of powers by the Executive Officer.—The Executive Officer may with the approval of the Commissioners at a meeting delegate all or any of his powers to the holder of any office under the Commissioners."

"68. Power of the Executive Officer.—(1) The Executive Officer shall be the principal executive officer of the Commissioners and all other officers and servants of the Commissioners shall be subordinate to him. He shall have the same right of being present at a meeting of the Commissioners or of any standing or special committee, and of taking part in the discussions thereat as if he were a Commissioner or a member of such committee and with the consent of the Chairman or the president of the meeting, as the case may be, he may at any time make a statement or explanation of facts, but he shall not vote upon, or make, any proposition at such meeting.

(2) Subject to the provisions of sub-section (2) of Section 51 and sub-section (3) of Section 67-A Executive Officer shall act in respect of all other matters under the direction of the Chairman through whom he shall be responsible to the Commissioners."

11. Mr. Chatterjee has urged that if all the powers of the Chairman and the Commissioners are vested in the Executive Officer appointed under Section 67-A (3), the other sections, he has referred to, would cease to be operative. According to learned counsel Section 67-A assumes the existence of the Chairman and the Commissioners and it cannot be construed to cover cases when the tenure of the Chairman or the Commissioners is at an end under Section 56 and Sec. 56-A of the Act. Section 56 puts an end to the tenure of the office of the Chairman, Vice-Chairman and Commissioners. Section 56-A provides for the appointment of a Committee in the case of delay in forming new body of Commissioners by reason of an order of Court or for other reasons.

12. To strengthen this argument learned counsel has referred to the relevant provisions of Section 554 which pre-

scribe the consequences of supersession of the body of Commissioners or of failure to assume office or of setting aside of election. The sum and substance of the contention on behalf of the appellants has been that when the Act intends to make the Chairman or the Commissioners altogether ineffective the Act has made separate provisions but when they do not cease to function altogether and some powers are still exercisable by them the Act provides in different circumstances for the appointment of an Executive Officer. Section 67-A (3) provides one of the methods of appointing an Executive Officer keeping alive the functions of the Chairman and the Commissioners to the extent they had not been taken away by the notification or notifications under the section. In these premises, it is not open to the State Government by an order passed under Section 67 to take away all the powers of the Chairman and Commissioners.

13. It seems to us that to ascertain the true scope and meaning of the word 'such' in Section 67-A (3), it is necessary to take into consideration the object of that section and the objects of Sections 552 and 553. The object of Sections 552 and 553 is to dissolve the body of Commissioners or to supersede the body altogether. The object of Sec. 67-A is to keep the Chairman and the Commissioners in office, to be re-installed if thought necessary with their full powers. Section 67-A gives to the State Government an emergency power for exercise in special circumstances for specified period. It does not take away the office of the Chairman or the Commissioners. They would remain in office. They have been only deprived of exercising the powers given to them under the Act which are specified in notifications under Section 67-A. This power of the State Government can be used when in its opinion either the affairs of a municipality are not properly managed or the affairs of a municipality cannot, for failure of a general election or for any other reason, whatsoever, be managed in accordance with law and if the State Government is of opinion that it is desirable in the public interest to exercise the power.

14. In our opinion, an Executive Officer appointed under Section 67-A may be armed either with some of the powers of the Chairman and the Commissioners whether at a meeting or otherwise or all powers of the Chairman and

the Commissioners. When all powers are conferred the Chairman and the Commissioners remain in suspended animation for periods specified in the notification or notifications under the sections. On the expiry of such period or periods the Chairman or the Commissioners may assume the powers they are deprived of and the municipality is allowed to function in the normal way through them.

15. The view we have taken would be supported to some extent by the judgment of the Supreme Court in *Radheshyam Khare v. State of Madhya Pradesh*, reported in AIR 1959 SC 107. In this case the Supreme Court was considering the provisions of Sections 53-A and 57 of the C. P. and Berar Municipalities Act (2 of 1922). It would be useful to set out the provisions of these two sections. They run thus:

"53-A. (1) If a committee is not competent to perform the duties imposed on it or undertaken by it by or under this Act or any other enactment for the time being in force and the State Government considers that a general improvement in the administration of the municipality is likely to be secured by the appointment of a servant of the Government as the executive officer of the committee, the State Government may, by an order stating the reasons therefor published in the Gazette, appoint such servant as the executive officer of the committee for such period not exceeding eighteen months as may be specified in such order.

(2) Any executive officer appointed under sub-section (1) shall be deemed to be an officer lent to the committee by Government under sub-section (3) of Section 25.

(3) When under sub-section (1) an executive officer is appointed for any committee, the State Government shall determine from time to time which powers, duties and functions of the committee, president, vice-president or secretary under this Act or any rule or bye-law made thereunder shall be exercised and performed by such officer, in addition to, or to the exclusion of, their exercise and performance by the said committee, president, vice-president or secretary.

(4) The secretary of the committee shall be subordinate to the executive officer.

(5) The executive officer shall have the right to attend all meetings of the committee and any joint committee or sub-committee and to take part in the

discussion so as to make an explanation in regard to the subject under discussion, but shall not move, second or vote on any resolution or other motion."

"57. (1) If a committee is not competent to perform, or persistently makes default in the performance of, the duties imposed on it or undertaken by it under this Act or any other enactment for the time being in force, or exceeds or abuses its powers to a grave extent, the State Government may, by an order stating the reasons therefor published in the official Gazette, dissolve such committee and may order a fresh election to take place.

(2) If after fresh election the new committee continues to be incompetent to perform, or to make default in the performance of, such duties or exceeds or abuses its powers to a grave extent, the State Government may, by an order stating the reasons therefor published in the Official Gazette, declare the committee to be incompetent or in default, or to have exceeded or abused its powers, as the case may be, and supersede it for a period to be specified in the order.

(3) If a committee is so dissolved or superseded, the following consequences shall ensue:—

(a) all members of the committee shall, as from the date of the order, vacate their offices as such members;

(b) all powers and duties of the committee may, until the committee is reconstituted, be exercised and performed by such person or persons as the State Government may appoint in that behalf;

(c) all property vested in it shall until the committee is reconstituted vest in the State Government.

(4) On the expiration of the period of supersession specified in the order, the committee shall be reconstituted, and the persons who vacated their offices under sub-section (3), Cl. (a), shall not, by reason solely of such supersession be deemed disqualified for being members.

(5) No order under sub-section (1) or sub-section (2) shall be passed until reasonable opportunity has been given to the committee to furnish an explanation.

(6) Any person or persons appointed by the State Government to exercise and perform the powers and duties of a dissolved or superseded committee may receive payment, if the State Government so directs, for his or their services from the municipal fund."

16. In construing the provisions of these two sections the Supreme Court at

page 113 of the Report in paragraph 7, inter alia, observes:

"The effect of an order made under Section 57 is, therefore, extremely drastic and puts an end to the very existence of the committee itself and, in view of the grave nature of the consequences that will ensue, the legislature presumably thought that some protection should be given to the committee before such a drastic action was taken and accordingly it provided, by sub-section (5) of that section, that no order should be passed until reasonable opportunity had been given to the committee to furnish an explanation—a provision which clearly indicates that action under Section 57 can only be taken after hearing and considering all the explanations furnished by or on behalf of the committee. The legislature did not think fit to provide a similar safeguard in Section 53-A presumably because the order under the last mentioned section was of a temporary duration, was not very drastic and did not threaten the very existence of the committee. A cursory reading of the two sections will also indicate that the conditions precedent to the exercise of the powers under both sections overlap to some extent, namely, that action can be taken under both if the committee "is not competent to perform the duties imposed on it....." To the extent that the requirements of the two sections overlap the State Government has the option of taking steps under one section or the other according to its own assessment of the exigencies of the situation. The position, therefore, is that if a committee is not competent to perform the duties imposed on it the State Government has to make up its mind as to whether it should take any action at all and, if it thinks that action should be taken, then it has further to decide for itself as to which of the two sections it would act under. If the State Government considers that the incompetency does not run to a grave extent and the exigencies of the situation may be adequately met by appointing an Executive Officer for a short period not exceeding 18 months with certain powers to be exercised by him, either in addition to or in exclusion of their, exercise by the committee, the president, vice-president or the secretary, the State Government may properly take action under Section 53-A. On the other hand if the State Government considers, having regard to all the circumstances of

the case, that the incompetency is much too grave to permit the committee, its president, vice-president or the secretary to function at all, it may take action under S. 57 and dissolve the committee and direct fresh election to take place. In other words incompetency on the part of the committee gives to the State Government an option to apply one of two remedies under the Act, if, that is to say, it considers it necessary to take action at all."

17. It is true that the wordings of the two sections the Supreme Court was considering are not the same as the wordings of the three Sections 67-A, 552 and 553 of the Act which we are considering. But there appears to be no doubt that Section 67-A is less drastic than Section 552 or 553. That is why when power is exercised under Section 552 or 553 it is expressly stated that the State Government has to give its reasons for doing so but when power is exercised under Section 67-A no such reason need be stated. This shows that power under Section 67-A can be exercised in an emergency for temporary periods only and when the emergency comes to an end and the municipality can be put back on its feet the Chairman and the Commissioners would resume their normal function. In meeting an emergency the State Government may take away only some of the powers of the Chairman and the Commissioners or may take all the powers of the Chairman and the Commissioners. They would depend on the nature and circumstances of each case depending on public interest to restore the municipality to its normal position. In these circumstances, we are of opinion that the word 'such' in Section 67-A (3) ought not to be given a restricted meaning.

18. Mr. Chatterjee also wanted to argue before us that Section 67-A is violative of the principles of natural justice inasmuch as the power under that section can be exercised without giving an opportunity to the Chairman and the Commissioners of being heard. On this point, Mr. Justice Gupta and Mr. Justice Deb in *Sailendra Nath Bhowmik v. State of West Bengal* reported in (1974) 78 Cal. WN 686 at p. 694 = (AIR 1974 Cal 363 at p. 368), paragraph 15, have observed:

"It was further contended on behalf of the appellants that the Commissioners

of the municipality were entitled to a notice before steps were taken under Section 67-A. This it was argued, was a requirement of the principle of natural justice. On a reading of the provisions of Section 67-A it appears that the State Government has been given the power to act under this section once it has formed an opinion that circumstances exist for the appointment of an executive officer. This is an opinion which does not have to be justified by stating reasons. It seems therefore that the section by necessary implication excludes the rule of natural justice requiring notice to be given to the persons affected."

19. This point was also taken before the Division Bench of Mr. Justice A. N. Sen and Mr. Justice S. K. Hazra in *State of West Bengal v. Surendra Nath Mondal*, ((1974) 78 Cal. WN 988). Mr. Justice Sen in paragraph 32 at page 1004 has refused to go into the question of violation of the principle of natural justice in the absence of proper materials. But Mr. Justice Hazra in paragraph 56 at page 1011 is clearly of opinion that there is no violation of the principles of natural justice when the statute does not require any reasons to be given or any opinion to be formed. The requirement of the principles of natural justice, according to Mr. Justice Hazra, must depend, *inter alia*, upon circumstances of the case, and also on the rules under which the Tribunal is acting. Mr. Justice Hazra says that Section 67-A, sub-section (3) of the Act does not provide that notice should be given to the Chairman or the Commissioners before conferring powers on the Executive Officer under the notification.

20. It appears therefore that there is no difference of opinion on the question of applicability of the principles of natural justice between the two Division Benches. And this Bench is not competent to determine the question in these circumstances.

21. We therefore express the view that the words 'such powers' in Section 67-A (3) of the Act may include 'all powers' of the Chairman or the Commissioners. In view of this finding the application is dismissed and the Rule is discharged. There will be no order as to costs.

22. The interim orders, if any, are vacated.

Full Bench Reference No. 2 of 1974 in Civil Rule No. 7247 (W) of 1972:

23. In view of the judgment delivered by us in Civil Rule No. 6098 (W) of 1972 (Kamal Krishna Bhattacharya v. State of West Bengal) above, this application is dismissed. The Rule is discharged. There will be no order as to costs.

24. The interim orders, if any, are vacated.

SALIL K. DATTA, J.:— I agree.

SALIL K. ROYCHOWDHURY, J.:— I agree.

Application dismissed.

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SPECIAL BENCH

SANKAR PRASAD MITRA, C. J.,
SABYASACHI MUKHARJI AND
SALIL KUMAR DATTA, JJ.

Ananda Kumar Chakraborty and another, Petitioners v. State of West Bengal and others, Respondents.

A. F. O. O. Nos. 869 and 100 of 1974, D/- 24-11-1976.

(A) Constitution of India, Art. 31 (2) and (3) — Combined effect of — State law providing for compulsory acquisition or requisition of property — Assent of President essential to make it enforceable.

The combined effect of Clause (3) and Clause (2) of Article 31 of the Constitution is that any law providing for compulsory acquisition or requisition of property passed by the legislature of the State will require reservation for consideration of the President and until the assent of the President has been received such law will not be enforceable. AIR 1952 SC 252 and AIR 1958 SC 468, Rel. on. (Para 4)

(B) West Bengal Estates Acquisition (Amendment) Act (9 of 1967), S. 2 — Amendment of S. 44 (2a), West Bengal Estates Acquisition Act, 1953 by substituting words 'within 12 years' for 'within 9 years' — Amending Act being inextricably linked up with scheme of acquisition is unenforceable for want of President's assent as required by Art. 31 of the Constitution. AIR 1976 Cal 15, Overruled. (Constitution of India, Article 31 (3)).

The West Bengal Estates Acquisition Act, 1953 (1 of 1954) is undoubtedly an Act which is for compulsory acquisition of property. The W. B. Amendment Act (5 of 1967) merely substituted the period

of 12 years to the existing period of 9 years for taking steps by the empowered officer to revise the records finally published in accordance with the provisions of sub-section (2) of Section 44 of the West Bengal Estates Acquisition Act, 1953. (Para 6)

The record-of-right determines the quantum of land and the particulars of the land to be retained. Such record-of-rights is the basis upon which the quantum and the persons entitled to the compensation for acquisition of properties will have to be determined. The right and extent of retention of land is inextricably linked up with the record-of-rights. The right to obtain compensation and the quantum thereof are also dependent upon the record-of-rights. It follows, therefore, that the procedure and the method for the preparation of the record-of-rights are integral parts of the scheme of acquisition under the West Bengal Estates Acquisition Act, 1953. A reading of the different provisions contained in Chapter V of the Act along with the rules namely Rule 25 onwards of the West Bengal Estates Acquisition Rules, 1954 leads to that conclusion. AIR 1976 Cal 15, Overruled. (Paras 6, 7)

By the amending Act IX of 1967 there has been an enlargement of the period of time within which the empowered officer can suo motu take steps for revision of the record of rights. Such enlargement of time affects fundamentally the procedure of the rectification of record of rights which is inextricably connected with the scheme of acquisition. Hence the West Bengal Act IX of 1967 being inextricably linked up with the scheme of acquisition comes within the purview of Clause (2) of Article 31 of the Constitution and without the assent of the President the same is unenforceable. (Para 7)

(C) Constitution of India, Arts. 31 (3) and 201 — West Bengal Estates Acquisition (Amendment) Act (31 of 1969), Section 4 — Amendment of Section 44 (2a) of main Act of 1953 by substituting '15 years' for '12 years' — President having given his assent to 1969 Act must also be deemed to have given his assent to W. B. Act (9 of 1967) effective only from date of assent. (West Bengal Estates Acquisition Act (1 of 1954), S. 44 (2a) — Amendment of by W. B. Act (9 of 1967) and W. B. Act (31 of 1969)).

In the absence of any rules framed under the Constitution for the man-

ner of giving assent of the President to an Act of the State Legislature can be implied from the conduct. Therefore, when the President in 1969 agreed by giving his assent to the West Bengal Estates Acquisition (Amendment) Act, 1969 that the period of time during which the specially empowered officer could take steps for re-opening the proceeding suo motu for rectification of record of rights would be 15 years instead of existing 12 years it must be deemed that he had assented or agreed to the period being 12 years before that assent, otherwise he could not have assented to the substitution of the period of 15 years for the period of 12 years. But the assent of the President to the earlier Act cannot be deemed to have been given at any earlier point of time than when it was actually given.

The President having given his assent to the West Bengal Estates Acquisition (Amendment) Act, 1969 it can be said that the President has given his assent to the West Bengal Estates Acquisition (Amendment) Act (IX of 1967) and such assent of the President to the West Bengal Act IX of 1967 must be deemed to have been given when the President assented to the West Bengal Estates Acquisition (Amendment) Act, 1969. AIR 1966 SC 764 and AIR 1970 SC 126, Foll.

(Para 10)

Cases Referred: Chronological Paras

AIR 1976 SC 1956 = 1976 UJ (SC) 740	7
AIR 1976 Cal 15 = (1974) 1 Cal HC (N) 473	7
AIR 1975 SC 1443 = 1975 Supp SCR 473	7
AIR 1971 SC 1992 = 1971 (Supp) SCR 661	5
AIR 1970 SC 126 = (1970) 1 SCR 317	1, 10
AIR 1967 SC 59 = (1962) 3 SCR 250	5
AIR 1966 SC 764 = (1966) 1 SCR 890	1, 10
AIR 1961 Andh Pra 523 = (1961) 2 Andh WR 60	5
AIR 1959 Pat 488 = 1959 BLJR 362	5
AIR 1958 SC 468 = 1958 SCR 1422	4
AIR 1955 Hyd 41 = ILR (1954) Hyd 640	5
AIR 1952 SC 252 = 1952 SCR 889	4

Arun Kumar Dutt (Jr.) and Sitaram Bhattacharjee (in A. F. O. O. No. 869/74) and Nirmal Chandra Chakraborty and Murari Mohan Mukherjee (in A. F. O. O. No. 100/74), for Appellants; P. K. Sengupta, Govt. Pleader and Anil Kumar Bhandari (in A. F. O. O. No. 869/74) and

P. K. Sengupta, Govt. Pleader and S. N. Dutta (in A. F. O. O. No. 100/74), for Respondents.

F. M. A. 869 of 1974.

SABYASACHI MUKHARJI, J.:— The petitioners state that they took raiyati settlement of lands mentioned in paragraph 2 of the petition from the recorded landlords Kartick Chandra Shawoo and Tarit Kumar Ballav. The particulars of the lands have been mentioned in the petition and it is not necessary for the present purpose to refer to the said particulars. As the landlords' right had vested in the State of West Bengal, the petitioners' estate were recorded as raiyati in the current settlement record in respect of said lands mentioned in the petition and a notice under Section 10 (2) of the West Bengal Estates Acquisition Act, 1953 was served on the landlords and the said landlords had filed an objection petition on the ground that the property in question was tank fishery right and as such excluded from the operation of the Act, that they had submitted requisite returns for the lands in question to keep these in khas. On the 4th of December, 1967 the Revenue Officer specially empowered under Section 44 (2a) of the West Bengal Estates Acquisition Act, 1953 directed the record of rights and papers to be put up for his examination. On the 5th of December, 1967 on the ground that the classification of lands had been wrongfully recorded for some plots the said officer examined the record of rights and the connected record and papers and passed an order starting suo motu proceedings under Sec. 44 (2a) of the Act for revision of the classification of lands in respect of the above. On the 9th of December, 1967 an order was passed by the said officer for issue of notice upon the recorded tenants to appear before him on 8th of January, 1968 to adduce evidence. It appears that the Revenue Officer passed a final order correcting the records of rights in respect of classification of the said lands on 21st of March, 1968. The petitioners, thereupon, moved this Court under Article 226 of the Constitution and obtained a rule nisi. The petitioners disputed the jurisdiction of the revenue officer to initiate such proceedings under Section 44 (2a) of the said Act. By virtue of Section 2 of the amending Act being West Bengal Act IX of 1967 the time specified in Section 44 (2a) within which such proceeding could be initiated suo motu was extended from

9 years to 12 years. It is not in dispute in this case that but for the period of 12 years the said proceedings could not have been initiated. It was contended on behalf of the petitioners that the said Amending Act IX of 1967 had not been reserved for the consideration of the President and had not received the assent of the President. According to the petitioners the amending Act could not have the effect of law, in view of the provisions contained in the said amending Act without the assent of the President because of Article 31 (3) of the Constitution of India. The petitioners contended that the provisions of Clause (2) of Article 31 would be applicable to the Amending Act and without the assent of the President the said Act could not have been enforced as law. Mr. Justice P. K. Banerjee before whom the matter came up for hearing came to the conclusion that in view of the provisions of West Bengal Estates Acquisition Act, 1953 and in view of the provisions of the Amending Act IX of 1967 the said Act in order to become enforceable as law required the assent of the President. But Mr. Justice Banerjee was, further, of the opinion that in view of the fact that assent of the President was obtained to the subsequent Amending Act of 1973 which was the West Bengal Act XXXIII of 1973 the defect of assent not being given to the earlier Amendment Act was cured. Mr. Justice Banerjee in coming to the said conclusion relied on the decisions of the Supreme Court in the case of *Jawaharlal v. State of Rajasthan*, AIR 1966 SC 764 as well as the decision of the Supreme Court in the case of *Venkatrao Esajirao Limbkar v. State of Bombay*, AIR 1970 SC 126. In the premises the learned Judge dismissed the application and discharged the rule nisi. Being aggrieved by the said decision the petitioners preferred an appeal. The appeal came up for hearing before Mr. Justice Anil K. Sen and Mr. Justice M. N. Roy. After discussing the facts of the case the learned Judges observed that the appeal raised two questions of importance, the decision whereon might lead to far reaching consequences. The questions formulated by the learned Judges of the Division Bench were as follows:—

(a) Whether the West Bengal Estates Acquisition Act (Amendment Act of 1967) being West Bengal Act IX of 1967 was an Act which required under Article 31 (3) of the Constitution to be reserved for consideration by the President and his assent thereto in order to become law;

(b) Whether the President having given his assent to the West Bengal Estates Acquisition Amending Act, 1969 and to the West Bengal Estates Acquisition Amending Act of 1973, can be said to have given his assent to the West Bengal Estates Acquisition Amendment Act of 1967 (West Bengal Act IX of 1967) and if so with effect from what date?

In view of the importance of the questions raised the learned Judges of the Division Bench were of the opinion that the matter should be heard by a larger Bench to be constituted by the learned Chief Justice and they reported accordingly. The matter has thus come up for hearing before us.

2. As mentioned hereinbefore it is not in dispute that if the West Bengal Act IX of 1967 had not become enforceable as law the impugned proceedings were beyond time. Section 44 of the West Bengal Estates Acquisition Act, 1953 which is in the Chapter V of the said Act deals with the draft and final publication of the record of rights. Sub-section (2a) of Section 44 authorises an officer specially empowered by the State Government to revise an entry in the record of rights finally published. Sub-section (2a) as it stands at present is to the following effect:—

“(2a) An officer specially empowered by the State Government may on an application within 9 months, or of his own motion within 21 years from the date of the final publication of the record of rights or from the date of coming into force of the West Bengal Estates Acquisition (2nd Amendment) Ordinance, 1957, whichever is later, revise an entry in the record finally published in accordance with the provisions of sub-section (2) after giving the persons interested an opportunity of being heard and after recording the reasons therefor.”

3. The sub-section contains two provisos which are not material for consideration of the issues before us. Sub-section (2a) was inserted with retrospective effect by Section 7 (a) of the West Bengal Estates Acquisition Act (2nd Amendment) Act, 1957 being West Bengal Act XXV of 1957. Originally the power of the officer was limited to nine months, which was extended to six years. Then that was extended to 9 years by Section 9 of the West Bengal Estates Acquisition (Amendment) Act, 1963 — being West Bengal Act XXII of 1963. Thereafter it was, further, extended from the period

of 9 years to 12 years by Section 2 of the West Bengal Estates Acquisition (Amendment) Act, 1967 being West Bengal Act IX of 1967. We are concerned in this reference with the effect of the said amendment. It was, further, extended from 12 years to 15 years by the West Bengal Estates Acquisition (Amendment) Act, 1969 being West Bengal Act of 1969. By the West Bengal Estates Acquisition (Amendment) Act, 1973 being West Bengal Act 1 of 1973 the period was further extended from 15 years to 18 years and by the West Bengal Estates Acquisition (Amendment) Act, 1975 being West Bengal Act XXXI of 1975 the period has now been extended from 18 years to 21 years. The provisions of the various Acts amending the period during which the empowered officer can take action for revision of the record of rights will have to be examined in little more detail. As mentioned hereinbefore the main contention in this reference before us, is, whether the West Bengal Estates Acquisition (Amendment) Act IX of 1967 could be enforced as law. The Act in question was passed by the West Bengal Legislature. It received the assent of the Governor and such assent was published in the Calcutta Gazette Extraordinary on the 17th of April, 1967. The Act was, as the preamble indicated, an Act to amend the West Bengal Estates Acquisition Act, 1953. It has three sections, the first dealing with the short title and the second providing for the substitution of the words "within 12 years" for the existing words "within 9 years" in sub-section (2a) of Section 44 of the West Bengal Estates Acquisition Act, 1953. Section 3 of the said Amending Act repeals the West Bengal Estates Acquisition (Amendment) Ordinance 1966 and saves any action taken pursuant to the said ordinance which had commenced from 1st of November 1966. Thereafter, came the West Bengal Estates Acquisition (Amendment) Act, 1969. The same was passed by the West Bengal Legislature and received the assent of the President which was published in the Calcutta Gazette Extraordinary on the 3rd of November, 1969. Section 2 of the said Act amended the provisions of Section 6 of the West Bengal Estates Acquisition Act, 1953 being West Bengal Act 1 of 1954. It is not material or necessary to refer to the said amendment. Section 3 amends Section 42 of the Act in certain manner and Section 4 amended sub-section (2a) of Section 44 of the West Bengal Estates Acquisition Act, 1953, by sub-

stituting 15 years to the then existing period of 12 years. The next amendment was made by the West Bengal Estates Acquisition (Amendment) Act, 1973 being West Bengal Act 1 of 1973. The said Act received the assent of the Governor which was published in the Calcutta Gazette Extraordinary on the 6th of March, 1973. Section 2 of the said amending Act substituted the words 'within 18 years' for the expression 'within 15 years'. Section 3 of the said amending Act repealed the West Bengal Estates Acquisition (Amendment) Ordinance of 1972 but saved actions taken under that Ordinance. Thereafter, came the West Bengal Estates Acquisition (Second Amendment) Act, 1973. This Act was passed by the West Bengal Legislature and received the assent of the President which was published in the Calcutta Gazette Extraordinary on the 12th of July, 1973. It amended Section 7 of the West Bengal Estates Acquisition Act, 1953 by Section 2 of the amending Act. By Section 3, sub-section (4) of Section 44 the main Act was amended. It is not necessary to refer to the said amendments. By Section 4 of the amending Act Section 46 of the main Act was omitted. By Section 5 of the amending Act Section 57-B was inserted barring the jurisdiction of the civil courts in respect of certain matters. For the present purposes it is not necessary to refer to the said provisions of amendment. Thereafter, came the West Bengal Estates Acquisition (Amendment) Act, 1975 which was passed by the West Bengal Legislature. It received the assent of the President and was published in the Calcutta Gazette Extraordinary on the 30th of June, 1975. By Section 2 of the amending Act Section 10 of the West Bengal Estates Acquisition Act, 1953 was amended. For the present purpose it is also not relevant to refer to the said amendment. Section 3 of the amending Act amended Section 26 of the main Act. It is also not relevant for the present purpose to refer to the actual provisions of amendment. Section 4 of the amending Act amended sub-section (2a) of Section 44 of the main Act by substituting the words "21 years" for the existing words "18 years."

4. In the aforesaid background of the legislative history of amendments the present questions referred to this Bench will have to be determined. The impugned action has been challenged on the ground that at the relevant time

when action was taken in this case namely between 6th of December, 1967 and 21st of March, 1968 the respondent authorities had no right to initiate proceedings for rectification of the record of rights as the said action was taken beyond the period of 9 years. The West Bengal Estates Acquisition (Amendment) Act, 1967 being West Bengal Act IX of 1967 was not enforceable at the time having not received the assent of the President as such the proceedings for re-opening for rectifying the record of rights could not be taken within the period of 12 years. Therefore, the action of the respondent authorities was without the authority of law. The first question, therefore, that requires to be considered is whether West Bengal Act IX of 1967 was an Act which required the assent of the President to be enforceable. Clause (2) of Article 31 of the Constitution enjoins that no property shall be compulsorily acquired or requisitioned save for a public purpose and save by authority of law which provides for acquisition or requisition of the property for an amount which may be fixed by such law or which may be determined in accordance with such law; and no such law shall be called in question in any Court of law on the ground that the amount so fixed or determined is not adequate or that the whole or any part of such amount is to be given otherwise than in cash. The proviso to clause (2) of Article 31 of the Constitution is not material for the present purpose. Clause (2a) provides that where a law does not provide for the transfer of the ownership or right of possession to any property to the State or to a corporation owned or controlled by the State it shall not be deemed to provide for the compulsory acquisition or requisitions of the property, notwithstanding that it deprives any person of his property. Clause (3) of Article 31 enjoins that no law as is referred to in clause (2) made by the Legislature of a State shall have effect unless such law, having been reserved for the consideration of the President, has received his assent. The combined effect of Clause (3) and Clause (2) of Article 31 of the Constitution is that any law providing for compulsory acquisition or requisition of property passed by the Legislature of the State will require reservation for consideration of the President and until the assent of the President has been received such law will not be enforceable. In the case of *State of Bihar v. Kameshwar*

Singh, AIR 1952 SC 252 at page 304 of the report the Supreme Court had occasion to examine the provision of Cl. (3) of Article 31 of the Constitution. S. R. Das, J., as the learned Chief Justice then was, explained the meaning of the expression 'law' in Clause (3) of Article 31 of the Constitution. The learned Judge observed at page 305 of the report that the procedure to be followed if a Bill was passed by the State Assembly was laid down in Article 200. Under that article the Governor can do one of the three things, namely, he may declare that he assents to it, in which case the Bill becomes a law, or he may declare that he withholds assent therefrom in which case the Bill falls through unless the procedure indicated in the proviso is followed or he may declare that he reserves the Bill for the consideration of the President, in which case the President will adopt the procedure laid down in Article 201. Under that article the President shall declare either that he assents to the Bill in which case the Bill will become law or that he withholds assent therefrom in which case the Bill falls through unless the procedure indicated in the proviso is followed. A Bill passed by the State Assembly may become the law if the Governor gives his assent to it or if, having been reserved by the Governor for the consideration of the President, it is assented to by the President. The learned Judge, further, observed that the question whether the requirements of Article 31 (3) have been complied with will arise only when the State purports to acquire the property of any person under any law and that person denies that the asserted law has any effect. It is at that point of time that the Court has to ask itself "is it a law which having been reserved for the consideration of the President has received his assent". It is in this sense that the word 'law' has been used in Clause (3) of Art. 31 of the Constitution. In other words the word 'law' has been used to mean what at the time of the dispute purports to be or is asserted to be the law. The learned Judge went on to explain that Article 200 of the Constitution did not contemplate a second reservation which would be necessary if initially the Governor instead of himself assenting to the Bill had reserved it for the consideration of the President. In the case of *Sundararamier and Company v. State of Andhra Pradesh*, AIR 1958 SC 468 the Supreme Court observed at page 489 of the report that in

considering the question as to the effect of the unconstitutionality of a statute it is necessary to remember that unconstitutionality might arise either because the law is in respect of a matter not within the competence of the Legislature, or because the matter itself being within its competence its provisions offend constitutional restrictions. A legislation on a topic not within the competence of the Legislature and the legislation within its competence but violative of constitutional limitations have both the same reckoning in a Court of Law; they are both of them unenforceable but it does not follow from this that both the laws are of the same quality and character and stand on the same footing for all purposes. While a law on a matter not within the competence of the Legislature is a nullity, a law on a topic within its competence but repugnant to the constitutional prohibitions is only unenforceable. If a law is on a field not within the domain of the Legislature, it is absolutely null and void, and a subsequent cession of that field to the Legislature will not have the effect of breathing life into what was a still-born piece of legislation and a fresh legislation on the subject would be required. But if the law is in respect of a matter assigned to the Legislature but its provisions disregard constitutional prohibitions, though the law would be unenforceable by reason of these prohibitions, when once they are removed the law will become effective without re-enactment.

5. Counsel in this connection also drew our attention to the observations to the similar effect in the case of Kodarap Laxmiah v. Hyderabad State, AIR 1955 Hyd 41. Inasmuch as the observations were made in the context of different facts and different question we do not feel it necessary to refer to the same in detail. Similar observations, that law which requires the assent of the President to be enforceable is not enforceable unless such assent is obtained, were made in the case of Rameshwar Kumar v. R. P. Mishra, AIR 1959 Pat 488 in a Bench decision of the Patna High Court. The Andhra Pradesh High Court in the case of Inamdars of Sulhagar Colony v. Government of Andhra Pradesh, AIR 1961 Andh Pra 523 was dealing with the Hyderabad Tenancy and Agricultural Land Act, 1950. The said Act contained provisions bearing on the acquisition and requisition of lands. The Division Bench of

the Andhra Pradesh High Court was of the view that the Act came within the purview of Article 31 of the Constitution and was inoperative as it had not been reserved for the consideration of the President and had not received his assent. Counsel for the petitioner drew our attention to the decision of the Supreme Court in the case of Mahant Sankarshan v. State of Orissa, AIR 1967 SC 59; there the Supreme Court observed that the benefit of Article 31-A of the Constitution would be available not only to those laws which by themselves provided for compulsory acquisition of property for public purpose but also to laws amending such laws, provided the assent of the President was obtained to such amending Act. It was to be presumed that the President gave his assent to the amending Act in its relation to the Act it sought to amend and this was more so when by the amending law the provisions of the earlier law relating to compulsory acquisition of property for public purpose were sought to be extended to new kinds of properties. In assenting to such law the President assented to new categories of properties being brought within the operation of the existing law and he in effect assented to law for the compulsory acquisition for public purpose of these new categories of property. The Supreme Court observed that the assent of the President to the Orissa Estates Abolition (Amendment) Act, 1954 amending the Orissa Estates Abolition Act (Act 1 of 1952) brought the same under the protection of Article 31-A as a necessary consequence. The amending Act, according to the Supreme Court, should be considered in relation to the old law which it had sought to extend and the President assented to such an extension or in other words to a law for the compulsory acquisition of the property for public purpose. Our attention was also drawn to the decision of the Supreme Court in the case of S. N. Medhi v. State of Maharashtra, AIR 1971 SC 1992, but the said decision does not carry the point any further.

6. The first question, therefore, is whether the West Bengal Act IX of 1969 comes within the purview of Clause (2) of Article 31 of the Constitution? We have noticed the provisions of the said Act. The West Bengal Estates Acquisition Act, 1953 being West Bengal Act 1 of 1954 is undoubtedly an Act which is for compulsory acquisition of property. The question, however, is whether the provi-

sions of the West Bengal Act IX of 1967 are inextricably linked up with the said acquisition of property under the West Bengal Estates Acquisition Act, 1953. The said amending Act merely substituted the period of 12 years to the existing period of 9 years for taking steps by the empowered officer to revise the records finally published in accordance with the provisions of sub-section (2) of Section 44 of the West Bengal Estates Acquisition Act, 1953. Section 44 is in Chapter V of the said Act. Chapter V of the West Bengal Estates Acquisition Act, 1953 deals with the preparation of the record-of-rights. Section 39 being the first section in Chapter V empowers the State Government for carrying out the purposes of the West Bengal Estates Acquisition Act, 1953 to make an order directing that the record of rights might be prepared or revised in accordance with the provision of said Chapter V and such rules as may have been made by the State Government. The importance of the record-of-rights for implementing the provisions of the West Bengal Estates Acquisition Act, 1953 cannot be over emphasized. The record-of-right determines the quantum of land and the particulars of the land to be retained. Such record-of-rights is the basis upon which the quantum and the persons entitled to the compensation for acquisition of properties will have to be determined. The right and extent of retention of land is inextricably linked up with the record-of-rights.

7. The right to obtain compensation and the quantum thereof are also dependent upon the record-of-rights. It follows, therefore, that the procedure and the method for the preparation of the record-of-rights are integral parts of the scheme of acquisition under the West Bengal Estates Acquisition Act, 1953. A reading of the different provisions contained in Chapter V of the Act along with the rules namely Rule 23 onwards of the West Bengal Estates Acquisition Rules, 1954 leads to that conclusion. In the case of Chabiran Bibi v. State, AIR 1976 Cal 15 a Division Bench of this Court observed that an order under Section 39 of the West Bengal Estates Acquisition Act, 1953 directing the record of rights to be prepared in respect of any district or part of a district was made only after the vesting of the estates. Preparation of record of rights, according to the said Bench decision, followed vesting and reflected the position after vesting. The

revision of an entry in the record of right under Section 44 (2a) was permissible only to correct an existing error in the record so that the true position resulting from the acquisition of the estate was reflected in the record-of-rights. Section 44 (2a) thus not being, according to the Division Bench, inextricably connected with the object of the Act nor being an integral part of the machinery of acquisition was not invalid simply because the amending Act IX of 1967 had not been assented to by the President. As we have noticed before, preparation of record-of-rights, under the scheme of the Act, is inextricably connected with the machinery of acquisition as also with the object of acquisition. Therefore, in so far as the Division Bench held that Section 44 (2a) was not inextricably connected with the object of the Act nor was an integral part of machinery of acquisition, we are, with respect, unable to agree with the said view of the Division Bench. But this conclusion by itself does not solve the question whether the amending Act IX of 1967 not having received the assent of the President was enforceable. Though the preparation and the authority to revise the record of rights by the specially empowered officer are integral parts in the scheme of acquisition embodied in the West Bengal Estates Acquisition Act, 1953 the question remains whether an Act enlarging or curtailing the period of time during which such action could be taken is also an integral part of the scheme of acquisition engrafted in the main Act. In the case of S. Ahmed v. State of Mysore, AIR 1975 SC 1443 the Supreme Court had to consider this aspect of the matter in connection with the Mysore Silk Worm Seed and Cocoon (Regulation of Production, Supply and Distribution) (Amendment) Act, 1969. The Supreme Court found that the principal Act had the sanction of the President and enabled orders to be passed which had the force of law enabling restrictions to be imposed and was covered by the purposes of the Act. The amendment only varied the form of restrictiveness without appreciably adding to its context, the amendment did not go beyond a regulation which was fully authorised by the language of the provisions of the Principal Act. Even any additional licence involved did not go beyond the purview of the provisions of the Principal Act and the rules framed thereunder. The mere change in form was from statutory rules to statutory provisions. It

was only an additional restriction from the special point of view of Article 304 (b) of the Constitution which required presidential sanction. As noticed before the facts of the instant case are distinctly different from the facts before the Supreme Court. By the amending Act IX of 1967 there has been an enlargement of the period of time within which the empowered officer can suo motu take steps for revision of the record of rights. Such enlargement of time affects fundamentally the procedure of the rectification of record of rights which is inextricably connected with the scheme of acquisition. In the case of Damodar Valley Corporation v. State of Bihar, AIR 1976 SC 1956 the Supreme Court had occasion to consider the effect of Clause (2) of Article 288 of the Constitution. Clause (1) of Article 288 of the Constitution deals with the exemption from taxation by States in respect of water or electricity in certain cases. Clause (2) of Article 288 provides that the Legislature of a State may by law impose or authorise the imposition of any such tax as is mentioned in Clause (1) but no such law shall have any effect unless it has received the assent of the President and if any such law provides for the fixation of the rates and other incidents of such tax by means of rules or orders to be made under the law by any authority, the law shall provide for the previous consent of the President being obtained to the making of such rule or order. The Supreme Court observed that it was not the effect of that clause that even if the requirements of two conditions mentioned in that clause were satisfied, the provisions which merely dealt with the manner and mode of payment of the aforesaid tax should also receive the assent of the President. In our view, however, the West Bengal Act IX of 1967 being, inextricably linked up with the scheme of acquisition comes within the purview of Clause (2) of Article 31 of the Constitution and without the assent of the President the same is unenforceable. The question No. (a) formulated by the referring Division Bench must, therefore, be answered in the affirmative.

8. The next question that requires consideration, is, whether the subsequent amending Act having received the assent of the President, can it be said that the President has given his assent to the West Bengal Estates Acquisition (Amendment) Act, 1967 and if so with effect from what date.

9. After the West Bengal Act IX of 1967 the next amendment was by the West Bengal Estates Acquisition (Amendment) Act, 1969 being West Bengal Act XXXI of 1969; the said amending Act received the assent of the President. By Section 4 of the Amending Act sub-section (2a) of Section 44 of the main Act has been amended by substituting 15 years for 12 years. Thereafter, the West Bengal Estates Acquisition (Amendment) Act, 1973 was passed by the West Bengal Legislature. The said Act received the assent of the Governor only. Section 2 of the said Act substituted 18 years for 15 years in sub-section (2a) of Section 44 of the main Act has been amended by substituting 15 years for 12 years. Thereafter, the West Bengal Estates Acquisition (Amendment) Act, 1973 was passed by the West Bengal Legislature. The said Act received the assent of the Governor only. Section 2 of the said Act substituted 18 years for 15 years in sub-section (2a) of Section 44 of the main Act. But as mentioned hereinbefore the said amending Act being West Bengal Act I of 1973 did not receive the assent of the President. There was another amending Act in 1973 being West Bengal Estates Acquisition (2nd Amendment) Act, 1973—West Bengal Act XXXIII of 1973. Though the said Act had received the assent of the President the said Act did not contain any provision for extending the period of time during which the specially empowered officer could take steps to revise the record of rights. Therefore, for the purpose of considering the present question the said 2nd amendment Act may be ignored. In the premises the only material question, is, whether the President having given his assent to the West Bengal Estates Acquisition (Amendment) Act, 1969 can it be presumed that the President has given his assent to the West Bengal Act IX of 1967?

10. Assent implies consent or in other words when the Constitution requires the assent of the President to a particular Bill either to become a law or for a particular Act to be enforceable, it requires that President must consent or agree to that. Assent can be express or implied. There is no specific mode of giving the assent. We enquired from counsel at the Bar whether there are any rules of business or any other rules framed under the Constitution indicating in what manner the assent of the President should be obtained whenever it is necessary.

No such rules were brought to our notice. Assent can therefore be implied from the conduct. Therefore, when the President in 1969 agreed by giving his assent to the West Bengal Estates Acquisition (Amendment) Act, 1969 that the period of time during which the specially empowered officer could take steps for re-opening the proceeding suo motu for rectification of record of rights would be 15 years instead of existing 12 it must be deemed that he had assented or agreed to the period being 12 years before that assent, otherwise he could not have assented to the substitution of the period of 15 years for the period of 12 years. This question was considered by the Supreme Court in the case of *Jawaharlal v. State of Rajasthan*, AIR 1966 SC 764. There the Supreme Court dealing with Article 255 observed at page 769 of the report that in the case of laws to which Article 255 of the Constitution applied the assent of the President given after the Act was passed served to cure the infirmity arising from the initial non-compliance with its provisions. In other words, an Act passed without obtaining the previous assent of the President does not become void by reason of the said infirmity; it might be said to be unenforceable until the assent was secured. Assuming such a law was otherwise valid, its validity could not be challenged only on the ground that the assent of the President had not been obtained earlier as required by the other relevant provisions of the Constitution. The said infirmity is cured by the subsequent assent and the law would become enforceable. As to the period of time when the President can be deemed to have given his assent the Supreme Court observed at p. 771 of the report that the assent of the President cannot by any legislative process be deemed to have been given to an earlier Act at a time when in fact it was not so given. The Supreme Court observed that in this context there was no scope for any retrospective deeming provision with regard to the assent of the President. We may emphasize that as the Legislature was incompetent to deem that the President had given his assent to an earlier Act at a time when in fact it was not so given, and are the courts of law incompetent by the process of interpretation to deem that the assent of the President was given to an earlier Act at a point of time when in fact it was not so given. It follows, therefore, that by subsequent assent to a subsequent Act if the facts and

circumstances of the case so justify it can be deemed that the President has given his assent to an earlier Act but such assent must be deemed to have been given on the date when the subsequent Act received the assent required. In this connection reference may be made to the observations of the Supreme Court in the case of *Venkatrao v. State of Bombay* AIR 1970 SC 126 at p. 129 of the report where the Supreme Court observed as follows:—

“Now the question of lack of assent of the President was never pressed before the High Court, nor have we been invited to examine it. We would, however, like to observe that, as noticed before, when Hyderabad Amending Act III of 1954 was enacted the assent of the President was duly obtained. Similarly when Bombay Act XXXII of 1958 which was meant for amending Hyderabad Act XXI of 1950 was enacted the assent of the President had been given. If the assent of the President had been accorded to the amending Acts, it would be difficult to hold that the President had never assented to the parent Act, namely, Hyderabad Act XXI of 1950. Even if such assent had not been accorded earlier it must be taken to have been granted when Amending Act III of 1954 was assented to.” For the aforesaid reasons we are of the opinion that the President, having given his assent to the West Bengal Estates Acquisition (Amendment) Act, 1969 it can be said that the President has given his assent to the West Bengal Estates Acquisition (Amendment) Act, 1967 being the West Bengal Act IX of 1967 and such assent of the President to the West Bengal Estates Acquisition (Amendment) Act, 1967 being West Bengal Act IX of 1967 must be deemed to have been given when the President assented to the West Bengal Estates Acquisition (Amendment) Act, 1969.

11. The Division Bench has referred this appeal to the Special Bench and according to the relevant Rule we have to dispose of the appeal as a whole. Therefore, we have to consider whether the order of Mr. Justice P. K. Banerjee discharging the rule nisi has to be altered or upheld. Before Mr. Justice Banerjee only one contention was urged namely, that the proceedings initiated were at a point of time when the West Bengal Act IX of 1967 was unenforceable and, therefore, the officer, concerned had no jurisdiction.

12. In the view we have taken when the suo motu proceedings for rectification of the record of rights were taken the said proceedings were beyond time and as such without jurisdiction. The subsequent assent of the President to the subsequent amending Act can only be effective from the date of the subsequent assent to the subsequent amending Act. Inasmuch as the said proceedings have been initiated before that date, it must be held the said proceedings and the impugned order are without jurisdiction. In the aforesaid view of the matter, the appeal is accordingly allowed. The said proceedings and the rectification order in Case No. 86 of 1967 mentioned in the petition are hereby quashed and set aside. The respondents, however, will be at liberty to take fresh proceedings in accordance with law. There will be no order as to costs.

F. M. A. 100/74.

13. In view of the judgment and order passed today in F. M. A. 869 of 1974 (Ananda Kumar Chakraborty v. State of West Bengal), this appeal is also allowed. The proceedings under Sec. 44 (2a) are quashed with liberty to the respondents to proceed afresh in accordance with law. There will be no order as to costs.

SANKAR PRASAD MITRA, C. J.:—

I agree.

SALIL K. DATTA, J.:— I agree.

Appeals allowed.

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R. BHATTACHARYA AND A. K. JANAH, JJ.

Sm. Biva Banerjee and another, Appellants v. Manmatha Nath Banerjee, Respondent.

Letters Patent Appeal No. 218 of 1974, D/- 21-9-1976.*

(A) Civil P. C. (1908), O. 41, R. 33 — Suit for eviction decreed — Remand by appellate court only in the question of ownership of plaintiff in respect of suit premises — Appeal — Defendant raising the plea that plaintiff was benamidar — Such plea not raised in pleading but sought to be raised on the basis of evidence of plaintiff — Absence of any issue

*(Against judgment of Chittatosh Moorjee, J. in F. A. No. 565 of 1972.)

KT/LT/E287/76/GGM

— Such plea not allowed to be raised — Remand order, held, was uncalled for — AIR 1963 SC 1516, Rel. on. (Para 11)

(B) Civil P. C. (1908), Ss. 96, 100 and 101 — Question of fact and question of law — Commencement of tenancy is not a pure question of law — It cannot be allowed to be raised for the first time in appeal — Especially when there is no pleading to that effect. AIR 1973 Cal 515, Ref. (Para 7)

(C) Civil P. C. (1908), O. 41, R. 33 and 4 — Scope — Provisions to be liberally construed — Power to be used sparingly and is to be exercised to do complete justice.

Per R. Bhattacharya, J.—

Rule 33 of O. 41 should be liberally construed to give effect in practice to secure ends of justice and also for doing complete justice between the parties after proper adjudication of the disputes raised. This wide and special power under R. 33 of Order 41 should be used sparingly and with great caution by the appellate Court under special circumstances only when the Court's conscience will not be at rest unless it gives relief under Rule 33. The Court should see that by the relief granted under this provision, no party gets an unreasonable and undue advantage to make up his deficiency in the litigation. (Para 16)

(D) Civil P. C. (1908), O. 41, R. 33 and O. 42, R. 1 — Applicability of O. 41, R. 33 in Letters Patent Appeal. (Letters Patent (Cal.), Cl. 15).

Per R. Bhattacharya, J.:

The High Court in Letters Patent appeal can apply O. 41, R. 33 in suitable cases. Order 41 of the C. P. Code relates to appeals from Original Decree, O. 42, R. 1 says that rules of Order 41 shall apply, so far as may be, to appeals from appellate decrees. According to Clause 15 of the Letters Patent for the Calcutta High Court, an appeal lies from the judgment of the appellate Court as indicated therein. 'Decree' being but a formal expression of the adjudication in the judgment it is, therefore, not distinct from the judgment of the court in an appeal. Judgment of an appeal means a judgment and/or a decree based thereon. Judgment for the purpose of Clause 15 of the Letters Patent includes a decree. Where Letters Patent appeal is against the decision in a first appeal the provisions of Order 41 including R. 33 shall be applicable in the appeal by virtue of

Order 42, R. 1. AIR 1921 PC 80, Rel. on.
(Para 20)

Cases Referred: Chronological Paras

AIR 1973 Cal 515	7
AIR 1971 SC 102 = (1970) 2 SCR 554	8
AIR 1963 SC 1516 = (1964) 1 SCR 980	11
AIR 1921 PC 80 = 25 Cal WN 557	48
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B. K. Bhose, Dilip Kumar Banerjee (No. 2) and P. C. Matilal, for Appellants; Tarak Nath Roy and Sankarlal Seal, for Respondent.

A. K. JANAH, J.:— This appeal is on behalf of the tenants-defendants and it arises out of a suit for ejectment instituted by the landlord-respondent on the ground of reasonable requirement for his own use and occupation and also for the use and occupation of the members of his family. The suit premises consists of the north and western portion of premises No. 198, Upper Circular Road. Originally the defendants' father Bipin Krishan Banerjee was a tenant in respect of the disputed premises under the predecessor-in-interest of the plaintiff. The plaintiff purchased premises No. 198, Upper Circular Road by a registered sale deed dated December 14, 1949 and became the owner of the said premises. The father of the defendant held the disputed premises at a monthly rent of Rs. 57.50 payable according to English Calendar month.

2. The plaintiff's case is that he purchased the disputed premises for his own use and occupation and for the use and occupation of the members of his family. It is alleged in the plaint that the plaintiff has a joint family dwelling house at 195, Upper Circular Road which is just in front of the disputed premises. It is stated that the plaintiff has six brothers and each brother has a large family. The total number of rooms in the said joint family dwelling house is not sufficient to accommodate the families of the plaintiff and his brothers. It is alleged that for want of accommodation the plaintiff is compelled to live in the house of his wife's brother at 271, Kalighat Road. His possession in the said house is merely permissive. The plaintiff has two sons, one of whom is married and the other is of marriageable age. The plaintiff's son's wife is compelled to live at her father's house since her marriage on account of want of accommodation. The family of the plaintiff consists of himself, his wife, two sons, wife of the eldest son and one unmarried deformed daughter and one

married daughter. The defence of the defendants is a denial of the plaintiff's reasonable requirement for his own use and occupation and for the use and occupation for the members of his family. The defendants allege that the plaintiff is the owner of premises Nos. 8A and 8C, Rashbehari Avenue which stand in the names of his sons.

3. The learned Judge in the trial court upon a consideration of the evidence adduced in the case decreed the suit in favour of the plaintiff. Against the said decision the defendants preferred an appeal, being F. A. No. 665 of 1972, to this Court. The appeal came up for hearing before Chittatosh Mookerjee, J. who affirmed the finding of the trial court with regard to plaintiff's reasonable requirement of the disputed premises for the plaintiff's own use and occupation and for the use and occupation of the members of his family, but remanded the suit to the trial court for a consideration of the question as to whether the plaintiff is the owner of the premises in question. His Lordship directed that in case the answer is in the affirmative, the trial court will grant a decree for eviction. On the other hand if the answer be in the negative the plaintiff's suit shall be dismissed. Against this decision of Chittatosh Mookherjee, J., the defendants have filed this Letters Patent Appeal.

4. Mr. Bhose, learned Advocate appearing in support of the appeal has argued in the first place, that the requirement of clause (ff) of sub-section (1) of Section 13 of the West Bengal Premises Tenancy Act, 1956 (hereinafter referred to as the 'Act') was not satisfied in the present case and as such the finding of the appellate court that the plaintiff reasonably requires the suit premises for his own use and occupation cannot be sustained. Mr. Bhose drew our attention to the statements made in paragraph 11 of the plaint to the effect that the plaintiff has no other house of his own in Calcutta, and contended that this averment is not sufficient for the purpose of clause (ff) of sub-section (1) of Section 13 of the Act, inasmuch as, the said clause contemplates 'any reasonably suitable accommodation'. According to Mr. Bhose what the plaintiff is required to allege and to prove is that he has no other reasonably suitable accommodation. Such accommodation need not necessarily be in a house exclusively owned by the plaintiff. Mr. Bhose wanted to contend

that since the plaintiff, according to his own case, had been living in his brother-in-law's house at Kalighat Road and since his son's wife was living in her father's house since her marriage, such accommodation was reasonably suitable accommodation within the meaning of clause (ff) of sub-section (1) of Section 13 of the Act. We are unable to accept this contention of Mr. Bhose. In our view the averment made in paragraph 11 of the plaint is quite sufficient for the purpose of clause (ff). Moreover, in view of the concurrent finding of fact arrived at by the two courts below we do not think that we would be justified in this appeal to go into the question as to whether the plaintiff was in possession of any other reasonably suitable accommodation.

5. The next contention advanced on behalf of the appellants is that on the application filed on behalf of the defendants on 7th December, 1970 an additional issue, being issue No. 7, was framed on the 8th December, 1970. The said additional issue is as follows:

"Additional Issue No. 7:

Does the plaintiff reasonably require the premises for the use and occupation of his two sons and wife of one of the sons?"

It was pointed out that in the judgment of the trial court the issues which have been set out do not contain the aforesaid additional issue No. 7. It was argued that this omission on the part of the learned Judge in the trial court has resulted in one of the important aspects of the case being left out of consideration altogether. From the judgment of the trial court it appears, however, that although this issue was not specifically mentioned, the learned Judge considered the question of accommodation of the plaintiff and the members of his family or his two sons for the matter of that, at premises No. 8/A and 8/C, Rashbehari Avenue. The learned Judge has considered the evidence adduced in the suit in so far as the accommodation in the said premises is concerned, and has come to the conclusion that in so far as premises No. 8/C, Rashbehari Avenue is concerned there is no evidence as to who is the owner of the same. In so far as premises No. 8/A, Rashbehari Avenue is concerned the finding is that the said house does not belong to the plaintiff but it belongs to his son. These findings of the trial court have been affirmed by the first appellate court and we find no reason not to accept the

said findings. If the plaintiff's son owns a house of his own that will not disentitle the plaintiff from claiming a decree for eviction on the ground of reasonable requirement for himself and the members of his family, including such a son. It was also argued on behalf of the appellants that the requirement of the two sons of the plaintiff and the wife of one of the sons is not the plaintiff's requirement in the present case in view of the fact that the sons have a separate house of their own and they are not going to come back and live with the plaintiff as members of his family. There is no evidence in the case that the sons are not coming to live with the father in the father's house. It cannot, therefore, be held merely on the basis of this suggestion made from the Bar that the son's requirement in the present case will not amount to the plaintiff's requirement.

6. Mr. Bhose made a grievance that Mookerjee, J. was not right in his view that because the defendants did not follow up their prayer for appointment of a Commissioner for local inspection to ascertain the accommodation available at premises No. 8/A, Rashbehari Avenue it was no longer open to them to agitate that point in the appeal before his Lordship. He contended that the trial court wrongly rejected his client's prayer for local investigation by order dated September 17, 1970. From the judgment of Mookerjee, J. it appears that in the course of the hearing of the appeal his Lordship was prepared to give the defendant another opportunity of having a local inspection of premises No. 8/A, Rashbehari Avenue but the learned Advocate for the defendants-appellants did not press his prayer for local inspection of the said premises. In these circumstances his Lordship was of the view that it was not open to the defendant to make any grievance that the trial court wrongly refused the defendants' prayer for local investigation. It also appears from the order passed by the trial court on September 17, 1970 that on the defendants' prayer a Commissioner was appointed for local inspection and the Commissioner had proceeded with his work to some extent, but ultimately the defendants themselves applied before the trial court for withdrawal of their application for local inspection. The writ issued to the Commissioner was accordingly recalled by the trial court. After the writ was recalled the defendants filed a fresh application

for appointment of a Commissioner for local investigation. This prayer was rejected by the trial court. Mookerji, J. took into consideration this fact and came to the conclusion that in the circumstances the application for local investigation was rightly rejected by the trial court. We do not see how any exception can be taken to the view which Mookerjee J. took on this aspect of the case. Mr. Bhose drew our attention to the trial court's order dated April 16, 1970 and contended that the prayer made by his clients was wrongly rejected by the trial court and Mookerjee J. did not consider this aspect of the matter. The prayers made by the defendants before the trial court were as follows:

1. That the plaintiff may be directed to arrange for the production of the original map of premises No. 8/A, Rashbehari Avenue which does not belong to the plaintiff; and

2. That the plaintiff may be directed to cause the presence of all tenants and occupiers of the aforesaid premises with their respective rent receipts and ration cards at the time of local inspection.

This prayer was rejected by the trial court on the ground that the premises No. 8/A, Rashbehari Avenue admittedly does not belong to the plaintiff and that the tenants of the said premises who were not parties to the suit could not be compelled to produce rent receipts and ration cards. In our view this extraordinary prayer made by the defendants was rightly rejected by the trial court.

7. The next point canvassed on behalf of the appellants is that the predecessor-in-interest of the defendants was originally a tenant in the disputed premises under the plaintiff's vendor. It was contended that after the disputed house was purchased by the plaintiff a new tenancy came into existence and that tenancy is not in accordance with the English Calendar. In support of this proposition reliance was placed on behalf of the appellants upon the case of *Bimalendu Bhusan Das v. Firm Mitra and Ghosh*, AIR 1973 Cal 515. In our view the appellants cannot be permitted to raise this point at this stage. In the written statement no such averment was made. No issue was framed in the trial court regarding the commencement of the tenancy. It is true that the appellants tried to raise this point in the appeal before Chittatosh Mookerjee J. But his Lordship rightly held that the appellants in the

circumstances of the present case could not be permitted to raise this point as the question as to the commencement of the tenancy is not a pure question of law. In order to determine such a point facts must be gone into, and there must be evidence on record upon which the court has to come to its conclusion. In the present case as there was no averment in the written statement and as there was no issue framed on this question the trial court had no occasion to consider the point which was sought to be raised in the appeal. The decision in *Bimalendu Bhusan's case* (supra) is distinguishable on facts. There it was found that by a mutual agreement dated 20th September 1965 there was a privity of contract between the parties establishing a new tenancy running from the 20th day of the English Calendar month. On that finding Amarendra Roy J. held that the ejectment notice was invalid and it did not terminate the tenancy. In the present case it was nowhere pleaded by the defendants that there was any fresh agreement between the plaintiff and the defendants' predecessor altering the date of commencement of the tenancy. If there was no fresh contract between the parties creating a fresh tenancy, then the old tenancy under the plaintiff's vendor would continue and the notice served in the present case would be quite sufficient and valid.

8. Lastly, it was urged on behalf of the appellants that the ejectment notice dated 19th December, 1966 served by the plaintiff-landlord upon the defendants terminating their tenancy on the expiry of the last day of January, 1967 is invalid inasmuch as there was an earlier ejectment notice dated 16th February, 1957 which was served by the plaintiff-landlord. In the present case the plaintiff landlord previously issued a notice dated 16th February, 1957 purporting to determine the tenancy of the predecessor-in-interest of the defendants. Upon the service of that notice the plaintiff brought the suit No. 1123 of 1957 in the City Civil Court for eviction of the tenant on the ground of reasonable requirement. The suit was decreed by the trial court. Bipin Krishna, the predecessor-in-interest of the defendants in the present case preferred an appeal against the said decree but it was dismissed by the learned Chief Judge, Small Cause Court, Calcutta. There was a second appeal to this Court during the pendency of which the original tenant died and the present ap-

pellants were substituted in his place. This Court held that the appeal preferred before the Court of Small Causes was not maintainable. Thereafter the memorandum of appeal was taken back from the lower appellate court and it was re-filed in this Court and it was registered as F. A. 61 of 1966. The Division Bench hearing that appeal was of the opinion that the notice dated 16th February, 1957 was not in compliance with the requirement of Section 13 (6) of the West Bengal Premises Tenancy Act. Their Lordships without expressing any opinion on the other points involved in the appeal allowed the appeal on the said ground alone and dismissed the suit. The plaintiff thereafter issued a fresh notice dated 19th December, 1966 and on the basis of that notice had brought the present suit out of which this appeal arises. The contention advanced on behalf of the appellants that the present notice is invalid cannot be accepted for the simple reason that after this Court had dismissed the earlier suit the tenancy of the defendants continued and therefore the plaintiff could not institute a suit for eviction without determining the tenancy. The earlier notice dated 16th February, 1957 became ineffective by reason of the decision of this Court in F. A. 61 of 1966. No fresh suit could have been filed on the basis of that notice. Moreover, that notice was found to be defective and, therefore, no suit for eviction could be filed on the basis of that notice. Learned Advocate for the appellants relied upon the case of Tayebali Jafarbhay Tankiwala v. M/s. Ahsan and Co., AIR 1971 SC 102 in support of his contention. In that case the landlord gave a first notice to quit on the ground of arrears of rent. The tenant did not vacate in spite of that notice. Thereafter a second notice was served after about a year demanding rent for the period between the first notice and the second notice. In a suit for ejectment the landlord claimed damages for use and occupation for the period subsequent to the second notice which showed that the landlord had made a distinction between the rent and damages for use and occupation. It was held that the first notice was waived and the landlord had treated the tenancy as subsisting. In our view, this decision is of little assistance to the appellants in the present case.

9. During the course of hearing of the appeal, a question arose as to whether in the event of the appeal being ultimate-

ly dismissed and the order of remand passed by Mookerji, J. being set aside a decree for partial eviction could be passed in favour of the landlord. Mr. Bhose, learned Advocate for the appellants stated before us that in such an event his clients were prepared to have a decree of partial eviction being passed against them. By consent of both parties we, therefore, by our order dated 5th August, 1976 appointed a learned Advocate of this Court to hold a local inspection of the disputed premises to ascertain certain points as mentioned in the said order, with a view to decide whether a decree for partial eviction could be passed in the present case. The learned Advocate Commissioner submitted his report dated 10th August, 1976 together with a sketch map. The said report and the map were accepted by both parties and the learned Advocates for the appellants as well as the respondent referred to the same in support of their respective contentions. It appears from the said report and the map that although there are a number of rooms in the ground floor besides the rooms on the second floor, most of the rooms in the ground floor are in a dilapidated and dangerous condition and those are not fit for human habitation. After having carefully considered the said report and the map and the contentions of the respective parties we have come to the conclusion that it is not possible in the present case to pass a decree for partial eviction.

10. The only point which remains for our consideration in this appeal is whether the order of remand made by Chittatosh Mookerjee, J. should be allowed to stand or whether we would dispose of the entire suit ourselves in this appeal. Chittatosh Mookerjee, J. affirmed the finding of the trial court with regard to the reasonable requirement of the plaintiff but his Lordship has remanded the suit to the trial court with a direction to decide whether the plaintiff was the owner of the disputed premises. At the hearing of the appeal before his Lordship learned Advocate for the appellants raised a contention that the plaintiff in his evidence before the trial court stated that the premises No. 99/2, Hazra Road which belonged to his wife was sold, and with the sale proceeds the plaintiff purchased the disputed premises. It was contended on behalf of the defendants-appellants that the plaintiff did not adduce any evidence whether the sale proceeds of 99/2 Hazra Road

had been gifted to him by his wife. Mookerjee J. took the view that the trial court was not right in coming to the conclusion that the plaintiff was the owner of the suit premises, and he therefore, remanded the suit to the trial court on that point alone.

11. In paragraph 1 of the plaint the plaintiff stated that the plaintiff became the owner of the disputed premises by purchase on December 14, 1949. To this averment made in paragraph 1 of the plaint the averment in paragraph 2 of the written statement is that the plaintiff is not the sole owner of the disputed premises. The defendants do not mention who else are the owners of the disputed premises along with the plaintiff. There is no dispute that the registered sale deed dated, 14th December, 1949 stands in the name of the plaintiff. The contention that the plaintiff is not the owner of the property has been raised on the basis of a statement made by the plaintiff in his evidence to the effect that the house at 99/2, Hazra Road belonged to his wife and that house was sold in 1944. With the sale proceeds of that house the plaintiff purchased the disputed premises. In the absence of any pleading the defendants cannot be permitted to set up a new case. In our view, the trial court was right in pointing out that the defendants cannot be permitted to say that the plaintiff is merely a benamdar for his wife in the absence of any pleading to that effect. What the defendants are now trying to say is that although the disputed premises stand in the name of the plaintiff the real purchaser is his wife and the plaintiff is merely a benamdar. The defendants cannot be permitted to make out such a case by utilising the statement made by the plaintiff in his evidence when there is no such pleading in the written statement and when there is no specific issue to the effect that the plaintiff is a benamdar of his wife. On the other hand, upon the defendants' pleading as contained in paragraph 2 of the written statement the issue was raised as to whether the plaintiff is the sole owner of the disputed premises and is the plaintiff alone entitled to sue. Amongst the other issues the parties went to trial on this issue. So far as this issue is concerned there is no material on record to hold that there are any other owners of the disputed premises who ought to have been joined as plaintiffs in the suit. That being the position we do not think that

an order of remand on a point as has been made in the present case was called for. We, therefore, in exercise of the power conferred upon an appellate court by Order 41, Rule 33 of the Code of Civil Procedure set aside the order of remand passed by Mookerjee, J. and decree the suit in favour of the plaintiff. We are supported in this view by a decision of the Supreme Court in *Pannalal v. The State of Bombay*, AIR 1963 SC 1516.

12. For the reasons mentioned above this appeal is dismissed. The order of remand passed by the first appellate court is set aside and the decree of the trial court is restored. In the circumstances of the case we make no order as to costs in this appeal.

13. In view of the fact that the defendants have been residing in the disputed premises for a long time we allow them time, at first instance, upto the 15th November, 1976. If within that period they file a written undertaking to this Court to vacate the disputed premises and deliver up vacant and peaceful possession to the plaintiff the time will be extended till the 31st March, 1977 provided however they go on depositing the current damages or mesne profits at an amount equivalent to the rate of rent month by month within the 15th of next succeeding month in the trial court. In default, of such deposit or deposits being made the decree will become executable forthwith. If the deposits are made as aforesaid the plaintiff would be entitled to withdraw the same without security.

14. In view of the order which we have made it is not necessary for us to pass any separate order on the application under Order 41, Rule 27 filed on behalf of the respondent. The said application stands disposed of.

R. BHATTACHARYA, J.:— 15. I agree but I add to what my learned brother has said on the question whether we can interfere with and set aside the limited order for remand passed in the first appeal by Chittatosh Mookerjee, J. for the decision by the trial court whether or not the plaintiff was the owner of the suit premises No. 198, Upper Circular Road.

16. It is needless to state the cases of the parties elaborately as they have been dealt with by my learned brother. The plaintiff as landlord has brought the action in ejectment against his tenants on the allegation that he purchased the premises for the purpose of the use and oc-

cupation of himself and the members of his family. He now reasonably requires the premises for such use and occupation and the suit has been started. The defence case is the denial of the reasonable requirement. The ground for eviction has been accepted by both the trial and the appellate courts. The first appellate court, however, sent back the case to the trial court to decide the question whether the plaintiff was the real owner of the suit premises or whether the money with which the property was purchased was made a gift of in favour of the plaintiff by his wife. A question has arisen on the contention of Mr. Bhose whether the plaintiff respondent can object to the order of remand without filing any appeal against the same. There is the provision in Order 41, R. 33 of the Code of Civil Procedure read with R. 4. The R. 33 should be liberally construed to give effect in practice to secure ends of justice and also for doing complete justice between the parties after proper adjudication of the disputes raised. This wide and special power under Rule 33 of Order 41 should be used sparingly and with great caution by the appellate Court under special circumstances only when the Court's conscience will not be at rest unless it gives relief under Rule 33. The Court should see that by the relief granted under this provision, no party gets an unreasonable and undue advantage to make up his deficiency in the litigation.

17. In the instant case we find that the plaintiff asserts in paragraphs 1 and 2 of his plaint that he became the owner of the suit premises by purchase on the basis of a sale deed and that he had 'purchased the premises for the purpose of his and family members' own use and occupation'. Against this statement, the defendants say in paragraph 2 of their written statement. "The defendants do not admit that the plaintiff is sole owner of the house..... and the suit as framed is not maintainable in law and also bad for non-joinder of parties". It is to be particularly noted that the defendants simply denied at best that the plaintiff was the sole owner of the house. They do not assert that the house belonged to several other co-sharers or that the house did not belong to the plaintiff or that the plaintiff purchased the house with money belonging to others. The trial court struck the following relevant issue on the pleadings of the parties.

1. Is the plaintiff the sole owner of premises No. 198, Upper Circular Road, now Prafulla Chandra Road, Calcutta, and is the plaintiff alone entitled to sue?

18. The plaintiff himself gave evidence and he stated that he had purchased the disputed premises by a conveyance dated 14-12-49. One of the defendants Biva Banerji was examined on commission. During the examination-in-chief the question put to her by her own Advocate, was "How long the tenants continued their occupation after the plaintiff became the owner?" and the answer was, 'For about 5/6 years'. The question itself suggested that the plaintiff was the sole owner. There is no indication or suggestion that the plaintiff was not the owner or that there were other co-sharer owners. The following question and answer in course of the examination-in-chief of Biva Banerji should be particularly noted:

Q. Regarding your assumption that the plaintiff does not require the premises for his own use and occupation, have you got anything further to state about it?

Ans. Manmatha Babu has purchased this premises at a very low price. He wants to evict us and sell the property at a higher price.

In view of the evidence of the defendant herself it is clear that the defendants admitted at the time of trial the plaintiff's case that he was the owner of the house by virtue of the purchase. There is no evidence on the side of the defendants that the plaintiff is not the sole owner or that there were other co-owners of the plaintiff in respect of the suit house. Besides the evidence as mentioned above, there is the deed of sale in favour of the plaintiff brought in evidence. In the circumstances the only irresistible and reasonable conclusion would be, as the trial court drew, that the plaintiff is the owner of the suit premises. Chittatosh Mookerjee, J., however, held that the plaintiff should prove that he was the owner of the house before he could get a decree for eviction. In this respect about onus, there is no dispute. Mookerjee, J., however, found that the evidence regarding ownership is inconclusive. His Lordship has felt this as during cross-examination the plaintiff stated that there was a house on Hazra Road belonging to his wife and the said house was sold away. It is also stated that with the money obtained by the sale of that house, the

plaintiff had purchased the suit premises. There was no further question put to the plaintiff from the side of the defendant challenging the sole ownership of the plaintiff or suggesting that there were other co-sharers with the plaintiff relating to the suit premises. At the time of argument it was contended by the learned Advocate for the defendants that the plaintiff was the benamdar of his wife as he had purchased the premises with money coming out of sale proceeds of the plaintiff's wife's house. This new case set up at the time of argument contradicts the case of joint ownership of the plaintiff and non-joinder of other necessary parties. This new case was set up at the time of argument on speculation getting the evidence of the plaintiff that he purchased the suit premises with the money he got out of the sale proceeds of his wife's house. There was no suggestion to the plaintiff even that he was the benamdar on behalf of his wife or that the real owner was his wife. Had there been any such case pleaded or even suggested to the plaintiff during cross-examination, the plaintiff could have stated how he became the owner of the said money. In view of the pleadings of the parties and the clinching and unambiguous evidence on record, particularly the admission of the defendant, Biva Banerji regarding the sole ownership of the plaintiff, there was no scope for remanding the case to ascertain whether the suit premises was purchased with the money belonging to the plaintiff's wife. This question of benami is foreign to the pleading of the defendants and without any evidence on the defendants' side ought not to have been considered or allowed to be canvassed either by the trial court or by the appellate court. This order for remand passed by the first appellate court below was against the provision of law and has caused failure of justice. To remedy the injustice done to the plaintiff the order for remand and the connected findings of the first appellate court on issue No. 1 relating to the ownership of the suit premises are liable to be set aside in the exceptional circumstances of this case.

19. The next point that arises is whether the provision as contained in Rule 33 of Order 41 of the Civil Procedure Code is applicable in a Letters Patent Appeal. Order 41 of the C. P. Code relates to appeals from Original Decree. Order 42, Rule 1 says that rules of Order 41 shall apply, so far as may be, to ap-

peals from appellate decrees. According to clause 15 of the Letters Patent for the Calcutta High Court, an appeal lies from the judgment of the appellate court as indicated therein. In the present case the first appeal was finally decided by a judgment in favour of the plaintiff-respondent on all points except one which was to be reconsidered by the trial court on remand on taking further evidence to the prejudice of the plaintiff's case. 'Decree' is but a formal expression of the adjudication in the judgment. Decree is, therefore, not distinct from the judgment of the court in an appeal. Judgment of an appeal means a judgment and/or a decree based thereon. Judgment for the purpose of clause 15 of the Letters Patent includes a decree. The present Letters Patent appeal is against the decision in a first appeal and as such the provisions of Order 41 including Rule 33 shall be applicable in this appeal by virtue of Order 42, Rule 1.

20. In this connexion I may refer to the decision of the Privy Council in the case of Sabitri Thakurain v. Savi reported in (1921) 25 Cal WN 557 = (AIR 1921 PC 80). This was an appeal before the Board against the decision passed in a Letters Patent Appeal of this Court. A contention was raised whether the Orders and Rules made under the Code of Civil Procedure, 1908 had any application to appeals brought under the Letters Patent of 1865 and whether in particular Order 41, Rule 10 applied to such appeals. The decision in that case is as follows:—

"The Orders and Rules made under the Code are, by Section 121, given the same effect as if they had been enacted in the Code, and therefore Order 41, Rule 10, is one of the provisions of the Code. It applies to appeals in the High Court, including the present appeal, unless any particular section of the Act can be found to exclude it."

Considering several provisions of law their Lordships of the Privy Council further held:

"Thus regulations duly made by Orders and Rules under the Code of Civil Procedure, 1908, are applicable to the jurisdiction exercisable under the Letters Patent, except that they do not restrict the express Letters Patent Appeal." It is clear, therefore, that the Court in Letters Patent Appeal may apply Order 41, Rule 33 of the Code to suitable cases.

21. It should be noted that the Code of Civil Procedure, 1908 is an Act

to consolidate and amend the laws relating to the procedure of the Courts of Civil Judicature and the Court is to follow the prescribed procedure in Letters Patent Appeals. Even if it is assumed that Order 41, Rule 33 is not strictly applied, in the absence of any bar in law to the contrary, the Court can for just and proper decision act on the principles laid down in Order 41, Rule 33 under the inherent power and jurisdiction under Section 151 of the Code of Civil Procedure.

22. In the case before us, we have no doubt that Order 41, Rule 33 of the Code will apply and under that provision we modify the judgment and the decree passed in the first appeal as indicated already by my learned brother.

Appeal dismissed.

AIR 1977 CALCUTTA 90

R. BHATTACHARYA, J.

Nurjahan Bibi, Appellant v. Md. Kajim Ali, Respondent.

A. F. A. D. No. 1472 of 1969, D/- 20-8-1976.

(A) Dissolution of Muslim Marriages Act (1939), S. 2 (ix) — Grounds for dissolution of marriage — Doctrine of 'Li'an' or false charge of adultery under Mahomedan Law can still be a valid ground. (Mahomedan Law — Divorce).

The doctrine of 'L'aan' or 'Li'an' has not become obsolete under the Mahomedan Law and, therefore, a Muhommedan wife can bring a suit for divorce against her husband on the ground that her husband has charged her with adultery falsely, by virtue of S. 2 (ix) of the Act. AIR 1927 All 56, Rel. on. (Para 5)

According to the Mahomedan Law the wife is entitled to a divorce if the husband makes a false charge of adultery against the wife. This false charge of adultery by the husband must be a voluntary and aggressive charge. If the allegation or the charge of adultery is by way of self defence or meant to disprove or counter-act some allegations of the wife in attack, it cannot be said that the allegation of the husband regarding the adultery is voluntary or actionable for getting a decree for divorce. Hence, if in a previous suit for dissolution of the marriage brought by plaintiff wife, the statement regarding the adultery of the

wife made by the defendant-husband was relevant in the suit and necessary to meet the attack of the wife in the suit, it cannot be called voluntary accusation of adultery against the wife and cannot be a ground for dissolution of marriage in a subsequent suit by her. (Para 7)

Cases Referred: Chronological Paras
AIR 1927 All 56 = 24 All LJ 881 5
AIR 1919 All 182 = 17 All LJ 78 4
(1865) 3 Suth WR 93 4

J. Islam, for Appellant; Barindra Nath Roy, for Respondent.

JUDGMENT:— This second appeal is by the plaintiff Nur Jahan Bibi against the judgment and the decree passed by the Additional District Judge, Murshidabad in the first appeal setting aside the decision of the learned Munsif of the trial court decreeing the suit of the plaintiff.

2. Nur Jahan Bibi filed the original suit against the defendant Md. Kejem Ali for dissolution of her marriage with the latter. The allegation of the plaintiff is that she was married with Kajem Ali according to Mahomedan Law. In the year 1964, she brought a suit against the defendant for dissolution of her marriage. In that suit the defendant submitted a written statement and therein he stated that the plaintiff was of bad character, that she was enamoured of one Asgar Ali and that she committed adultery with him. During evidence also the defendant made such statement. In consequence of these statements of the defendant, she is entitled to dissolve her marriage with the defendant on the basis of 'Li'an'. It has been alleged by the plaintiff that those allegations are false and they were not retracted by the defendant. The defendant Kajem Ali filed a written statement and his defence is that whatever statements he made in the previous written statement and during evidence were true and the present suit is not maintainable. Other material allegations made by the plaintiff against the defendant have been denied. The learned Munsif decreed the suit in favour of the plaintiff on ground that as the defendant failed to prove that the plaintiff had committed adultery with Asgar Ali, the plaintiff would be entitled to the decree prayed for. The plaintiff examined herself alone on her side, but the defendant besides himself examined several other witnesses. The learned Munsif was of the view that the wife should always be presumed to be devoted to her husband.

and when the defendant failed to prove the allegation of adultery against her, the learned Munsif was inclined to accept the evidence of the plaintiff as true. In the appeal the learned Additional District Judge in order to appreciate the allegation of the plaintiff as to whether the statements made in the previous suit amounted to a charge of adultery, on the prayer of the respondent-plaintiff and for ends of justice, admitted in evidence without objection from the side of the appellant, the deposition of the defendant given in the previous suit. The said deposition was marked Exhibit 3. On consideration of the pleadings of the parties as well as of the evidence of the defendant in the previous suit, the learned Additional District Judge held that the statements made in the previous suit did not amount to any charge of adultery which would give right to the plaintiff to dissolve her marriage with the defendant. On this finding the appeal was allowed with the setting aside of the judgment and the decree of the trial court and the suit was dismissed. Against that decision the present appeal has been taken to this Court.

3. I have heard Mr. Islam, the learned Advocate appearing on behalf of the appellant and Mr. Roy for the respondent.

3-A. The parties in the suit are governed by the Muslim Law. The wife has come forward with the suit for dissolution of her marriage with the husband. The Dissolution of Muslim Marriages Act, 1939 was passed as it was found 'expedient to consolidate and clarify the provisions of Muslim Law relating to suits for dissolution of marriage by woman married under Muslim Law and to remove doubts as to the effect of the renunciation of Islam by a married Muslim woman on her marriage tie.' Section 2 of this Act enumerates several grounds of which one or more may be the basis on which the Court may pass a decree for dissolution of marriage in a suit brought by a Muslim woman. Ground No. (ix) says, "On any other ground which is recognised as valid for the dissolution of marriages under Muslim Law". Article 240 appearing in 12th Edn. of Mulla's Mahomedan Law is quoted below:—

240. Li'an or imprecation:—

(1) The wife is entitled to sue for a divorce on the ground that her husband has falsely charged her with adultery. She must file a regular suit for dissolu-

tion of her marriage as a mere application to the Court is not the proper procedure. If the charge is proved to be false, she is entitled to a decree, but not if it is proved to be true. No such suit will lie if the marriage was irregular.

At page 596 of Amir Ali's Mahomedan Law Vol. II 4th Edn. we get:

"When a false accusation is preferred against a woman, and the husband is unable to establish the charge, the woman is entitled to claim a divorce from the Court."

In this connexion two instances were mentioned as cited by Sautayra on the subject. The first was a case of Yehia bin Mohammad where he accused his wife of misconduct. She denied the charge and required him before the Kazi to establish it by formal evidence. As the husband failed to do so, an order was passed for dissolution of the marriage. The other case mentioned is a case decided by the Court of Algiers in 1871. There the husband demanded a cancellation of contract on the ground that the wife had been guilty of immorality before her marriage. The allegation was denied by the wife and wanted a divorce on that ground of false allegation. The husband could not prove the immorality of the wife and the Kazi passed order for a divorce.

4. In Zafar Husain v. Ummat-ur-Rahaman reported in (1919) 17 All LJ 78 = (AIR 1919 All 182) decided by a Division Bench of the Allahabad High Court, it was held that a Mahomedan wife is entitled to bring a suit for divorce against her husband and obtain a decree on the ground that the latter falsely charged her with adultery. In that case the plaintiff's wife's allegation was that her husband stated before several persons that she had illicit intercourse with her brother and imputed fornication to her. Among other grounds, a plea was taken that the law of 'L'aan' had no place on Anglo Mahomedan Law and must be considered obsolete. The ground was rejected and it was held that Kazi of the Muslim Law was replaced by the Court. Besides the judgment of Knox, J. there is a separate judgment of Banerji, J. where he referred to the decision of a Division Bench of the Calcutta High Court in the case of Jaun Beebee v. Sheikh Moonshee Beparee reported in (1865) 3 WR 93. It appears to me that Banerjee, J. had the impression that the decision was of the view that the charge-

of adultery of the wife made by the husband could not be the ground of divorce by the wife and in this connexion only a part of a sentence from the judgment was quoted. The quotation is 'a charge of adultery does not operate as a divorce'. Of course Banerji, J. could not accept that view. I have gone through the said Calcutta case. There the husband Beparee brought a suit for restitution of conjugal rights against his wife Jan Beebee. The husband got the decree duly affirmed by the Principal Sudder Ameen in the appeal. The wife came up before the High Court with the special appeal. The matter was heard by a Bench consisting of Shamboonath Pandit and G. Campbell, JJ. In the original suit by the plaintiff a Mahomedan against his wife of the same religion, the latter pleaded that the husband had charged her with infidelity and proved it and that it operated as a divorce. There are several other pleas taken by the wife not relevant for our purpose. Regarding the charge of infidelity, the Bench held:

"On hearing the special appeal of the wife, we think that the Courts below have rightly held that a charge of adultery does not operate as a divorce, though a false charge might be an item of ill-usage towards making up a sufficient answer. A true charge would be no step towards such an answer."

Going through the entire judgment I do not find any decision to the effect that the false charge of adultery made by the husband against the wife would not be a ground for the wife to claim a decree for dissolution of her marriage with the offending husband. That was a case by the husband for restitution of conjugal rights against the wife and in that proceeding the defendant's claim for divorce against the wife did not arise. Moreover mere charge of adultery by the husband against the wife will not automatically terminate the relationship between the husband and the wife. For the dissolution of marriage on that ground, the wife has to start a separate suit in Court against the husband.

5. The principles laid down in the case of Jafar Husain were accepted by the Allahabad High Court in *Rahima Bibi v. Fazul* appearing in (1926) 24 All LJ 881 = (AIR 1927 All 56). My attention has not been drawn to any authority which has declared that the doctrine of 'L'aan' or 'Li'an' has become obsolete. I am, therefore, of the view, that a Mahomme-

dan wife can bring a suit for a divorce against her husband on the ground that her husband has charged her with adultery falsely.

6. An important point has been raised before me as to whether the statement made by the husband about the adultery of his wife by way of defence in a suit brought by the wife against him could be legally availed of by the wife in a subsequent suit for dissolving her marriage with the husband. In the present case before me, the plaintiff admittedly brought a suit against the defendant-husband for dissolution of marriage on the ground that the defendant, a 'Ghar-jamai' of the plaintiff's parents, had left her after ill-treating her and making no provision for her maintenance. There were other grounds not relevant for our purpose. That suit was registered as Matrimonial Suit No. 6 of 1964, Kajim Ali appeared there and filed a written statement denying the allegations made by the plaintiff. His case was that he lived with his wife at the house of his mother-in-law. He loved his wife. The plaintiff had fallen in love with her cousin Asgar. The defendant doubted that the suit had been brought at the instigation of Asgar and other relatives. It was also stated in the written statement that recently the plaintiff was residing at the house of Asgar. During evidence in that previous suit, the defendant said during examination-in-chief that at that time he was residing in his own house. As Asgar used to make frequent visits in the house of the plaintiff's mother, he fled away from that house. It was stated also that the plaintiff was given in marriage with Asgar on Baisak last meaning subsequent to the filing of the previous suit. The defendant was cross-examined and during such cross-examination from the side of the defendant, he said that the plaintiff was a bad woman and Asgar was residing in the house of the plaintiff with bad motive and that plaintiff and Asgar were in love with each other. That previous suit was dismissed by the learned Munsif and the findings were against the plaintiff. The grounds urged by the plaintiff in that suit were not accepted by the Court and the suit was dismissed.

7. According to the Mahomedan Law the wife is entitled to a divorce if the husband makes a false charge of adultery against the wife. This false charge of adultery by the husband must be a voluntary and aggressive charge. If

the allegation or the charge is by way of self defence or meant to disprove or counteract some allegations of the wife in attack, it cannot be said that the allegation of the husband regarding the adultery is voluntary or actionable for getting a decree for divorce. If any wife brings a suit for dissolution of marriage on certain grounds against the husband and if the husband in his written statement makes allegation of the plaintiff's adultery with some other person by way of defence so that the plaintiff may not be believed and may not get a decree, such allegation cannot amount to a voluntary or aggressive or independent statement of adultery against the wife. The husband by way of defence is compelled to make such allegation for his own protection. Such allegation is certainly not a voluntary one which might give rise to a cause of action to the wife for dissolution of marriage. The law allows the defendant-husband to oppose the case of the plaintiff by appropriate grounds to defend himself. When the law allows the defendant to take up a relevant plea for self defence as against the plaintiff case, such plea cannot, in my view, be used as a weapon against him. If he is prevented from making such allegation in the written statement, it will go against the public policy and consequently proper justice and decision cannot be made in any civil action. If such allegation by the defendant made in the written statement be allowed to be used by the plaintiff-wife as a ground for a future litigation for dissolution of marriage, then certainly the privilege of law will be denied to the defendant who may be hesitant to make a relevant allegation due to the uncertainty of the decision to be made in the suit. This position for the defendant, if allowed, will mean denial of a legitimate right to the defendant. In my view if the statement regarding the adultery of the wife made by the defendant-husband is relevant in the suit and necessary to meet the attack of the wife in the suit, it cannot be called voluntary accusation of adultery against the wife and cannot be a ground for dissolution of marriage in a subsequent suit by her.

8. The other point which is relevant in the present second appeal is whether the statements made by the defendant in the previous suit would amount to accusation of adultery against the wife. The written statement of the previous suit has been marked Ext. 2. The re-

levant portion of the written statement says that the defendant did not misbehave with the plaintiff, that the plaintiff has recently been in love with her cousin Asgar and that she is now living in his house. His deposition in the previous suit has been marked Ext. 3. In Ext. 3 the plaintiff, it appears, says that he fled away from the plaintiff's mother's house as Asgar used to make frequent visits and that the plaintiff was given in marriage (Nika) with Asgar presumably by his mother on 10th Baisak last, that is to say, after the institution of the suit. During cross-examination the defendant says that the plaintiff and Asgar are in love with each other, that plaintiff is a bad woman and that Asgar has been residing in the house of the plaintiff with bad motive. On consideration of the statements made by the defendant, it cannot be stated, in my view, that there was any clear or positive allegation of adultery as required for the purpose of L'aan. At best there was the imputation of love and attachment between the plaintiff and Asgar and their ill motive. No accusation of plaintiff's adultery is there. The defendant never stated that the plaintiff and Asgar were living in the same room or sharing the same bed. I find that the learned Additional District Judge on consideration of the materials before him could not find any allegation of adultery made by the defendant and he was of the view that the defendant could resist the suit by the plea of justification. I find no reason to interfere with the decision of the learned Additional District Judge in the first appeal below. It appears that the learned Munsiff of the trial court did not consider the pleadings of the previous suit and also the evidence adduced before him. His decisions are not based upon evidence but mostly upon surmises. The evidence on record clearly proves that the defendant's allegations were acceptable and proved regarding the intimacy of the plaintiff with Asgar. There can be no doubt that the defendant's allegations were all bona fide. The first appellate court was justified in setting aside the judgment and the decree of the trial court. I find no reason to interfere with the decision of the first appellate court below.

9. In the result, the appeal fails and the same is hereby dismissed with costs.

Appeal dismissed.

AIR 1977 CALCUTTA 94

S. K. BHATTACHARYYA AND
A. K. JANAH, JJ.

M/s. Universal Trading Co., Appellants v. Prafulla Kumar Sarkar and another, Respondents.

First Appeals Nos. 1101 and 1102 of 1969, D/- 28-7-1976.

(A) West Bengal Premises Tenancy Act (1956), S. 13 (1) (ff) — Tenant — Eharatia under Calcutta Thika Tenancy Act is not a tenant — Suit for eviction for use and occupation — Tenancy validly terminated — Plaintiff entitled to decree under General Law. (T. P. Act (1882), S. 106).

A Bhartia under the Calcutta Thika Tenancy Act cannot be regarded as a 'tenant' under the West Bengal Premises Tenancy Act, vis-a-vis his landlord, the thika tenant, or the purchaser of the structure from the thika tenant. Consequently in a suit for eviction on the ground of reasonable requirement of premises for use and occupation even if the plaintiff does not satisfy the conditions of S. 13 (1) (ff), if the tenancy is validly terminated by a notice under general law, the plaintiff is entitled to a decree. AIR 1974 Bom 281; (1962) 66 Cal WN 338; (1956) 60 Cal WN 642 and AIR 1930 PC 54, Ref.

(Paras 4, 6 and 10)

Cases Referred: Chronological Paras

AIR 1975 SC 1146 = (1975) 2 SCR 774	2
(1975) 1 Cal LJ 404	5
(1975) 1 Cal LJ 413	5
AIR 1974 Bom 281 = 1974 Mah LJ 674	3
(1971) 75 Cal WN 979	5, 7
ILR (1968) 2 Cal 70	5
(1962) 66 Cal WN 338	3
(1956) 60 Cal WN 642	3
AIR 1930 PC 54 = 57 Ind App 49	3

R. P. Bagchi, N. C. Chakravarty and Bhuban Mohan Saha, for Appellant; Ranjit Kr. Banerjee, Bidyut Kr. Banerjee and Mrinal Kanti Das, for Respondents.

JANAH, J.:— These two appeals arise out of two suits for ejectment which were instituted by the respondents against the appellant for the latter's eviction from two tenancies at No. 72, Baithakhana Road. The plaintiff-respondents alleged that the defendant-appellant held one residential tenancy in respect of 3 rooms at 72, Baithakhana Road under the plaintiffs at a rental of Rs. 21/- per month according to Bengali calendar. The defendant appellant also held another

tenancy under the plaintiff-respondents at the aforesaid premises No. 72, Baithakhana Road in respect of a shop room at a rental of Rs. 32/- per month according to Bengali calendar. Ejectment suit No. 44 out of which F. A. 1101 arises was instituted in respect of the residential tenancy and Ejectment Suit No. 45 out of which F. A. 1102 arises was instituted in respect of the shop room. It was alleged that the plaintiffs had purchased the structure at 72, Baithakhana Road in which the disputed tenancies were situate, from the heirs of the original owner, late Gendu Khan, who was a thika tenant in respect of the land on which the said structure stood, by a kobala dated August 10, 1964. It was further alleged that after their purchase the plaintiffs informed the defendant about their purchase but the defendant did not pay rent to the plaintiffs, and the defendant was in default since Sravan, 1371 B.S. The plaintiffs further alleged that the shop room was required by them for their own occupation for business purpose and that the premises in the other suit was required by the plaintiff No. 2 for his own use and occupation and for the use and occupation of the members of his family as their residence. The defendant denied the relationship of landlord and tenant between the parties and contended that the plaintiffs were not the sole owners of the structure in which the disputed tenancies were situate. The defendant denied the service and sufficiency of the notice to quit. Reasonable requirement on the part of the plaintiffs was also denied in the written statement.

2. As common questions of law and facts arose in both the suits the two suits were tried together. The learned Judge in the trial court accepted the plaintiff's case and decreed both the suits. Against the trial court's decrees the present appeals have been filed by the tenant defendant. The suit was filed on January 4, 1967 i.e. within 3 years from the date of plaintiffs' purchase. Section 13 of the West Bengal Premises Tenancy Act, 1956 (hereinafter referred to as the 'Premises Tenancy Act') was amended by the West Bengal Premises Tenancy (Second Amendment) Act, 1969 (hereinafter referred to as the 'Second Amendment Act') which came into force with retrospective effect on 14th November, 1969, after the suits were disposed of by the trial court. In view of the decision in the case of B. Banerjee v. Anita Pan, AIR 1975 SC 1146 the plaintiffs-respondents

filed an application for amendment of the plaint praying for incorporating an averment in the plaint that the plaintiffs were not possessed of any other reasonably suitable accommodation. The said prayer having been allowed by this court the defendant-appellant filed an additional written statement denying the plaintiffs' allegations whereupon an additional issue was framed and thereafter the parties adduced evidence in support of their respective cases in this Court.

3. Mr. Nirmal Chandra Chakravarty, learned Advocate, appearing on behalf of the appellant has contended in the first place, that the plaintiffs are the purchasers of the interest of a thika tenant and hence they cannot file a suit under the Premises Tenancy Act for eviction of the defendant who was a 'Bharatia' under the plaintiffs' predecessors. He drew our attention to the deposition of plaintiff No. 2 where he has admitted that the interest of the plaintiffs is that of a thika tenant. He also referred to Exhibit 7 series which show payment of ground rent by the plaintiffs to the superior landlord, Mr. Chakravarty, therefore, contended that the defendant was not a tenant under the Premises Tenancy Act and as such the suit for eviction under the said Act was not maintainable. It is not in dispute that the plaintiffs purchased the structure from the heirs of Gendu Khan whose status was that of a thika tenant. The question that arises for consideration, therefore, is whether a 'Bharatia' as defined in the Calcutta Thika Tenancy Act, 1949 (hereinafter referred to as the 'Thika Tenancy Act') is a tenant within the meaning of Premises Tenancy Act vis-a-vis his landlord, the thika tenant, or the purchaser of the structure from the thika tenant. Mr. Chakravarty relied on a decision in Santilata Dey v. Sarjubala Devi, (1956) 60 Cal WN 642 in support of his contention. That is a case where tenant was inducted by virtue of a lease which expressly described it to be a lease of land with the building and structures situated thereon. In an action for ejectment the defendant in that case took the plea that his tenancy is governed by the Thika Tenancy Act. The courts below upheld the said contention. On revision a Division Bench of this Court held that the lease being one of land with the buildings etc. situated thereon the tenancy in question in that suit was not governed by the Thika Tenancy Act. There is, therefore, nothing in

the said decision which can be of any assistance to the appellant in the present case. Mr. Chakravarty strongly relied upon the provisions of Section 10 of the Thika Tenancy Act in support of his contention that a Bharatia is not a tenant within the meaning of Premises Tenancy Act vis-a-vis the Thika Tenancy. He contended that the provisions in Section 10 to the effect that when any structure standing on any holding of a Thika Tenancy vests in the landlord on any of the grounds mentioned in Section 3 of the Thika Tenancy Act except clause (i) of sub-section (1) of Section 3 the Bharatia of such thika tenant shall be deemed to hold under the superior landlord as a tenant under the Premises Tenancy Act, goes to show that only in such cases the Bharatia will be deemed to be a tenant under the Premises Tenancy Act. This provision according to Mr. Chakravarty necessarily implies that the Bharatia does not hold his tenancy under the thika tenant or his transferee, as a tenant within the meaning of Premises Tenancy Act. Mr. Chakravarty strengthened his submission on the basis of certain observations in the case of Annapurna Seal v. Tincowrie Dutt, (1962) 66 Cal WN 338. In that case a Division Bench of this Court in construing the words 'land' and 'structure' in Section 2 (5) of the Thika Tenancy Act observed as follows:—

"No interpretation should be put upon this Calcutta Thika Tenancy Act which makes it a redundant duplicate of the cognate statute of the West Bengal Premises Tenancy Act, 1956. To construe the words 'land' and 'structure' in Section 2 (5) of the Calcutta Thika Tenancy Act so liberally as to make them premises within the meaning of Section 2 (f) of the West Bengal Premises Tenancy Act, 1956 will be to duplicate statutes which could not have been the intention of the Legislature and will lead to utter confusion. If West Bengal Premises Tenancy Act or its precursors the Rent Control Act were applicable then it is difficult to understand the utility of another statute. It is because it was thought that these Acts were not sufficient to protect this class of tenant that the Calcutta Tenancy Act was enacted. This Calcutta Tenancy Act was fully alive to this situation and only permit the Rent Act to apply in the case of 'Bharatia' alone in the limited eventuality expressly mentioned in Section 10 (2) of the Calcutta Thika Tenancy Act."

Relying on these observations Mr. Chakraborty contended that a 'Bharatia' is not a tenant under the Thika Tenancy Act or within the meaning of the Premises Tenancy Act. According to him a 'Bharatia' cannot be said to be a tenant within the meaning of the Premises Tenancy Act by putting any construction upon the provision of the Thika Tenancy Act because Section 10 (2) of the latter Act contains a deeming provision, and it is only the Legislature which can make a deeming provision and the Court cannot introduce a deeming provision by a construction of the statute. In this connection Mr. Chakraborty drew our attention to the case of Commr. of Income-tax, Bombay Presidency v. Bombay Trust Corporation Ltd., (1930) 57 Ind App 49 = (AIR 1930 PC 54) where their Lordships of the Privy Council observed that

"when a person is 'deemed to be' something the only meaning possible is that whereas he is not in reality that something an Act of Parliament requires him to be treated as if he were."

Mr. Chakraborty also relied upon the observations in *S. R. Phate v. C. A. Kedar*, AIR 1974 Bom 281 appearing at paragraph 11 of the report, and contended that a deeming provision cannot be introduced by construction and it is the exclusive privilege of the Legislature to apply a deeming fiction in a given case. It was accordingly contended that since a deeming provision has been incorporated in Section 10 (2) of the Thika Tenancy Act it goes to show that a Bharatia is not and cannot be a tenant under the Premises Tenancy Act, except in the case contemplated by Section 10 (2).

4. In order to appreciate the contention of Mr. Chakraborty it is necessary to refer to certain provisions of the Thika Tenancy Act. The preamble to the Act says that the said Act has been enacted "to make better provision relating to the law of landlord and tenant in respect of Thika Tenancy in Calcutta". The Act accordingly makes provisions for regulating the rights and obligation of a thika tenant vis-a-vis his landlord. Barring a few provisions regarding the rights of a Bharatia under a thika tenant the Act makes no provision for regulating the relationship as between a thika tenant and his Bharatia. The rights which have been conferred upon a Bharatia under the said Act are to be found in Sections 10, 10-A and 32-B. Sec. 10 provides that in certain cases where the

structures standing on the holding of a thika tenant vests in the landlord the Bharatia shall be entitled to continue in possession and he shall be deemed to be a tenant in respect of the portion in his occupation within the meaning of the Premises Tenancy Act. Section 10-A gives the thika tenant a right to erect pucca structure but in doing so the thika tenant cannot eject a Bharatia. If, for such purpose, the thika tenant wants to have vacant possession of the portion in occupation of the Bharatia then he is to make alternative accommodation for the Bharatia until the erection of such pucca structure. Similarly, Section 32-B creates an obligation on the part of the thika tenant to provide for essential amenities for the Bharatia, such as, supply of water, conservancy and sanitary services. It also gives a right to the Bharatia to apply to the Thika Controller if these amenities are not provided for or are insufficient. Apart from conferring some rights on the Bharatia under the aforesaid sections the Thika Tenancy Act does not make any provision as to the rights of a Bharatia as against the thika tenant. The rights of a tenant under the Premises Tenancy Act are however much wider. To say that a Bharatia is a tenant within the meaning of the Premises Tenancy Act would be to confer much greater rights upon the Bharatia which the Thika Tenancy Act does not intend to do. Moreover, if a Bharatia is regarded as a tenant under the Premises Tenancy Act vis-a-vis the thika tenant then two parallel provisions would be available to the thika tenant under the two Acts, as for instance, if the supply of water to the Bharatia is interfered with by the thika tenant the Bharatia would have a remedy under Section 32-B of the Thika Tenancy Act as well as under Section 34 of the Premises Tenancy Act. This is a situation which could never have been contemplated by the Legislature. Moreover, the rights conferred upon a thika tenant under the Thika Tenancy Act as it originally stood were very limited in character compared to those of a tenant under the Premises Tenancy Act. If a Bharatia is regarded as a tenant under the Premises Tenancy Act then the Bharatia would have greater rights than his landlord, the thika tenant himself has. It follows, therefore, that a Bharatia cannot be regarded as a tenant under the Premises Tenancy Act.

5. It was contended on behalf of the appellant that as a Bharatia is not a

tenant under the Premises Tenancy Act his landlord, the thika tenant, cannot bring a suit for eviction under the Premises Tenancy Act, and the present suits are accordingly liable to be dismissed. In support of this contention reliance was placed upon the decision in *Sahadeb Chandra Paul v. Manmathanath Mondal*, (1971) 75 Cal WN 979, where a learned Judge of this Court sitting singly took the view that as landlords in that suit were thika tenants they had no right to bring a suit for eviction against the tenants defendants of that suit. That decision was arrived at by our learned brother on the basis of certain observations in *Yogamaya Pakhira v. Santisudha*, ILR (1968) 2 Cal 70 in which it was held that the expression 'owner' occurring in clause (f) of Section 13 (1) of the Premises Tenancy Act prior to its amendment or in clause (ff) of the said section after its amendment must be given its ordinary connotation or dictionary or usual meaning, that is, a person having full and absolute ownership of the disputed property and would not include a permanent lessee. Reliance was also placed on the decisions in *Nishikanta Roy v. Monomohan Sengupta*, (1975) 1 Cal LJ 404 and *Jagannath Sen v. Sriram Pasricha*, (1975) 1 Cal LJ 413 in support of this contention advanced on behalf of the appellant. In these two cases however there was no dispute that the defendants in those suits were tenants within the meaning of the Premises Tenancy Act. In the case of *Nishikanta* the question was whether the plaintiff who was himself a tenant could be regarded as 'the owner' within the meaning of Section 13 (1) (ff) of the Premises Tenancy Act. It was held that the term 'owner' did not include the tenant of the tenanted premises; as such the plaintiff is not entitled to a decree for ejectment. In the case of *Jagannath Sen* the question arose as to whether a co-sharer owner was 'owner' within the meaning of clause (ff) of Section 13 (1) of the Premises Tenancy Act. Their Lordships held that a co-sharer owner did come within the expression 'owner' as used in Section 13 (1) (ff). But in the present case as we have seen the defendant is a Bharatia, and as such, he is not tenant within the meaning of the Premises Tenancy Act. The question, therefore, arises as to whether the plaintiffs in the present suit are disqualified from filing a suit for eviction against the defendant on the ground of non-payment of rent and also for requirement of the plaintiffs as

the plaintiffs are not 'owners' within the meaning of Section 13 (1) (ff) of the Premises Tenancy Act.

6. It is to be remembered in this connection that suit for recovery of possession is not one under the Premises Tenancy Act, but it is under the general law, after determination of the tenancy by a notice to quit. The Premises Tenancy Act puts certain restrictions on the landlords' right to recover possession from the tenant unless certain conditions as enumerated in Section 13 (1) of the Premises Tenancy Act are fulfilled. It is only after the bar is lifted that a decree for eviction can be passed against a tenant. Under the general law there is no such bar or restriction upon the landlord's right to evict a monthly tenant. The landlord is not required to satisfy the court as to whether he requires the subject-matter of the tenancy for his own use and occupation or a tenant is a defaulter or that any of the conditions mentioned in Section 13 (1) of the Premises Tenancy Act exists in order to get a decree for eviction against the tenant. The only thing which the landlord is required to prove in such a case is, that the tenancy has been determined by service of a valid notice to quit. On that question the trial court has recorded a finding in favour of the plaintiffs. In fact it was not disputed before the trial court that the notice had been duly served on the defendants in respect of both the tenancies.

7. On behalf of the appellant it was contended on the basis of *Sahadeb's* case ((1971) 75 Cal WN 979) (supra) that the plaintiffs themselves being thika tenants they are not owner within the meaning of Section 13 (1) (ff) of the Premises Tenancy Act and therefore, their suits are liable to be dismissed. We have already held that the defendant is not a tenant within the meaning of the Premises Tenancy Act. That being so it matters little whether the plaintiffs are 'owner' within the meaning of Section 13 (1) (ff) of the Premises Tenancy Act or not. In *Sahadeb's* case it is not clear whether the defendants were Bharatia or not. On the other hand it appears that both the parties accepted the position that they were tenants within the meaning of Premises Tenancy Act. The said decision is, therefore, of no assistance to the defendant in the present case.

8. The next point urged on behalf of the appellant is that the plaintiffs

have no title to the disputed property as the kobala by which they purchased the disputed property is a void document. The kobala was attacked on two grounds, first, that the original owner Gendu Khan had other heirs who were not parties to the kobala and the plaintiffs had not purchased the interest of those heirs. Secondly, it was contended that the said document is void as it offends Sections 5 and 23 of the Foreign Exchange Regulation Act, 1947 and also Section 23 of the Indian Contract Act, 1872. Mr. Chakraborty appearing on behalf of the appellant drew our attention to the evidence of Jatindra Kumar Sarkar, witness No. 1 for the plaintiffs at page 63 of the Paper Book where the said witness stated that the sum of Rs. 10,000/- was paid to the widow of Gendu Khan in Pakistan in presence of her two sons and daughter. He also stated that no money was paid at the time of execution and registration of kobala. Mr. Chakraborty also drew our attention to the disputed kobala, Ext. 3, in which it has been recited in the memo. of consideration that a sum of Rs. 10,000/- was paid by 100 pieces of currency notes of Rs. 100/- each. We were accordingly invited to hold that P.W. 1 was not speaking the truth. Mr. Chakraborty also criticised the evidence of P.W. 1 on the ground that the said witness did not, in fact, know anything about the transaction but the persons who knew about it namely, Prokash Chandra Sarkar and Prafulla Kumar Sarkar, were not examined in the suit. Having regard to the totality of evidence that has been placed before the court we are unable to agree with Mr. Chakraborty, and in our view, there is no sufficient reason why the evidence of P.W. 1 Jatindra Kumar Sarkar should not be accepted. With regard to the second objection raised by Mr. Chakraborty in this behalf we find no reason why the disputed kobala, Ext. 3, should be held to be void. Section 5 of Foreign Exchange Regulation Act, 1947, inter alia, puts a restriction in making payment by a person in, or resident in India to or for the credit of any person resident outside India. Section 23 of the said Act provides for the penalty and procedure for imposing the same for contravention of Section 5 and certain other sections of the said Act. In the present case the evidence is that the money was paid in Pakistan by P.W. 1 who, at the relevant time, was residing in Pakistan. There is no evidence as to how Indian money was taken to

Pakistan. In such a case, therefore, Section 5 of the Foreign Exchange Regulation Act, 1947 can hardly have any application. Even if Section 5 is held to be applicable the result would be that the person concerned would make himself liable to the penalty under Section 23. But for that reason the document cannot be held to be void. Section 23 of the Contract Act provides that the consideration and object of an agreement is lawful unless it is forbidden by law, or it defeats the provisions of any law, or is fraudulent, or involves or implies injury to the person or property of another, or the court regards it as immoral or opposed to public policy. There is nothing in the present case which can be said to bring the disputed transaction within any of these six exceptions mentioned in Section 23 of the Contract Act. We are, therefore, unable to uphold the contention advanced by Mr. Chakraborty in this behalf.

9. Lastly, Mr. Chakraborty contended that in deciding the present appeals this Court should take notice of certain subsequent events and also take additional evidence in respect of certain documents, copies of which have been annexed to the application filed by him for that purpose under Order 41, Rule 27 read with Section 151 of the Code of Civil Procedure. In the said application the petitioner has stated that although he was definite that Gendu Khan died leaving behind him surviving 8 persons as his heirs and legal representatives as mentioned in paragraph 4 of the said application the petitioner could not produce and/or adduce any documentary evidence in support of his defence. It has been stated further that it is only after the receipt of a letter dated 11th October, 1969 from one Sri K. B. Kanjilal, Advocate, that the petitioner made enquiries at different places and ascertained that Gendu Khan died leaving 8 persons as his heirs and legal representatives. The documents on which the plaintiffs rely in support of their title were all filed in the trial court. The defendant could easily obtain inspection of the same and make necessary enquiry regarding such particulars as were necessary according to him. The fact that the defendant could not produce or adduce any documentary evidence in support of his defence at the appropriate stage is no ground for reception of additional evidence by the appellate court. Moreover, we do not require additional evidence for deciding the present appeals.

The application for the reception of additional evidence is accordingly dismissed.

10. Mr. Chakraborty addressed us at length on the point of reasonable requirement of the suit premises on the part of the plaintiffs for their own use and occupation. For this purpose he relied upon the evidence which was taken in this Court on the additional issue which has been framed. We have already held that the defendant is not a tenant within the meaning of Premises Tenancy Act. That being so, it is immaterial whether the plaintiffs satisfied the conditions mentioned in clause (if) of sub-section (1) of Section 13 of the Premises Tenancy Act. In view of what has been discussed above it follows that there is no bar to the suits being decreed. These appeals, therefore, fail and are accordingly dismissed. The judgment and decrees of the trial court are affirmed. In the circumstances we make no order as to costs.

S. K. BHATTACHARYA, J.:— I agree.

Appeals dismissed.

AIR 1977 CALCUTTA 99

RABINDRANATH BHATTACHARYA
AND A. K. JANA, JJ.

Saraswati Debi and others, Appellants v. Satya Narayan Gupta, Respondent.

Letters Patent Appeal No. 57 of 1974,
D/- 16-6-1976.*

(A) Evidence Act (1872), Ss. 101 to 104 — Final decree passed in partition suit — Plaintiff instituting another suit for recovery of amount paid to discharge joint liabilities — Burden of proof.

When it has been proved that it was the plaintiff who acted as the karta upto the final decree in the previous partition suit and that he was collecting the income of the joint properties, the onus is upon the plaintiff who has brought the subsequent money suit for the recovery of amount alleged to have been spent by him to meet joint family liabilities to prove how much money he realised out of the joint property and how much money he had spent to meet the joint liabilities. He is the best person to render

the accounts and not the defendants who are not expected to have any knowledge as to the actual income and expenditure.
(Para 4)

(B) Civil P. C. (1908), O. 2, R. 2 — Partition suit for partition of joint family properties and business and also for accounts — Final decree — Subsequent suit for recovery of amount paid to discharge joint liabilities — O. 2, R. 2, held, not attracted.

In the previous partition suit, the plaintiffs of that suit prayed for partition of all the joint properties and businesses and also for accounts against the defendants in respect of the said properties and businesses and claimed both preliminary and final decrees and in fact after the passing of the preliminary decree, the plaintiff filed accounts upto a certain date subsequent to the passing of the preliminary decree. The plaintiff claimed a decree for accounts upto the date of final decree in respect of the joint properties and businesses. In the subsequent suit the plaintiff had claimed certain amounts of money which he paid towards the liabilities of the joint properties.

Held, that for the subsequent suit there could not be any application of O. 2, R. 2. There was no omission of any claim in the earlier suit. (Para 5)

(C) Civil P. C. (1908), S. 54 and O. 20, R. 18 — Partition suit — Scope of — Separate prayer for rendition of accounts — Whether necessary.

In a suit for partition of common properties and businesses, the shares of the parties in the subject-matters should first be ascertained. Next, in order to make proper allotments to the parties, the subject-matters for partition should be properly assessed and valued and for that purpose and for fair valuation of the allotments for the parties, the assets and the liabilities of the estate for partition should be found out. Provision may be made for meeting the liabilities and in making allotments while considering the assets and liabilities of the joint properties owelty money, if necessary, is to be determined for assessment of the proper valuation of the allotments. In order to achieve these purposes, accounts of profits and liabilities are to be taken up for consideration at the time of final decree so that in future after the final decree, the parties may not have any occasion to file suits in connection with the liabilities or claims in respect of the properties already partitioned and in which the par-

* (Against judgment of A. K. Sinha J. in A. F. O. D. No. 256 of 1963, D/- 28-6-1972.)

ties have been given possession. There should not be any scope for future litigation over the same matters after the determination of the partition suit. In a suit for partition of properties and businesses, the question of accounting becomes unavoidable for final determination and assessment of the valuation of the properties to be allotted to the parties. AIR 1951 Mad 938 (FB) and AIR 1961 Orissa 111, Rel. on. (Para 6)

In a partition suit where different properties and businesses are involved, the question of accounts and joint liabilities and assets of the estate to be partitioned becomes essential and for that purpose no separate prayer for rendering accounts need be mentioned in the plaint. (Para 6)

(D) Civil P. C. (1908), O. 6, R. 2; O. 14, Rr. 1, 3; O. 20, R. 4 — Decision on a plea not covered by pleadings and issues — Principles and tests for upholding such decision.

The parties must have fully known before going to the trial that the new plea taken would be thrashed out and decided in the suit to have a bearing on the ultimate result of the suit. None of the parties should be taken by surprise on account of a new plea foreign to the pleading of the party raising it.

The opponent of the party setting up the new plea must have accepted the challenge of the said plea without objection as to its absence in the pleading or issue by adducing rebutting evidence or otherwise dealing with the same.

The party challenging the plea must have reasonable opportunity to meet it effectively and to adduce evidence against the said plea.

The court must see that by allowing one party to raise a new plea or case not pleaded in his pleading, or for which no issue was framed, no prejudice or injustice is done to the other party.

The new plea set up should not be otherwise legally barred.

If the conditions mentioned above are fulfilled, then the Court can legitimately act upon the new plea not finding any place in the pleading and on which no issue has been framed when the said pleas are proved. The absence of issue in a case like this will be of no avail and the objection, if any, becomes technical having no value. (1869-1870) 13 M. I. A. 573, AIR 1956 SC 593, AIR 1966 SC 735, AIR 1971 SC 1676, Rel. on. (Para 8)

(E) Civil P. C. (1908), S. 11 Explanation 4 — Previous suit for partition and

accounts — Subsequent money suit for recovery of amount paid to discharge joint liabilities — Bar of constructive res judicata — (Contract Act (1872), Ss. 69 and 70).

The principle of res judicata is well known and it is meant to avoid institution of frivolous and harassing suits and also to get rid of multiplicity of proceedings and litigations and to end for good the disputes between the parties on disputes of the same nature.

Where the plaintiff in the previous suit for partition and accounts did not make any claim regarding the payments alleged to have been made by him and the liabilities of the joint estate, it was held that he was estopped from raising it in a subsequent suit by the principles of constructive res judicata under Section 11 Exp. 4 of the Code of Civil Procedure. All the disputes regarding accounts, liabilities and claims in respect of the joint properties had been settled in the previous suit and no part of the claim connected with the previous joint properties and businesses as mentioned in the subsequent suit was maintainable. In the facts and circumstances, the plaintiff was estopped by his conduct in the previous suit by not claiming the amounts demanded in the subsequent suit. It also amounted to waiver of his claim.

(Paras 11 and 12)

When in the previous partition and accounts suit the plaintiff had the right to have a decree for the payments he had made towards the liabilities of the joint properties, such claim could not be made in a subsequent suit in the garb of a different form, alleging that it was a claim under Sections 69 and 70 of the Contract Act. (Para 11)

Cases Referred: Chronological Paras
AIR 1971 SC 1676 = (1971) 1 Lab LJ 31

8

AIR 1966 SC 735 = (1966) 2 SCR 286 8

AIR 1961 Orissa 111 = 27 Cut LT 43 6

AIR 1956 SC 593 = 1956 SCR 451 8

AIR 1951 Mad 938 = (1951) 2 Mad LJ 176

(FB) 6

AIR 1940 PC 11 = ILR (1940) 1 Cal 255

= 67 Ind App 11 6

(1869-1870) 13 Moo Ind App 573 7

Bhupendra Kumar De and Sm, Archana Bhaduri, for Appellant; B. C. Dutta and Amiya Kumar Chatterjee, for Respondents.

R. BHATTACHARYA, J.:— This is an appeal under the Letters Patent against the judgment and the decree

passed by one of our learned brothers, A. K. Sinha, J. in a first appeal reversing the judgment and the decree passed by the Judge, 8th Bench of the City Civil Court at Calcutta in Money Suit No. 81 of 1960. The defendants are the appellants here. In the trial court the suit was dismissed, but in the first appeal the suit was decreed after the setting aside of the decision of the trial court.

2. The relevant facts for this appeal may be stated in brief. One Jhawalal Gupta, a Hindu governed by the Benaras School of Hindu Law was the owner of several properties. He died leaving a widow and four sons. They constituted a joint undivided family. Thereafter Satya Narayan Gupta for self and representing his minor sons filed a suit in the High Court for partition in respect of the properties left by Jhawalal. There were prayers for partition of the properties and also for accounts. A preliminary decree was passed on 23-5-1952 and before the Commissioner of Partition, the plaintiff being the managing member of the undivided family filed accounts upto 31st Chaitra, 1361 B. S. corresponding to 14th April, 1955 in respect of the properties and the business sought to be partitioned. The Commissioner submitted a report and the court on hearing the parties accepted the Commissioner's report after some modifications therein, and passed a final decree in the suit on the basis thereof on 8-9-58. The parties, thereafter, took possession of the allotments made by the court according to the final decree. Subsequently, however, on 9-3-60 the plaintiff of the previous partition suit, Satya Narayan Gupta filed a Money Suit in the City Civil Court at Calcutta for recovery of an amount of Rs. 4572/- against the widow of late Jhawalal Gupta and the other three step-brothers who were younger in age to the plaintiff and made defendants in the earlier partition suit. The allegations made in the plaint are that in connexion with certain certificate cases started by the Income-tax Department for certain liability of the joint family of the parties and also for joint liability for payments of sale tax of the undivided business of the parties, the plaintiff Satya Narayan had to make payments to the total amount of Rs. 5265.59 to avoid attachment of his own properties and that excluding his share of liability, the plaintiff is entitled to get the total sum of Rs. 4572/- from the defendants on account of the latter's share of the liability. It may be mention-

ed that some items of payments as mentioned in the plaint were made after the final decree and the rest during the pendency of the suit. The defendants who are appellants in this appeal filed a written statement denying the liability. It is stated that the suit is barred by the principles of waiver, estoppel and acquiescence, that the suit is hit by the principles of res judicata and that till the final decree was passed in the previous partition suit, the parties lived in joint mess and the defendants were under the control and management of the plaintiff. It is further stated in the written statement that all payments were made out of the fund of the joint estate and the defendants cannot be liable for any sum. It is also stated that if there was any liability, the plaintiff would have stated before the court in the partition suit or to the Commissioner of Partition and that in the absence of such assertion or claim in the partition suit, the plaintiff is not entitled to ask for contribution towards the alleged payments after the final decree. Such right, if any, was waived by the plaintiff. The learned Judge of the City Civil Court on a consideration of the evidence and circumstances came to the finding that there was abundant evidence to prove that till the date of final decree in the partition suit, namely, 8-9-58, the plaintiff controlled the affairs of the family relating to the immovable properties. The trial Judge disbelieved the plaintiff's evidence that his step-mother, one of the defendants, controlled the affairs of the joint property. The plaintiff himself admitted that he had brought a suit as Karta of the joint family against a tenant in respect of a joint property. According to the learned Judge of the trial court the plaintiff had in his hand money realised out of the joint family properties till the date of final decree and that the plaintiff failed to prove that he had made payment of the certificate dues and sale tax dues as mentioned in the plaint with his own money. In effect the trial court believed that upto the date of final decree, the plaintiff managed the joint family properties and handled the income of the same and as such the payments made were with the money of the joint fund. As the plaintiff could not prove that he spent his own money for meeting the joint liability, the suit was dismissed.

3. In the first appeal before this court preferred by the plaintiff two

contentions were raised from the side of the appellants. The first one was that the onus of proving that the plaintiff continued to act as the karta of the joint family and received all the income of the properties lay on the defendants and the second one was that the burden was on the defendants to prove how much money was received by the plaintiff towards the income of the properties out of which he made payments of the dues towards the joint liability. On the points raised, Sinha, J. did not, however, confidently disturb the finding of the trial court that the plaintiff had been acting as the karta of the joint family till the dates of final decree in the partition suit. But according to him, it was for the defendants to prove how much money was actually realised by the plaintiff out of the joint family funds and further to prove that the plaintiff made payments towards the certificate and sale tax dues of the joint family out of the income of the joint properties coming to the hand of the plaintiff. On the question of *res judicata*, Sinha, J. held,

"it is desirable that any joint liability of the family if known to any of the coparceners or the karta should be brought in the matter of final accounting between the parties, but if for any reason the parties failed to bring those items in the account adjusted on a date prior to the payment of the liability that cannot mean that any party meeting that liability individually would be debarred from realising the proportionate amount by any legal action subsequently. This contention therefore fails."

Ultimately the appeal was allowed and the defendants were held to be liable to pay the amount claimed.

4. We have heard Mr. Dey, the learned Advocate appearing on behalf of the appellants and Mr. Dutt for the plaintiff-respondent. Mr. Dey has challenged the throwing of the onus upon the defendant to prove how much money the plaintiff realised towards the income of the joint properties as karta upto the date of final decree and also the contention that it was for the defendants to prove that the plaintiff had paid money out of the joint income towards the certificate and the sale tax dues. In my view, the onus has been wrongly placed upon the defendants in the present case to prove what amount of money was actually received by the plaintiff acting as the karta of the joint family towards the

income of the joint properties. When it has been proved that it was the plaintiff who acted as the karta upto the final decree in the previous partition suit and that he was collecting the income of the joint properties, the onus is upon the plaintiff to prove how much money he realised out of the joint property and how much money he had spent to meet the joint liabilities. According to the plaintiff, he was managing the affairs of the joint properties, and, as such, he submitted accounts of the joint properties upto the 31st day of Chaitra, 1361 B. S. When it has been proved by evidence that the plaintiff also acted as karta and realised income of the joint property upto the date of the final decree, it was for him to submit accounts relating to the money which came to his hands and also the expenditure he incurred for the maintenance of the property and for meeting the joint liabilities. He was the best person to render the accounts and not the defendants who were not expected to have any knowledge as to the actual income and expenditure. Moreover, Mr. Dey has contended that in the facts and circumstances of this case, it should have been held that the respondent-plaintiff's suit was hit by the principles of *res judicata* and that the suit was barred by Order 2, Rule 2 of the Code of Civil Procedure. It has been further contended that the plaintiff ought to have been held estopped from claiming any amount due to the alleged payments towards the income tax and sales tax liabilities which were alleged to have been made on account of his not having made any such claim before the final decree in the partition suit. Mr. Dutt, however, has contended that as there was no issue regarding *res judicata* in the trial court, and as the plaintiff made the payments subsequent to the submission of his accounts in the partition suit, a different cause of action arose under Sections 69 and 70 of the Contract Act which entitled the plaintiff to file the second suit.

5. Before going to a detailed discussion on the points raised in this appeal, we should note that in the year 1951 the plaintiff Satya Narayan Gupta for self and as natural guardian on behalf of his minor sons Narendra Nath Gupta and Birendra Nath filed the partition suit against Lakshmi Narayan, Sew Narayan, Uday Sankar and Sm. Saraswati Debi, the present defendants, for partition of the joint family properties and businesses and also for accounts. Satya Narayan

as the karta of the joint family, after the preliminary decree was passed declaring the shares of the parties, filed before the Commissioner of Partition accounts in respect of the joint family properties and businesses upto 31st Chaitra, 1361 B.S. The Commissioner made a report to the Court and the same is dated 25th May, 1956. This has been marked Ext. 3 in this suit. It may be mentioned that the preliminary decree in partition suit was passed on 23-5-1952. Thereafter, on some modifications of the Commissioner's report a final decree was passed on 8-9-58. Rule 2 of Order 2 of the C. P. Code provides that every suit shall include the whole claim to which the plaintiff is entitled in respect of the cause of action, but the plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of the court. Where a plaintiff omits to sue in respect of or intentionally relinquishes any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished. It is also stated that a person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs, but if he omits, except with the leave of the court, to sue for all such reliefs, he shall not afterwards sue for any relief so omitted. For the purpose of our present suit, there cannot be any application of Order 2, Rule 2 of the C. P. Code because in the previous partition suit, the plaintiffs of that suit including the plaintiff of the present suit prayed for partition of all the joint properties and businesses and also for accounts against the defendants in respect of the said properties and businesses and claimed both preliminary and final decrees, and in fact after the passing of the preliminary decree, the plaintiff Satya Narayan filed accounts upto a certain date subsequent to the passing of the preliminary decree. Clearly, therefore, it is evident that besides final decree for partition of the joint properties and businesses, there was a prayer for accounts claiming a final decree therefor. The plaintiff claimed a decree for accounts upto the date of final decree in respect of the joint properties and businesses. There was no omission of any claim in the suit. The plaintiff demanded his full claim for partition of the properties and the businesses owned by the members of the joint family and also accounts upto the date of the final termination of the suit. In the present suit the plaintiff has claimed certain amounts of

money which he paid towards the liabilities of the joint properties, particularly the suit business, which come under the purview of the partition and accounts to be determined in the previous suit for partition and accounts. In my view, therefore, Order 2, Rule 2 of C. P. Code need not be considered to see whether the present suit is barred by that provision.

6. Before we pass on to the question of *res judicata*, we should consider the scope of a partition suit because this will be relevant for our consideration in this case. In a suit for partition of common properties and businesses, the shares of the parties in the subject-matters should first be ascertained. Next, in order to make proper allotments to the parties, the subject-matters for partition should be properly assessed and valued and for that purpose and for fair valuation of the allotments for the parties, the assets and the liabilities of the estate for partition should be found out. Provision may be made for meeting the liabilities and in making allotments while considering the assets and liabilities of the joint properties. Money, if necessary, is to be determined for assessment of the proper valuation of the allotments. In order to achieve these purposes, accounts of profits and liabilities are to be taken up for consideration at the time of final decree so that in future after the final decree, the parties may not have any occasion to file suits in connexion with the liabilities or claims in respect of the properties already partitioned and in which the parties have been given possession. There should not be any scope for future litigation over the same matters after the determination of the partition suit. In a suit for partition of properties and businesses, the question of accounting becomes unavoidable for final determination and assessment of the valuation of the properties to be allotted to the parties. In this connection the decision of the Full Bench of the Madras High Court in the case of *Babbru Basavabasavayya v. Babbru Guravayya* reported in AIR 1951 Mad 938 (FB) may be considered. The Bench was constituted by Rajamannar, C. J., Biswa Nath Sastri and Panchapaksa Ayyar, JJ. In that case the nature and scope of an ordinary partition suit was discussed. In paragraph 7 of the judgment, we get:

"It may be necessary in a partition suit not merely to divide the properties

but also to realise outstandings, discharge common liabilities, sell properties not capable of easy division, direct different shares to account for different periods of time in respect of profits of different properties, adjust equities between the parties and give directions from time to time to the Commissioners appointed to divide the properties or take accounts. It is not reasonable to suppose that the power of the court to give directions in respect of all or any of these matters must be exercised only at the time of passing the preliminary decree and is exhausted with the passing of that decree." In paragraph 8 towards the end we get:

"A suit for partition by a member of a joint Hindu family is substantially a suit for an account of the joint family properties on the date of the suit as well as all the profits received by the manager since that date, so that the profits should also be divided and his proper share given to him."

In paragraph 13 of the judgment a summary of the conclusion has been made and we quote a portion thereof as follows:

"A partition suit in which a preliminary decree has been passed is still a pending suit and the rights of the parties have to be adjusted as on the date of the final decree: *Jadunath v. Parameswar*, ILR (1940) 1 Cal 255 = (AIR 1940 PC 11). In such a suit the Court has not only to divide the common properties but has also to adjust the equities arising between the parties out of their relation to the common property the property to be divided. The preliminary decree determines the moieties of the respective parties and thereby furnishes the basis upon which the division of the property has to be made. There are other matters in addition to the moieties of the parties that have to be considered and decided before an equitable final partition can be effected. Among them are the realisation of common outstandings, the discharge of common liabilities, the distribution of the profits of the properties realised pending the suit either in cash or by allotment of property of the requisite value, the grant of owelty, the provision of maintenance to parties entitled thereto, the allotment of lands on which improvements have been effected to the sharer who has improved them, the allotment of alienated lands to the share of the alienor and other similar matters."

The above Madras case was considered by a Division Bench of the Orissa High

Court in the case of *Udekar v. Chandra Sekhar Sahu* reported in AIR 1961 Orissa 111. In this case on consideration of different cases particularly the Full Bench decision of Madras High Court, the Bench held:

"Hence it is obvious that a claim for accounts in a partition suit is implicit in the original suit for partition by metes and bounds and it ought to be settled at the time of the preparation of the final decree."

We have no doubt that in a partition suit like the one before us, where different properties and businesses are involved, the question of accounts and joint liabilities and assets of the estate to be partitioned becomes essential and for that purpose no separate prayer for rendering accounts need be mentioned in the plaint. In the case before us however, besides the prayer for partition of the properties and businesses, there was, in addition a prayer for accounts made by the plaintiff in the plaint.

7. With regard to the question of *res judicata* raised from the side of the defendant-appellants. Mr. Dutt has first of all submitted that in the absence of any issue being framed on the question regarding *res judicata* the said point cannot be considered. In this connexion the case of *Musummat Mitna v. Syed Fazul Rob* reported in (1869-1870) 13 Moo Ind App 573 (PC) may be considered. In that case the Principal Sadar Ameen did not strike any issue according to the Code of Civil Procedure but witnesses were examined and a decree was made. In the appeal before the High Court the decree was affirmed. The matter was then taken to the Judicial Committee. Their Lordships, however, held that though no issue was framed in the trial Court, the parties had gone to trial having full knowledge regarding the real controversy between them, that on that question evidence had been taken and that the conclusion had been correctly arrived at from the evidence by the lower appellate Court. There was no reason for their Lordships to interfere with the decree passed. It was, however stated that although it was the duty of the Court to settle the issues before trial, yet mere omission to frame issue did not vitiate the trial in that case because there was no failure of justice.

8. There is the decision of the Supreme Court in the case of *Nagubai Ambal v. B. Samaroo* reported in AIR 1956 SC 593. In that case the plaintiff

did not make any averment regarding the Rule of his pendency relating to a sale either in his plaint or his reply statement, but he raised this point at the beginning of the trial and led evidence on it. The defendants at that time did not raise any objection to such evidence. The plaintiff was cross-examined on that point and the defendant also gave evidence on his side in that respect. When the matter came before the Supreme Court it held, "That the defendants went to trial with full knowledge that the question of his pendency was in issue, had ample opportunity to adduce their evidence thereon and fully availed themselves of the same and that, in the circumstances, the absence of a specific pleading on the question was a mere irregularity, which resulted in no prejudice to them". Ultimately the Supreme Court explained the principle in paragraph 12 of the judgment in the following words:

"The true scope of this Rule is that the evidence let in on issues on which the parties actually went to trial should not be made the foundation for decision of another and different issue, which was not present to the minds of the parties and on which they had no opportunity of adducing evidence. But that Rule has no application to a case where parties go to trial with knowledge that particular question is in issue, though no specific issue has been framed thereon, and adduce evidence relating thereto."

The Supreme Court in the case of Bhagwati v. Chandramaul appearing in AIR 1966 SC 735 gave a clear decision on this point in the following terms:

"The general rule, no doubt, is that the relief should be founded on pleadings made by the parties. Where the substantial matters relating to the title of both parties to the suit are touched, though indirectly or obscurely, in the issues, and evidence has been led about them, then the argument that a particular matter was not expressly taken in the pleadings would be purely formal and technical and cannot succeed in every case. What the Court has to consider is: did the parties know that the matter in question was involved in the trial and did they lead evidence about it? If it appears that the parties did not know that the matter was in issue at the trial and one of them has had no opportunity to lead evidence in respect of it, that undoubtedly would be a different matter. To allow one party to rely upon a matter in respect of which

the other party did not lead evidence and has had no opportunity to lead evidence, would introduce considerations of prejudice and in doing justice to one party, the Court cannot do injustice to another."

Our attention has been drawn to the case of State of Punjab v. B. D. Kaushal decided by the Supreme Court and reported in AIR 1971 SC 1676. In connection with the point raised as to whether the principle of *res judicata* could be waived and was actually waived in that case, the Supreme Court held "Although no specific plea was taken in the written statement nor was any issue framed before the time of trial, but the necessary facts were present to the mind of the parties and were gone into by the Court." It was further found that the question of *res judicata* was agitated in the Courts below and in this view of the matter, the Supreme Court was unable to understand how in the circumstances, the question of waiver would arise when the point had throughout been under consideration and discussed. Considering the different case laws, the principles and tests for upholding the decision of a plea not covered by pleadings and issues struck in the trial Court may be generally summarised as follows:—

(i) The parties must have fully known, before going to the trial that the new plea taken would be thrashed out and decided in the suit to have a bearing on the ultimate result of the suit. None of the parties should be taken by surprise on account of a new plea foreign to the pleading of the party raising it.

(ii) The opponent of the party setting up the new plea must have accepted the challenge of the said plea without objection as to its absence in the pleading or issue by adducing rebutting evidence or otherwise dealing with the same.

(iii) The party challenging the plea must have reasonable opportunity to meet it effectively and to adduce evidence against the said plea.

(iv) The Court must see that by allowing one party to raise a new plea or case not pleaded in his pleading, or for which no issue was framed, no prejudice or injustice is done to the other party.

(v) The new plea set up should not be otherwise legally barred.

If the conditions mentioned above are fulfilled, then the Court can legitimately act upon the new plea not finding any place in the pleading and on which no issue has been framed when the said pleas

are proved. The absence of issue in a case like this will be of no avail and the objection, if any, becomes technical having no value.

9. Remembering the above principles, let us now consider the facts of the case before us. Against the claim of the plaintiff, it was stated in the written statement that the suit was barred by the principles of waiver, estoppel and acquiescence. It was also stated therein that the suit was barred by *res judicata*. It was also alleged in the written statement that the plaintiff should have disclosed the liabilities before the Court or to the Commissioner for Partition while the previous partition suit was pending and that the plaintiff had waived his right, if any, and is neither competent nor entitled to ask for the contribution for the alleged payments made in the certificate cases before or after the final decree. According to the averment of the defendants all the payments were made out of the income and fund lying with the plaintiff in trust for and on behalf of the defendants. Admittedly, there was the suit for partition and accounts started by Satya Narain Gupta and his sons. The certified copy of the final decree passed in that suit has been marked Ext. 2 and the report of the Commissioner of Partition connected with the decree has been marked Ext. 3. Both the documents were marked exhibits on the side of the plaintiff. Admittedly, the plaintiff's case is that for the joint liability of all the parties including the defendants, he paid the amounts mentioned in the plaint to satisfy the income-tax and the sales tax demands relating to the income of the joint estate including the properties and the businesses which were partitioned in the previous partition suit. Admittedly, again, the plaintiff Satyanarayan submitted accounts of the joint estate including the businesses upto 31st Chaitra, 1361 B. S. He claimed partition as well as all accounts relating to the joint properties and businesses. As against the defence taken on the question of *res judicata* and waiver the plaintiff himself tried to explain the non-inclusion of the claims for the payments in the partition suit stating that before the final decree of the partition suit he informed his Attorney about the payment of the dues which ought to have been paid by all co-sharers. His plea in evidence was that he was told by the attorney that the matter could not be urged in the partition suit. In view of the defence the plaintiff also gave evidence that

after 31st of Chaitra, 1361 B. S. he was not in charge of the joint estate and that his step mother, the defendant No. 1 herself began to look after the joint properties from Baisakh, 1362 B. S. In cross-examination the plaintiff admitted a large number of receipts which were granted on behalf of the co-owners to the joint tenants before the final decree in partition suit. The person who collected rents from the tenant was Manoranjan. He was examined on the side of the defendants and he stated that after collection, he paid rents to the plaintiff who received the same on behalf of all co-sharers. Admittedly again, the plaintiff brought a suit as the karta of the joint family against a tenant and the said suit was dismissed in September, 1958. Plaintiff examined no other witnesses on his side besides himself. On a consideration of the evidence, the trial Court held that not only upto 31st Chaitra, 1361 B. S. was the plaintiff the karta of the joint family and managed the affairs relating to the joint properties but also till the final decree in the partition suit did he act as such, and collect all the income of the joint property and also handled the same. In the facts and circumstances, therefore, it is quite clear that the plaintiff was aware of the defence plea of *res judicata* and waiver in view of the decision of the previous partition suit. The plaintiff also gave evidence to explain why there should not be any plea of *res judicata*. The absence of any specific issue regarding the question of *res judicata* or waiver will not matter in the present case as this will not cause any prejudice to the plaintiff. Both the parties adduced evidence keeping in mind the said plea raised by the defendant. In the present case, however, there was in the pleading of the defendants the pleas of *res judicata*, waiver, estoppel and acquiescence. It can be stated, therefore, that the absence of issue on the said plea will be of little value.

10. It has been next contended by Mr. Dutt on behalf of the respondent that there can be no application of the principles of *res judicata* in this case because the final decree was passed on the basis of the account as submitted upto 31st Chaitra, 1361 B. S. and that the period thereafter upto the date of disposal of the suit was kept open, and in that event when the plaintiff paid the income-tax and sale tax dues after the 31st of Chaitra 1361 B. S. there would be a fresh cause of action for the plaintiff to claim the

money he spent for the joint liabilities of the parties. In this connection Mr. Dutt has submitted that when the plaintiff claims the money, he has paid towards the joint liability and claims the sum payable by the defendants under Sections 69 and 70 of the Contract Act, it has no connexion with the decree for accounts and partition passed in the previous suit. As already stated earlier, the suit was filed for partition and accounts and the plaintiff prayed for final decree in that respect. The plaintiff as the karta of the joint family and as manager filed the accounts of the joint properties and businesses upto 31st Chaitra, 1361 B. S. It should be remembered that Satyanarayan is the plaintiff in the instant case and he was also the plaintiff and represented the other plaintiffs, his minor sons as their guardian. First of all it is the duty of the plaintiff to see that his claim for accounts in the suit be decreed according to his claim. He should take necessary steps for production of evidence to substantiate all his claims regarding the accounts. As the karta, he submitted his accounts upto 31st Chaitra 1361 B. S. The Commissioner for partition considered the same according to the direction of the Court and submitted his report. Before passing the final decree, the Court considered the claims of the parties and made certain modifications in respect of the allotments suggested by the Commissioner for passing a final decree. Before the final decree, therefore, it is but obvious, and also admitted that the plaintiff did not inform either the Commissioner for partition or the Court as to his claim regarding the payments he made for any liability of the joint properties for which his interest might be affected later on. The trial Court in the present suit has found that even after the 31st of Chaitra, 1361 B. S. and upto the date of final decree, the plaintiff Satya Narayan was acting as the karta and managing the joint family properties and also collecting income of the joint estate. This finding has not been set aside or disbelieved by the first appellate Court. The evidence on the other hand, clearly proves that he was in fact receiving rents from the tenants upto the date of the final decree. This is supported by reliable evidence adduced on the side of the defendant. When the plaintiff had managed the affairs of the joint family properties, it was for him to submit accounts for the period subsequent to the 31st of Chaitra, 1361 B. S. He did not submit any such account. It was his duty and it was only

natural for him to claim the amounts of money he had paid towards the joint liabilities as has been claimed by him in the present suit. But, admittedly, the plaintiff did not set up any such claim or submit any account of any joint liabilities either after 31st of Chaitra, 1361 B. S. or at the time when the Court considered about the modification of the report of the Commissioner of Partition in order to pass a final decree in respect of the joint family properties and businesses. He claimed in the partition suit accounts upto the date of final decree and he had every right to make any claim which he was entitled to. The non-submission of the accounts before the final decree or non-mention of any claim in respect of payments, alleged to have been made by him or any liabilities in respect of the joint property supports the defence contention that he made payments in question with the money which were lying in his hands coming out of the income of the joint property. As he had not to pay from his own pocket, he made no claim in respect of the payments made by him. This non-assertion of claim or giving up of the claim will certainly give rise to the bar by the principles of *res judicata* if the plaintiff claims the same in a subsequent suit because this claim he could have made in the previous partition suit, but he did not.

11. Regarding the submission of Mr. Dutt that there was a fresh cause of action as the plaintiff now claims the money under Sections 69 and 70 of the Contract Act, the answer is that the claim of the money relates to the accounting of the joint estate and that the plaintiff could have claimed this money in the partition suit when he was already found to be managing the affairs of the joint family upto the date of final decree and when he had already made payments of the same and had not alleged the same to be the liabilities of the joint estate. When in the previous partition and accounts suit the plaintiff had the right to have a decree for the payments he had made towards the liabilities of the joint properties, such claim cannot be made in a subsequent suit in the garb of a different form. In connexion with this point, the Commissioner's report referred to in the final decree may be looked into. According to the evidence of the plaintiff, the payments were made in connexion with the joint sweet meat manufacturing business now allotted to the plaintiff which was valued at Rs. 10,000/-. It is clearly stated in the item

No. 1 of Pt. II of the Commissioner's report relating to the said business that there were no outstanding and liabilities of the said business. According to the plaintiff's case the payments were made in respect of this business and that was subsequent to the report made by the Commissioners. The plaintiff did not object at the time of passing of the final decree regarding the absence of outstanding and liabilities of the business. The principle of *res judicata* is well known and it is meant to avoid institution of frivolous and harassing suits and also to get rid of multiplicity of proceedings and litigations and to end for good the disputes between the parties on disputes of the same nature. In the present case there can be no doubt that as the plaintiff in the previous suit for partition and accounts did not make any claim regarding the payments alleged to have been made by him and the liabilities of the joint estate, he is estopped from raising it in a subsequent suit by the principles of constructive *res judicata* under Section 11 Explan. 4 of the Code of Civil Procedure. All the disputes regarding accounts, liabilities and claims in respect of the joint properties have been settled in the previous suit and no part of the claim connected with the previous joint properties and businesses as mentioned in the present suit is maintainable.

12. In the facts and circumstances, the plaintiff is estopped by his conduct in the previous suit by not claiming the amounts demanded in the present suit. It also amounts to waiver of his claim. According to the final decree in the partition suit, he got the Sweet Meat business to his own allotment without there being any liability for any of the joint owners. But now, after getting the same for himself the plaintiff cannot say that there was joint liability either for payment of sale tax or income-tax. The plaintiff must be held to be estopped by his conduct from claiming any money from the previous joint owners on the ground of joint liabilities. Had there been any claim on the part of the plaintiff for such payment, then the other co-owners would have the right to demand accounts regarding the management of the plaintiff as the karta from 31st of Chaitra, 1361 B. S. to the date of final decree. This was certainly to the disadvantage of the defendants and this sort of claim, for ends of justice, should not be allowed.

13. In the facts and circumstances mentioned above, we find that the learned Judge was wrong to hold that the ques-

tion of *res judicata* should not be allowed to be agitated. He was again wrong in holding that simply because the payment of sale tax and income-tax was admitted, the plaintiff was entitled to get a decree against the defendants. The first appellate Court came to its decision without properly considering the plea of *res judicata*. The judgment and the decree passed in the first appeal are, therefore liable to be set aside.

14. In the result, the appeal succeeds and the judgment and the decree in the first appeal are hereby set aside and the judgment and the decree of the trial Court are restored. We have no order, however, as to costs in this appeal or in the Court of appeal below.

A. K. JANAH, J.:— I agree.

Appeal allowed.

AIR 1977 CALCUTTA 108

A. P. BHATTACHARYA AND
BIMAL CHANDRA BASAK, JJ.

Ayesha Khatoon, Appellant v. Durga Sahaya, Respondent.

A. F. O. D. No. 286 of 1969, D/- 14-6-1976.

Civil P. C. (1908), O. 6, R. 17 — Court can take notice of subsequent events in deciding application for amendment of plaint — Power of appellate Court.

A (landlord) filed a suit for ejectment of B (tenant) on the ground of forfeiture of lease. The suit was dismissed by the first Court and A filed an appeal. Pending appeal the period of lease expired and the appellant applied for amendment of plaint by claiming relief on the additional ground of expiry of lease.

Held: it is well settled that in proper cases the Court is entitled to take note of the subsequent events and grant relief to the parties accordingly, if by so doing it can shorten litigation and best attain the ends of justice. This power may be exercised even by the Court of appeal as an appeal is only in the nature of a rehearing. AIR 1959 Andh Pra 9 and AIR 1975 SC 1409, Rel. on. (Para 2)

Cases Referred: Chronological Paras

AIR 1975 SC 1409 = 1975 SC (Notes) 141

AIR 1959 Andh Pra 9 = (1958) 2 Andh
WR 447

JT/KT/D331/76/KNA

C. C. Ganguly and A. K. Chatterjee, for Appellant; B. K. Lal, for Respondent.

A. P. BHATTACHARYA, J.:— This is an appeal by the plaintiffs whose suit for ejectment of a monthly tenant on the ground of forfeiture of the lease for non-payment of rent was dismissed by the trial Court. The appeal is contested by the defendant. The defendant's prayer for relief against forfeiture under Section 114 of the Transfer of Property Act was allowed by the Court below and on compliance thereof the suit was dismissed. Mr. Ganguly arguing the appeal before us has submitted that the conduct of the defendant appellant has been such that the relief against forfeiture should not have been allowed to him as he had contested the suit and is also contesting the appeal with equal vigour.

2. Mr. Ganguly at the time of argument submitted that the lease had expired on 31st May 1976 and he made an application for amendment of the plaint by introducing an additional ground for eviction namely a ground which is now available to the plaintiffs appellants after the lease has expired by efflux of time on 31st May 1976 though this event happened during the pendency of this appeal. An application for amendment of the plaint by adding an alternative prayer to that effect as a ground for eviction is opposed by the respondent who has sworn an affidavit-in-opposition as a counter to the petition of the appellant. Mr. Ganguly contends that his application should be allowed not only for ends of justice but also for shortening litigation. He placed reliance upon a Bench Decision of Andhra Pradesh High Court reported in AIR 1959 Andh Pra 9, *Amritlal N. Shah v. Alla Annapurnamma*. The facts of the Andhra Pradesh case are identical to the facts of the instant case. The plaintiff in the reported case brought a suit for eviction of the defendant on the ground of forfeiture of lease for non-payment of rent. During the pendency of the suit, the lease expired and the plaintiff sought for an amendment of the plaint putting forward an alternative ground of claim for possession on the basis of expiry of the lease. It was held that the prayer for amendment should be allowed and the plaintiff could be granted relief on that basis without driving him to a separate suit. The identical facts are before us and we agree with the principles laid down by the Andhra Pradesh High

Court. It is well settled that in proper cases the Court is entitled to take note of the subsequent events and grant relief to the parties accordingly, if by so doing it can shorten litigation and best attain the ends of justice. This power may be exercised even by the Court of appeal as an appeal is only in the nature of a re-hearing. Mr. Ganguly has also referred to a decision of the Supreme Court in *Pasupaleti Venkateswarlu v. The Motor & General Traders*, (C. A. No. 2120=22 of 1972) dated 18-3-1975 (1975 SC (Notes) 141) = (AIR 1975 SC 1409). It was held that the Court could take cognizance of subsequent events or of any facts which had a material bearing on the right claimed by the party. On the facts of the reported case the subsequent event of recovery of another accommodation by the landlord during the pendency of a suit for ejectment was taken into consideration though it happened during the pendency of the litigation. It has been observed that it would be unfair to drive parties to a new litigation of unknown duration. The landlord was accordingly allowed to amend the petition if he had a case for eviction on any other legally permissible ground. The proposition laid down by the Andhra Pradesh High Court thus finds support in the Supreme Court decision which has been placed before us. The instant application for amendment in our view should therefore be allowed. The plaintiff appellant is permitted to amend the plaint in Title Suit No. 59 of 1966. Leave is also given to re-verify the plaint as prayed for. In that view of the matter the decision of the trial Court is liable to be set aside.

3. It is ordered that the appeal be allowed and the decree under appeal is set aside and the suit is sent back on remand to the trial Court. After the amendment of the plaint is carried out and re-verification is made the defendant would be given reasonable opportunity of filing additional written statement against the said amendment of the plaint and the Court will frame the relevant additional issue and entertain additional evidence, if any, both oral and written and decide the case. With regard to the findings of the trial Court on the issue already before him we do not express our views on those findings as at present. We make no order as to costs in this appeal.

4. Let the records go down to the trial Court promptly and the Court below will dispose of the suit within three

months of receipt of the record in the lower Court.

BIMAL CHANDRA BASAK, J.:— I agree.

Appeal allowed.

AIR 1977 CALCUTTA 110

FULL BENCH

SANKAR PRASAD MITRA, C. J.

M. M. DUTT AND A. K. DE, JJ.

Gurudas Biswas, Appellant v. Charu Panna Seal and others, Respondents.

Full Bench Reference No. 1 of 1967 in A. F. O. D. No. 241 of 1960, D/- 17-7-1974.

(A) W. B. Premises Tenancy Act (12 of 1956), Sections 17 (3) and 13 (1) and (6) — Suit for ejectment — Defence as to delivery of possession struck out under Section 17 (3) — Tenant is not precluded from taking defence on non-existence or invalidity of notice under Section 13 (6). (Interpretation of Statutes — Heading of Section — Consideration).

Where in a suit for ejectment even if defence as to delivery of possession has been struck out under Section 17 (3) the defendant can take the defence of the non-existence or invalidity of a notice under Section 13 (6) in the Court below and in the Court of appeal. (1964) 68 Cal WN 184, Relied on. (Para 29)

On a reference to Section 13 it can be found that the grounds on which "recovery of possession" may be had are enumerated in its sub-section (1) and not in any other sub-section. Upon a reading of Sections 17 (1) & 17 (3), with Section 13, particularly its sub-section (1) it would be clear that the expression "defence against delivery of possession" in Section 17 (3) means the defence as may be taken on any or more of the "grounds" in Section 13 (1). When a defence against delivery of possession is struck out, the tenant's defence on the grounds in Section 13 (1) is only struck out. By Section 13 the tenants have been given special protection against evidence on grounds, enumerated in Clauses (a) to (k) of sub-section (1). In Section 13 (6) it has further been laid down that a landlord, before filing a suit for eviction, is required to give a notice of suit in addition to, or together with, his notice to quit under Section 106 of the T. P. Act to "ask for" a decree for possession considering

"if the tenant has disintitiled himself" to protection against eviction on any or more of the grounds introduced by Sec. 13 (1). (Paras 8, 9)

When a tenant is held evictable in law, the Court further considers whether he can seek or get protection against "eviction" on any grounds in sub-sec. (1). Sub-section (6) is not any protection against eviction. Sub-section (6) is part of Section 13. The heading of section is "protection of tenant against eviction". Heading prefixed to a section cannot restrict the meaning of the section, and, is only useful aid in cases of doubt. If the language of section is clear, heading is not to be taken into consideration. The heading cannot be used to cut down the clear words of the section. (Para 13)

(B) W. B. Premises Tenancy Act (12 of 1956), Section 17 (3) — Suit for ejectment — Tenant not appearing in Court and taking defence as to non-existence or invalidity of notice of ejectment — Decree passed ex parte — Defendant is barred from taking that defence in appeal. (Civil P. C. (1908), O. 20, R. 4, Evidence Act (1872), S. 115).

To pass an ex parte decree in a suit for ejectment on one of the grounds in Section 13 (1), the Court is required to decide, whether the suit is defended or not (if the relationship of landlord and tenant is not disputed) (a) whether the tenancy has been validly determined by a notice under Section 106, T. P. Act, (b) whether a valid notice of suit was given before filing the suit, (c) whether the ground alleged in the plaint to take away the tenant's special protection conferred by Section 13 (1), has been established on the evidence. This is the requirement of Order 20, Rule 4, Civil P. C., whether the suit is contested or not. The Court cannot relieve itself of the necessity of complying with Order 20, Rule 4 even if it strikes out the tenant's defence against delivery of possession or the written statement. That being the position in law, it would be wrong not to permit the tenant to contend and show, if possible, on plaintiff's evidence and materials as are on record, both at the trial and also at the appeal stage, that the plaintiff is not entitled to the decree prayed for, though he would not be permitted either to cross-examine plaintiff's witnesses, when they give evidence, or to call his own witnesses at the trial, if his defence is struck out.

(Para 26)

There is no finding in the ex parte judgment by the trial Judge that the de-

fendant is a "defaulter". As it had not made any such finding, the Court could not pass a decree for eviction. (1969) 2 SCR 432, Rel. on. (Para 27)

When a suit is decreed *ex parte*, because of the defendant not appearing or not participating in the trial after appearance, law has given him the right to file an appeal against that *ex parte* judgment and decree and to show in that appeal that the judgment, on the materials on record, could, and should, not have been passed. He cannot, therefore be debarred from urging at the hearing of such an appeal his objections to the decree. Further because of his appearance on the day of trial and "Voluntary retirement" thereafter from the case it could not be said that he waived his "right" to object to the entertainability of the suit on the ground of absence or invalidity of the notice of ejectment. Voluntary retirement following an erroneous admission of the lawyer is no "waiver" by the defendant. Even if it were so, it would not be waiver as this "right to object" was not known. (Para 25)

Cases Referred: Chronological Paras

AIR 1973 SC 1311 = (1973) 3 SCR 691	27
AIR 1970 SC 794 = 1970 Ren CR 375	27
AIR 1970 SC 838 = (1969) 2 SCR 1048	27
AIR 1972 SC 343 = 1972 Lab IC 200	21
(1969) 2 SCR 432 = (1969) 1 SCWR 51	27
AIR 1964 Cal 1 = 67 Cal WN 977 (FB)	23
(1964) 68 Cal WN 184	6, 10, 12, 17, 20, 22, 28
(1961) 65 Cal WN 1110 = ILR (1960) 1 Cal 875	10
AIR 1959 SC 149 = 1959 Supp (1) SCR 528	21
AIR 1957 SC 425 = 1957 SCR 575	22
AIR 1953 Cal 409 = 57 Cal WN 294	10, 11
AIR 1950 SC 134 = 1950 SCR 335	14
(1948) 1 KB 29 = (1947) 2 All ER 276	16
AIR 1940 PC 105 = 67 Ind App 222	15
AIR 1935 PC 79 = 62 Ind App 100	21
AIR 1919 Cal 972 = 27 Cal LJ 447	25
AIR 1918 PC 20 = ILR 42 Bom 462	15
(1907) 11 Cal WN 848	22
(1904) 31 Ind App 132 = ILR 26 All 393	13, 14

Sushil Kumar Biswas, Biplab Kumar Mitra, for Appellant; Satya Charan Pain, for Respondents.

A. K. DE, J.:— Charu Panna Seal started Ejectment Suit No. 1832 of 1958 on 8-10-1958 in the City Civil Court for eviction of Gurudas Biswas from Suite No. 1 on the first floor of premises No. 1, Jatindra Mohan Avenue.

2. In the plaint she stated that she had terminated the tenancy of Gurudas by serving a "notice to quit" on him on 13-8-1958 asking him to vacate the premises on the expiry of the last day of September, 1958. She further stated in the plaint that Gurudas had disintitiled himself to protection from eviction having "defaulted in the payment of rents for the suit premises from December, 1954".

3. Gurudas contested the suit filing a Written Statement. He denied that he was a defaulter in the payment of rents. He also denied receipt of the notice to quit and stated that the notice dated 13-8-1958 was illegal, insufficient and void and had not determined his tenancy under Charu Panna. Gurudas, the defendant, appeared in the suit on 12-3-1959 and on the same day filed a petition praying for "leave" to deposit rents for the months of January and February, 1959 and the subsequent current rents, month by month. The learned Judge by his order No. 5 dated 12-3-1959 granted it. After the issues were framed in the suit the plaintiff filed on 5-5-1959 a petition under Section 17 (3) of the West Bengal Premises Tenancy Act with the prayer to strike out the defendant's "defence against delivery of possession". This petition under Section 17 (3) was taken up for hearing on 22-6-1959 when the learned Judge made the following order:—

"Petition under Section 17 (3) is taken up. Heard lawyers appearing on both sides. As the facts necessary to decide question of default which is one of the issues framed in the suit also are involved in the application under Sec. 17 (3) of the West Bengal Premises Tenancy Act, it is desirable that both the matters should be heard on the same date and as such, the petition under Section 17 (3) is left for consideration at the trial".

4. On the same date the defendant filed a petition of objection against the plaintiff's petition under a Section 17 (3). On 14-3-1960 the plaintiff filed a petition for her own examination on commission. The learned Judge by his order No. 19 dated 14-3-1960 allowed that prayer. Her evidence was taken by a Commissioner appointed by the Court. The said Commissioner submitted his report on 16-3-1960. In the meantime, the learned Judge

by his Order No. 20 dated 15-3-1960 fixed the suit for positive hearing on 16-3-1960. On that date both the parties came ready and the learned Judge had recorded this order.

"23. 16-3-60. Both parties ready. The plaintiff has tendered the commission evidence. The application under Section 17 (1) (a mistake for Section 17 (3)) W. B. P. R. C. Act, 1956 put up. The defendant's learned Advocate Sree R. L. Dutta examining after the Challans filed by the defendant submitted that the defendant did not, on the Challans filed, deposit rent on term of Section 17 (1), of the Act upto date and that his W. S. can't be saved from being struck off. Then Sree Dutta took leave of the Court and retired. The W. S. of the defendant is struck off. The plaintiff's evidence on commission submitted for judgment to 17th March, 1960, as the defendant has withdrawn from the suit.

S. Bagchi
Judge."

On 17-3-1960 the learned Judge decreed the suit ex parte for eviction of the defendant Gurudas by his order No. 25 dated 17-3-1960. The defendant filed First Appeal No. 242 of 1960 in this Court against the said judgment and ex parte decree.

5. In the first appeal the defendant-appellant appeared to have argued that the plaintiff was not entitled to a decree in the suit as no notice of suit had been given under Section 13 (6) and that such notice, if any given, was invalid; that the evidence, on which the learned Judge had decreed the suit ex parte, was not sufficient to prove the validity of the notice of ejectment meaning the notice to quit under Section 106 of the Transfer of Property Act.

6. Two learned Judges of the Division Bench, hearing the first appeal, were of the view that when the defence against delivery of possession had been struck out under Section 17 (3) the defendant should not be allowed to agitate the ground as to the non-existence or invalidity of a notice under Section 13 (6), either in the Court below or in the Court of Appeal and that he should not be permitted to take the defence as to the non-existence or invalidity of a notice of ejectment for the first time in appeal as he did (not?) appear in the Court below at the final hearing. Their views, indicated above, did not agree, in their opinion, with the decision of another Division Bench of this Court in the case of *Subodh Chandra Singha v. Santosh*

Kumar Srimani reported in (1964) 68 Cal WN 184 on those points. They had framed two points, quoted below, and had referred the case to the Full Bench for determination as to whether upon the two points, framed by them, the decision in the case of *Subodh Chandra Singha v. Santosh Kumar Srimani*, (1964) 68 Cal WN 184 has been rightly decided.

7. The two points, framed by them, are:—

(1) In our opinion, where a defence as to delivery of possession has been struck out under Section 17 (3) the defendant can no longer take the defence of the non-existence or invalidity of a notice under Section 13 (6) either in the Court below or in the Court of Appeal.

(2) In our opinion, where a defendant does not appear in the Court below and take the defence as to the non-existence or invalidity of a notice of ejectment he should not be permitted to take the defence for the first time in appeal.

8. Before introduction of Section 12 of the West Bengal Premises Rent Control (Temporary Provisions) Act, 1950 and subsequent introduction of Section 13 (1) in the West Bengal Premises Tenancy Act, 1956, on repeal of 1950 Act, a landlord was entitled to a decree for eviction of a tenant on proof that he had validly determined the tenancy of the tenant. By Section 13 of the West Bengal Premises Tenancy Act, 1956 the tenants have been given special protection against eviction on grounds, enumerated in Clauses (a) to (k) of sub-section (1). In Section 13 (6) it has further been laid down that a landlord, before filing a suit for eviction, is required to give a notice of suit in addition to, or together with, his notice to quit under Section 106 of the Transfer of Property Act to "ask for" a decree for possession considering "if the tenant has dis-entitled himself" to protection against eviction on any or more of the grounds introduced by Section 13 (1).

9. Section 17 (1) of the West Bengal Premises Tenancy Act, 1956, to be hereafter called the Act, is that a tenant, against whom a suit on "any of the grounds referred to in Section 13" has been instituted will be required to pay or deposit arrear of rents, if any, and to continue depositing or paying current rents, thereafter, within periods specified therein. Consequence of non-compliance with Section 17 (1) is in Section 17 (3) which is that if a tenant fails to deposit or pay any amount "referred to in sub-section (1)....." the Court shall

order, his defence "against delivery of possession" to be struck out and shall proceed with the hearing of the suit. When we refer to Section 13, we find that the grounds on which "recovery of possession" may be had are enumerated in its sub-section (1) and not in any other sub-section. Upon a reading of Sections 17 (1) and 17 (3), with Section 13, particularly its sub-section (1) we are of opinion that the expression "defence against delivery of possession" in Section 17 (3) means the defence as may be taken on any or more of the "grounds" in Sec. 13 (1). When a defence against delivery of possession is struck out, the tenant's defence on the grounds in Section 13 (1) is only struck out.

10. The decision in (1964) 68 Cal WN 184 had been doubted by the Division Bench, referring to the Gellatly's case in 57 Cal WN 294 = (AIR 1953 Cal 409) to observe that "sub-section (6) of Section 13 is as much protection to the tenant as sub-section (1)" because of the "heading of Section 13". A similar argument based on Gellatly's case, was made and repelled in the case of Ajit Kumar v. Baijnath in (1961) 65 Cal WN 1110, Renupada Mukherjee, J., observing:

"That decision was made under the Rent Control Act of 1950 and to some extent the Lower Appellate Court has relied upon that decision. I am, however, of opinion that that decision has got no application to a case where a defence of the tenant against delivery of possession has been struck out under Section 17 (3) of the West Bengal Premises Tenancy Act, 1956. The reason is this. Mr. Roy Chowdhury rightly pointed that the Rent Control Act of 1950 did not make any provision for service of a notice of ejectment upon a tenant prior to the institution of the suit. The notice was governed by the provisions of Section 106 of the Transfer of Property Act. The West Bengal Premises Tenancy Act of 1956 makes a separate provision for service of notice upon the tenant before the filing of an ejectment suit... ..

Section 17 (3) of the Act does not say that the whole defence of the defendant will be struck out if he incurs the penalty of non-payment of arrears of rent or of current rent. It says that the defence against delivery of possession will be struck out. The expression "defence against delivery of possession" is a relative expression, because the word "defence", is a counterpart of the word

"offence" which in this particular context means the case of the plaintiff. In an ejectment suit under Section 17 of the Act, the plaintiff claims recovery of possession of some particular premises on a ground or grounds referred to in Sec. 13. Where a suit is contested, the tenant puts forth a defence against the ground or grounds alleged in the plaint. Sub-section (3) of Section 17 lays down that a tenant who incurs the penalty contained in that sub-section shall not be permitted to press his defence against delivery of possession which should be struck out. This has no reference to the service of notice or to its validity. It may be that the service of a notice to quit is a condition precedent to the institution of a suit for ejectment under Section 17 of the Act, but it cannot be said by any stretch of imagination that the notice has any connection, direct or remote, with the several grounds of ejectment enumerated in Clauses (a) to (k) of sub-section (1) of Section 13 of the Act. That being the position, it will be permissible for a tenant whose defence against delivery of possession has been struck out to contest the suit of the plaintiff landlord on the ground that the notice to quit has not been served upon him, or that the notice is not legal or sufficient."

11. In 57 Cal WN 294 = (AIR 1953 Cal 409) the suit was filed on the ground that the tenant, being a defaulter in payment of rents, was not entitled to any protection under Section 12 (1) (i) as his defence against "ejectment" had been struck out under Section 14 (4) of 1950 Act. It was held that for non-compliance with the provision of Section 14 (1) his defence against ejectment i.e. his defence so far as the "special protection" in Section 12 (1) (i) conferred on the tenant, would be unavailable to him. That case did not consider the question that has arisen in the instant case. There was no corresponding provision like Section 13 (6) in Section 12. Whether a defence as to the entertainability of a suit on the ground of absence of notice, enjoined under the 1950 Act, was also a "special protection" conferred to a tenant by that Act was not considered or decided. That case is of no aid in determination of the questions before us.

12. The conclusion, that we have reached above, is what two Division Bench decisions of this Court, namely in (1964) 68 Cal WN 184 and 73 Cal WN 305 have made on the same question. P. M. Mukherjee, J., speaking for the Court in

(1964) 68 Cal WN 184 observed as follows rejecting Mr. Sen's contention.

"Mr. Sen appearing on behalf of the plaintiff respondent while realising that the impugned notice might be invalid or insufficient for purposes of Section 13 (6) of the West Bengal Premises Tenancy Act, 1956, and this invalidity or insufficiency may lead to the dismissal of his client's suit, as aforesaid sought to argue that the above objection is no longer open to the defendant appellant in this Court. Mr. Sen argued that in the instant case the tenant's defence against delivery of possession was struck out under Section 17 (3) of the West Bengal Premises Tenancy Act, 1956. Mr. Sen argues that the objection to the notice under S. 13 (6) of the West Bengal Premises Tenancy Act, 1956 which according to him, is only part of the special defence, provided under the aforesaid Act, must be deemed to have been taken away from the defendant and it is no longer open to him to urge this point in support of this appeal..... The mere striking out of the tenant's defence — be it the general defence under the law or only the special defence, if any, under the above Act, would not, therefore, affect this position and improve the plaintiff's lot and its only effect will be that the tenant, whose defence has been struck out, will be placed merely in the position of one, who has not defended the suit and the suit would proceed ex parte. In other words, the result, will be that the suit will be heard ex parte. Even at this ex parte hearing, however, the plaintiff will have to prove that he has complied with all the requirements, which would entitle him to maintain the suit. The position in regard to the notice under Section 13 (6) in this respect, is in no way, different from the position in regard to a notice to quit and it is, certainly, well and firmly established that, even in an appeal from an ex parte decree for ejectment, the tenant is entitled to challenge the validity and sufficiency of the notice to quit".

R. N. Dutt, J., in the other case, speaking for the Court, observed as follows:

"We would rather hold that what is struck out is the defence against delivery of possession under Section 13 (1) of the Act. The special protection conferred on the tenant under the premises Tenancy Act, 1956, is contained in Section 13 (1) of the Act. What is struck out under Section 17 (3) of the Act is the defence against delivery of possession provided

for under the Act, that is the special protection contained in Section 13 (1) of the Act. The effect of this conclusion is that apart from the question of jurisdiction the landlord will have to prove the service of notice of suit under Section 13 (6) of the Act of 1956."

13. The next point for consideration is whether sub-section (6) of Section 13 is also a special "protection" conferred by 1956 Act to the tenant. Sub-section (6) is part of Section 13. The heading of section is "protection of tenant against eviction". Heading prefixed to a section cannot restrict the meaning of the section, and, is only useful aid in cases of doubt. If the language of section is clear, heading is not to be taken into consideration. The heading cannot be used to cut down the clear words of the section. Lord Macnaghten speaking for Privy Council in the case of *Thakurain Balraj Kunwar v. Rae Jagatpal Singh* reported in (1904) 31 Ind App 132 (PC) observed at page 142

"It is well settled that marginal notes to the section of an Act of Parliament cannot be referred to for the purpose of construing the Act. The contrary opinion originated in a mistake and it has been exploded long ago. There seems to be no reason for giving the marginal notes in an Indian Statute any greater authority than the marginal notes in an English Act of Parliament".

Sub-section (6) prescribed a step to be taken before filing the suit. "Protection against eviction" relates to a step after the suit is decided against the tenant for his eviction. When a tenant is held evictable in law, the Court further considers whether he can seek or get protection against "eviction" on any grounds in sub-section (1). Sub-section (6) is not any protection against eviction.

14. In *I.-T. Commissioner v. Ahunbhai Umarbhai & Co.* reported in AIR 1950 SC 134 at p. 141, para. 19 (middle) Supreme Court quoted with approval the observations in (1904) 31 Ind App 132 (PC).

15. Lord Thankerton in the case of *Secretary of State v. Mask & Company* reported in AIR 1940 PC 105-109 and Lord Sumner in the case of *Abdul Rahim Mohamed v. Municipal Commissioners for City of Bombay* reported in ILR 42 Bom 462 = (AIR 1918 PC 20) made similar observations.

16. *Mostwell on Interpretation of Statutes* — 11th Edition at page 48 quot—

ing Lord Goddard in *Rex. v. Surrey Assessment Commissioner* reported in (1948) 1 KB 29 at page 32 writes:

"While the Court is entitled to look at the headings in an Act of Parliament to resolve any doubt they may have as to ambiguous words, the law is quite clear that you cannot use such headings to give a different effect to clear words in this section, where there cannot be doubt as to the ordinary meaning".

17. P. N. Mukherjee, J., has held in (1964) 68 Cal WN 184 at page 187. Col. 2 that it refers to "Jurisdiction" observing as follows:—

"It is, in essence, a point of jurisdiction or, in other words, the Court has no jurisdiction to entertain the suit in the absence of such a notice. It is not, strictly a part of the tenant's defence. It is a part of the requirement of the plaintiff to entitle him to maintain the suit."

18. If we accept the contention that the heading controls the whole of Section 13 in all its sub-sections, consequence that will follow will be that the defence of a tenant, sued for eviction on the ground under Section 13 (1) (f), pleading the bar laid down in sub-sec. (3-A), will also be unavailable to him on his "defence against delivery of possession" being struck out. That is a defence unconnected with "special protection", imposing restriction upon the landlord in the matter of commencement of his suit for eviction before a "certain period". "Special Protection", conferred by the 1956 Act, is only in Section 13 (1). Any other defence under any other sub-section of Section 13 or in any other section of the Act or in other Act is not "against delivery of possession". The words of Section 13 are clear. Meaning of any of its sub-section, is not to be ascertained with reference to the heading of the section.

19. By the notice under Sec. 106, Transfer of Property Act the landlord gets the right to possess. He has to enforce that right by a suit for recovery of possession. An embargo on his such right by a suit to recovery of possession is that he has to give a notice of suit under Section 13 (6) of 1956 Act. It was argued that by putting that "embargo" another protection against eviction was given to the tenant. This contention does not appear to us to be sound. This restriction has no connection with "eviction of the tenant". It is but a restriction on the "filing" of the suit. That means that the

Court is to consider, on such objection when taken, as to whether it can hear the suit or go into questions relating to special protection and not to consider as to whether "special protection" is available or will be given or not.

20. The decision in (1964) 68 Cal WN 184 cannot be said to have been reached incorrectly on this ground. Question (1) will be answered in the affirmative.

21. When a suit is decreed *ex parte*, because of the defendant not appearing or not participating in the trial after appearance, law has given him the right to file an appeal against that *ex parte* judgment and decree and to show in that appeal that the judgment, on the materials on record, could, and should, not have been passed. He cannot, therefore be debarred from urging at the hearing of such an appeal his objections to the decree. The question is whether because of his appearance on the day of trial and "Voluntary retirement" thereafter from the case he waived his "right" to object to the entertainability of the suit on the ground of absence or invalidity of the notice of ejectment. Whether he, has waived his "right" by voluntary retirement? N. H. Bhagwati J., in the case of *Basheswar Nath v. I.T. Commissioner* reported in AIR 1959 SC 149 in para. 53 while dealing with the connotation of "waiver" observed:

"It has been said that 'waiver' is a troublesome term in law. The generally accepted connotation is that to constitute waiver there must be an intentional relinquishment of a known right or the voluntary relinquishment or abandonment of a known existing legal right, or conduct such as warrants an inference of the relinquishment of a known right or privilege. Waiver differs from estoppel in the sense that it is contractual and is an agreement to release or not to assert a right, Estoppel is a rule on evidence. (See *Dawson's Bank Ltd. v. Nippon Menkwa Kabushiki Kaisha*, 62 Ind App 100 at p. 108 = (AIR 1935 PC 79 at p. 82))... and it would, I think, be going too far to hold that every unsuspecting submission to a law, subsequently declared to be invalid, must give rise to a plea of waiver; this would make constitutional rights depend for their vitality on the accident of a timely challenge and render them illusory to a very large extent."

In the case of *The Indian Link Chain Manufacturers Ltd. v. The Workmen re-*

ported in AIR 1972 SC 343 it has been held that "there cannot be any waiver by conduct or by implication of the requirement of a written notice" Voluntary retirement of the lawyer is only a 'conduct' of the defendant, if any.

22. P. N. Mukherjee, J., in (1964) 68 Cal WN 184 at page 186, Col 2 observed:

"Assuming however, that the point was not raised earlier as aforesaid, even then we are of the view that the plea of waiver is utterly inappropriate in a case of this kind. Waiver, as it is well known, is intentional relinquishment of a known right. It is true, that such intention may be inferred from circumstances, but the right in question must be a known right. This, indeed is well established in this Court (Vide — Dhanukdhari Singh v. Nathima Sahu, (1907) 11 Cal WN 848) and it has only recently been re-affirmed by the Supreme Court in Manak Lal, Advocate v. Dr. Prem Chand Singhi, AIR 1957 SC 425 at p. 431. Their Lordships of the Supreme Court have in the case, just cited, categorically laid down that the party, against whom waiver is pleaded, must have known about the relevant facts and of his right, which was said to have been waived. Judged by this test, the plea of waiver in the instant case would be unavailing. The law on the point of the notice under Section 13 (6) of the West Bengal Premises Tenancy Act, 1956, and particularly, whether it will be a notice to quit or a notice of suit or a combined notice to answer both the above descriptions, was unsettled and was in a state of confusion or in a fluid state until the recent Special Bench decision in F. A. 444 of 1961 (See also F.S.'s Nos. 101 and 102 of 1961), above cited. If the law was unsettled and the position was not clear as to the nature of this particular notice, it will normally, at least, and generally speaking, — that is, in the absence of very strong circumstances to the contrary — be utterly inappropriate to uphold a plea of waiver in respect of such a notice. It is significant to note, in this connection, that the plaintiff, in the instant case, refers to the notice in question only as a notice to quit. There is no reference, in the plaint to this notice as a notice of suit. It is difficult, in the above context, in the circumstances of this case, to sustain a plea of waiver of the disputed notice or of any defect thereof as a notice of suit, even assuming that no specific objection was taken on the ground that it is not a proper notice of

suit under Section 13 (6) of the West Bengal Premises Tenancy Act, 1956."

23. Waiver is "intentional withdrawal of a known existing right". The judicial pronouncement laying down that a notice is a necessary antecedent step before a trial for eviction was made only on 19-6-1963 when this Court in its Full Bench decision in AIR 1964 Cal 1 so ruled. The tenant when his lawyer retired on 16-3-1960 had not any knowledge of any such right to object to the filing of ejectment suit for absence of notice under Section 13 (6). So his retirement on 16-3-1960 was not waiver of a known right. The referring Judges when they felt unable to agree with P. N. Mukherjee, J. do not appear to have adverted to his Lordship's observations and had not given any reasons for their disagreement with him.

24. There was no statement in the plaint that two notices, one to quit and the other notice of suit, or one notice, combining both, was given. If the statements in paras. 3 and 4 of the plaint are taken as referring to the two notices, separate or combined, then the defence in paras. 4 and 5 of the written statement is a denial of the same, as to the existence and validity of both. No specific issue was raised as to the notice of suit. There was no waiver of the objection as to absence or invalidity of notice of suit. Objection as to that, in our opinion, was taken in paragraphs 4 and 5 of the written statement. The question is whether the tenant, not waiving his objection as to the notice, in his written statement, can be said to have waived it by "retirement" from the suit.

25. It was contended that there was "voluntary retirement" from the suit by the defendant when his lawyer, upon his reading of the defendant's challans, submitted "the defendant did not, on the challan filed, deposit rent on term of Section 17 (1) of the Act upto date and his written statement cannot be saved from being struck off". His retirement, with Court's leave, could not have been from the suit. The Court could not have given such 'leave' for his retirement from the suit wholly. For, even after his defence against delivery of possession was struck out, he could show that the notice to quit was not served at all. The allegation in plaintiff's petition under Section 17 (3) was that the "rents from December, 1954, to date of suit" had not been deposited in "Court". It was not his allegation that he had not deposited those in

Rent Controller's Office. The point for determination in the application under Section 17 (3) was whether the deposit of rents, allegedly in arrears, by the defendants in Rent Controller's Office, as stated in his objection, filed on 20-6-1959 would be "good deposit" for the purpose of Section 17 (1) or were not deposit in Court. Defendant's learned Advocate on his view that those were not "good deposits" under Section 17 (1) asked for Court's leave to retire from the suit. In spite of defendant's clear case in his petition of objection dated 20-6-1959 to plaintiff's petition under Section 17 (3) the Court did not decide whether or not those deposits in Rent Controller's Office were "good deposits" under Section 17 (1). The entire trial was vitiated by lawyer's mistaken admission on a point of law. In the case of Secretary of State v. Shiba-prasad Jana reported in AIR 1919 Cal 972 the decision is that "an erroneous admission by a lawyer on a point of law is of no effect and does not preclude a party from claiming his legal rights in the appellate Court". Voluntary retirement following an erroneous admission of the lawyer is no "waiver" by the defendant. Even if it were so, it would not be waiver as this "right to object" was not known.

26. To pass an ex parte decree in a suit for ejectment on one of the grounds in Section 13 (1), the Court is required to decide, whether the suit is defended or not (if the relationship of landlord and tenant is not disputed as here) (a) whether the tenancy has been validly determined by a notice under Section 106, Transfer of Property Act, (b) whether a valid notice of suit was given before filing the suit (c) whether the ground alleged in the plaint to take away the tenant's special protection conferred by Section 13 (1), has been established on the evidence. This is the requirement of Order 20, Rule 4, Civil Procedure Code, whether the suit is contested or not. The Court cannot relieve itself of the necessity of complying with Order 20, Rule 4 even if it strikes out the tenant's defence against delivery of possession or the written statement. That being the position in law, it would be wrong not to permit the tenant to contend and show, if possible, on plaintiff's evidence and materials as are on record, both at the trial and also at the appeal stage, that the plaintiff is not entitled to the decree prayed for, though he would not be permitted either to cross-examine plaintiff's witnesses, when they give evidence, or to call his

own witnesses at the trial, if his defence is struck out.

27. There is no finding in the ex parte judgment by the trial Judge that the defendant is a "defaulter". As it had not made any such finding, the Court could not pass a decree for eviction. This is the view taken by the Supreme Court in the case of Bahadur Singh v. Muni Subrat Dass in (1969) 2 SCR 432 where it has been held that the decree for delivery of possession to the landlord is a nullity if not made in a suit by the landlord for recovery of possession from the tenant on any of the grounds stated in Section 13 (1) of Delhi & Ajmir Rent Control Act, 1952 and unless the Court was satisfied that such a ground of eviction exists. Reference may also be made to the case of Smt. Kaushalya Devi v. K. L. Bansal in AIR 1970 SC 838 and Ferozilal Jain v. Man Mal in AIR 1970 SC 794 and K. K. Chari v. R. M. Seshadri in AIR 1973 SC 1311. The defendant cannot, therefore, be debarred from showing in the appeal Court absence of such finding.

28. The case of Subodh v. Santosh in (1964) 68 Cal WN 184 has been rightly decided on both the points, framed by the referring appeal Court.

29. We answer the points raised as follows:—

(1) Yes, can take.

(2) Should be permitted.

SANKAR PRASAD MITRA, C. J.:— I agree.

M. M. DUTT, J.:— I agree.

Answer accordingly.

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M. N. RAY, J.

Debi Prosad Singha Roy, Petitioner v. State of West Bengal and others, Respondents.

Civil Rule No. (W) of 1977, D/- 18-1-1977.

Constitution of India, Article 226 — Writ petition by Prodhon challenging order of supersession of Panchayat — Panchayat not impleaded as party — Petition not maintainable — (West Bengal Panchayat Act (1 of 1956), Ss. 30, 67)

Held that the Panchayat which has a juristic character and has been superseded, in view of its incorporation, is not only a relevant but also a necessary and proper party because the right of the

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same has primarily been infringed or prejudiced by the order of supersession. The Prodhan, if at all, has some indirect right and such right cannot be claimed directly and in the absence of the said Panchayat, because his right, if any, is subject to the life of the same. (Para 8)

In this view the application at the instance of the Prodhan and in the absence of a relevant and proper party viz., the Panchayat, would not be maintainable even though the other members of the said Panchayat have been impleaded as respondents. A person who is directly affected by an order as in the present case can certainly throw a challenge but the position would be different if he himself is not directly involved by the impugned order because he cannot claim the right in the absence of the source of such right. If anybody who is interested in the said source of the right in the case it is the said Panchayat and none else. As such, the petition, in the absence of the said Panchayat would not be maintainable. (1977) 1 Cal LJ 60, Followed.

(Para 9)

Cases Referred: Chronological Paras

(1977) 1 Cal LJ 60 8

AIR 1966 SC 828 = (1966) 2 SCR 172 5, 9

AIR 1962 SC 1044 = 1962 Supp (3) SCR 1 4, 9

AIR 1965 Bom 187 = 67 Bom LR 11 7

AIR 1959 Cal 519 6, 9

AIR 1954 Cal 208 5, 9

Mr. Maitra, for Petitioner.

ORDER:— In this application, the petitioner, who is an elected member of the Kankuria Anchal Panchayat (hereinafter referred to as the said Panchayat), has impeached an order dated December 31, 1976 (Annexure B), whereby in terms of a notification issued under Section 67 of the West Bengal Panchayat Act, 1957 (hereinafter referred to as the said Act), the said Panchayat has been superseded for a period of one year from January 3, 1977. The said order was made on the basis of and under an order dated December 21, 1976 (Annexure 'A'), which the petitioner has also challenged.

2. Admittedly the petitioner is not the elected Prodhan of the said Panchayat and he has contended that because of abscondence of the erstwhile Prodhan of the said Panchayat and two other members, the same has suffered much and in fact such sufferings continued till the election of one Shri Pasupati Tah, Respondent No. 7 as Prodhan on the basis of a

meeting convened in March 1972 with the prior approval and sanction in terms of law. He has stated that on such election the said Panchayat resumed its due functions with effect from March 31, 1972. As such, the petitioner has contended that since then he along with other members of the said Panchayat were discharging their functions duly. In fact the petitioner has contended that the administration and acts of the said Panchayat have been duly appreciated by the authorities concerned. Such appreciation, the petitioner has contended was made and received after an inspection on January 19, 1974 by the Panchayat Extension Officer, Kalna I.

3. Thereafter, there was another inspection of the said Panchayat by the said Panchayat Extension Officer and Block Development Officer, Kalna I, on November 30, 1976 and it was found and recorded by them that the Prodhan of the said Panchayat was not competent and authorised to spend any money on repair of bridges and as such the said expenditure should be reported to the said Panchayat at its next meeting. It was also recorded that the said Shri Tah (Respondent No. 7), the elected Prodhan made over the charge of his office to the petitioner along with Rs. 3,491.91 paise. Apart from the above, the working of the said Panchayat was otherwise found to be satisfactory. It has further been contended by the petitioner that he was duly elected by the other members of the said Panchayat to carry out the duties and functions of a Prodhan in the temporary absence on leave of the duly elected Prodhan viz., Respondent No. 7. It has been contended by him that even in spite of overall improvements of the said Panchayat and its commendable performances that by a notification dated December 21, 1976 (Annexure 'A'), the Governor was pleased to record his satisfaction on the report of the prescribed authority under the said Act and appointed for the purpose of Section 67 of the same that the said Panchayat was not competent to perform and was guilty of default in the performance of duties under the said Act and as such in exercise of powers under the said Section 67, the said Panchayat should be superseded for a period of one year from the date of publication of the notification and the impugned order in Annexure "C", particulars whereof have been mentioned earlier, was issued on December 31, 1976, directing thereby that during the period of supersession of the

said Panchayat, all powers, duties and functions of the same shall be exercised by the Extension Officer of Panchayats, Kalna I, Development Block.

4. The order of supersession has been contended by the petitioner to be bad, void, illegal, irregular, unauthorised and against principles of natural justice. It was contended that at no point of time the said Panchayat was even given any notice or informed of any unsatisfactory work or any irregular or illegal act or action on their part. It has further been contended that such supersession has cast a stigma, an aspersion on the work and dealings of the said Panchayat and as such the same should have been given an opportunity to explain and that fact or failure alone would be enough to hold and find violation of principles of natural justice. Mr. Maitra appearing in support of the application further took me through Sections 67 and 68 and submitted that on the admitted facts of the case, read along with those sections, the petitioner should be deemed to be successful in establishing a prima facie case for a Rule and the corresponding order of injunction in terms of prayer (d) of the petition. Since a point whether the petition at the instance of the petitioner and not the Anchal Panchayat concerned which under Section 30 of the said Act, is a body corporate having perpetual succession and a common seal and can sue or be sued in its corporate name and that too because of the nature of the impugned order of supersession, would be maintainable, arose, Mr. Maitra submitted that since the petitioner has a right to hold the office of the Pradhan of the said Panchayat, he must be considered to be a person aggrieved and as such entitled to maintain the petition and that too because his right to the office was jeopardised by the patent illegal order of supersession. He submitted that since the effect of supersession of the said Panchayat would ultimately affect the petitioner's right to hold the office, he must also be deemed to be the person aggrieved and to maintain the petition. He submitted further that the office of the Pradhan is not an office of profit but one of prestige and when such right has been threatened or sought to be interfered with, although indirectly, the petition at the instance of the petitioner would be maintainable, the more so when other members of the said Panchayat have been impleaded as party respondent. It may be necessary here to mention also that the said Panchayat, which is not only a

proper but a necessary party, in view of the incorporation, has not been impleaded either as a petitioner or as respondent. In support of his contentions that any person having a legal right to enforce any obligation or law, can apply for appropriate writ or writs under Art. 226 of the Constitution of India Mr. Maitra first relied on the case of *Calcutta Gas Co. (Proprietary) Ltd. v. State of West Bengal*, AIR 1962 SC 1044. It has been held in that case that:

"Article 226 confers a very wide power on the High Court to issue directions and writs of the nature mentioned therein for the enforcement of any of the rights conferred by Part III or for any other purpose. It is, therefore, clear that person other than those claiming fundamental rights can also approach the High Court seeking a relief thereunder.

Article 226 in terms does not describe the classes of persons entitled to apply thereunder; but it is implicit in the exercise of the extraordinary jurisdiction that the relief asked for must be one to enforce a legal right. The existence of the right is the foundation of the exercise of jurisdiction of the High Court under Article 226. The legal right that can be enforced under Article 226, like Article 32, must ordinarily be the right of the petitioner himself who complains of infraction of such right and approaches the Court for relief. The right that can be enforced under Article 226 also shall ordinarily be the personal or individual right of the petitioner himself, though in the case of some of the writs like habeas corpus or quo warranto this rule may have to be relaxed or modified."

5. Mr. Maitra, thereafter relied on the case of *Gadde Venkataswara Rao v. Government of Andhra Pradesh*, AIR 1966 SC 828, wherein it has been held that:

"A petitioner who seeks to file an application under Article 226 of the Constitution should 'ordinarily' be one who has a personal or individual right in the subject-matter of the petition. A personal right need not be in respect of a proprietary interest: it can also relate to an interest of a trustee. That apart in exceptional cases, as the expression 'ordinarily' indicates, a person who has been prejudicially affected by an act or omission of an authority can file a writ even though he has no proprietary or even fiduciary interest in the subject-matter thereof."

6. Mr. Maitra then referred to the case of *Makhan Lal Chakravartty v. S. K. Chatterjee*, AIR 1954 Cal 208, wherein it has been held that:

"following the usual procedure applicable to motions the position is as follows: (1) In an application under Article 226, all persons must be made parties, who are or are likely to be affected by the issue of a writ or order. In the case of mandamus or prohibition all parties must necessarily be before the Court who are required to obey the directions of the writ, or whose presence is necessary to make such directions effective. (2) The artificial rules under the English practice, where in certain cases such writs can be made *ex parte* in the first instance, do not prevail in Courts of India. (3) Any party likely to be affected by a writ or order, may appear at the hearing (or make a prior application), and ask for leave to join the proceedings, or to have the rule served upon it. (4) The Court may order that a petition used as grounds for the issue of a rule nisi be amended and/or a rule nisi be amended, by the addition of parties. (5) If a necessary party or a party likely to be affected by the writ or order, or a party whose presence may be necessary to make the writ effective is not before the Court, the Court may, either upon an application made for that purpose, or of its own motion direct that such a party be added and the rule nisi served upon him or even that he may be allowed to be present at the hearing without being served with a rule nisi. In such a case, the person served with the rule nisi or permitted to attend the hearing, would be deemed to be a party and be entitled to show cause or support or oppose a cause already shown. (6) Such amendments should ordinarily be done upon notice to the party proposed to be added or served. There is however no rule of law which prevents an *ex parte* order being made in a suitable case. (7) Upon such an amendment being effected, directions should be given for the use of affidavits and/or additional affidavits."

and contended that since all the other members of the said Panchayat have been impleaded as party respondent, the application should not be dismissed and at least a Rule should be issued as there is a strong *prima facie* case for the same and the question of locus standi of the petitioner should not at this stage stand in the way of issuing the Rule, the more so when all the necessary parties are be-

fore the Court on being impleaded as Respondents. In support of such contentions, Mr. Maitra relied on the case of *Jivandas Khimji v. Smt. Narbada Bai*, AIR 1959 Cal 519, where it has been observed on the question as to who is a necessary party that:

"the position in law undoubtedly is that in the absence of necessary parties a decree will not be made in favour of the plaintiff. The question as to what parties are necessary is often not easy to determine. One test which has all along been recognised as of great importance is that when in the absence of a party the Court cannot give an effective remedy, that party is a necessary party."

In order that a party may be considered a necessary party defendant, two conditions must be satisfied, first, that there must be a right to some relief against him in respect of the matter involved in the suit; and second, that his presence should be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit."

7. Mr. Maitra then referred to the prayers in the petition which include prayers for the issue of both the writs of Mandamus and Certiorari and submitted that if the prayer was only for Mandamus, then perhaps and if at all, the petition would not have been maintainable at the instance of the petitioner because the grant of the same is, as a general rule, a matter for the discretion of the Court and is not an order granted as of right and is also not issued as a matter of course. He submitted that accordingly, the Court may refuse the order, not only upon merits, but also by reason of the special circumstances of the case. Even then it was submitted by Mr. Maitra that the Rule at the instance of the petitioner should be issued because such power to issue a Rule and the writs asked for can be exercised for a two-fold purpose, viz., (1) the enforcement of (a) fundamental rights, as well as of (b) non-fundamental or ordinary legal rights and the more so and particularly when there is a prayer for Certiorari, which is a writ of course when the authorities concerned, having the legal authority to determine questions affecting the right of subjects and having the duty to act judicially, fail of refuse to act duly. Hence such writ is also available against quasi-judicial orders, which according to Mr. Maitra was one in the instant case and

this it was submitted that a Rule at least for the prayer of certiorari should be issued. To substantiate his contentions that the order in the instant case was quasi-judicial, reliance was placed by Mr. Maitra on the case of *Dr. A. N. Tendulkar v. C. F. Mathias*, AIR 1965 Bom 187. In that case, the State Government, by an order dated July 16, 1964, in exercise of the powers under Section 23 (7) of the Bombay District Municipal Act, 1961, removed the petitioner from the office of the President and it has been observed that the order passed by the State Government under the provisions as aforementioned removing the said President on the ground of neglect and incapacity in performing his duty properly, viz., his failure in disallowing the resolution passed by the members for suspending certain Councillors and thus preventing them from participating in a meeting, was a quasi-judicial one. It may be mentioned that the petitioner in that case was the President of the Municipality in question.

8. The propositions as submitted by Mr. Maitra are sound but still then the question is whether at the instance of the petitioner, who has just claimed to be the Prodhan of the said Panchayat, although the members of the same and not the said Panchayat, which under Section 30 of the said Act has a juristic character, have been impleaded as respondents. The said Panchayat which has a juristic character and has been superseded, in view of its incorporation, according to me is not only a relevant but also a necessary and proper party because the right of the same has primarily been infringed or prejudiced by the order of supersession. The petitioner, if at all, has some indirect right and such right cannot be claimed directly and in the absence of the said Panchayat, because his right, if any, is subject to the life of the same. Article 226 of the Constitution of India as has been observed by me in the case of *Ganesh Chandra Das v. Director of Rationing*, (1977) 1 Cal LJ 60 (61):

"Article 226 of the Constitution does not say anything about the person by whom an application for relief can be made but it does indicate the purpose for which writs, directions and orders can be issued and obtained. Under that Article, such writs etc. can be obtained only for enforcement of fundamental rights and for any other purpose. It follows therefore that the relief that

may be sought for under the said Article can only be had if such relief is based on the existence of a right. The powers under the Article can normally be invoked only by a person whose personal rights or interests are adversely affected by any impugned law or Order. Hence the right which may be the basis of an application under Article 226 must be a personal and individual right. The person who complains of any infringement as the basis of his writ application must prove and establish either that he himself has been victim or that an action has been taken by any authority to his prejudice. Thus, the rights that can be enforced in writ petitions must ordinarily be the rights of the petitioners themselves."

In the view as aforesaid, although the order in the instant case was quasi-judicial, the application at the instance of the petitioner and in the absence of a relevant and proper party viz., the said Panchayat, would not be maintainable even though the other members of the said Panchayat have been impleaded as respondents.

9. The cases as cited by Mr. Maitra are distinguishable in the facts and circumstances of the present one. In the case of *Calcutta Gas Company (Proprietary) Ltd. v. State of West Bengal*, (AIR 1962 SC 1044) (Supra) the Company itself moved against the impugned action and the point arose whether the petition at the instance of the Company was maintainable. There the Company itself was directly affected by the order in question and that was not a case of indirect effect as in the present one. A person who is directly affected by an order as in the present case can certainly throw a challenge but the position would be different if he himself is not directly involved by the impugned order because he cannot claim the right in the absence of the source of such right. If anybody who is interested in the said source of the right in the case is the said Panchayat and none else. As such, the petition, in the absence of the said Panchayat, in my view would not be maintainable. If Mr. Maitra's submissions are accepted then that would create greater chaos and difficulty. If his contention are accepted then why a Prodhan, a petition would also be maintainable at the instance of any employee as after all he also be affected by the order of supersession as his terms of service or conditions of employment may in any way or adversely

affected by the order. The right of a Prodhani or the members of a Panchayat being dependent on the existence of a Panchayat, if any one would be interested in such right is the Panchayat concerned and as such any petition without the Panchayat, in this case the said Panchayat, which as a juristic character under the said Act, would not be maintainable. The view which I have taken would also distinguish the case of Gadde Venkateswara Rao v. Government of Andhra Pradesh, (AIR 1966 SC 828) (supra) and furthermore when it is not apparent from the said determination whether the Panchayat concerned was a party respondent in the said proceedings. The case of Makhan Lal Chakravarty v. S. K. Chatterjee, (AIR 1954 Cal 208) (supra) is also distinguishable on the admitted position that the said Panchayat has not been impleaded as a party and the same view would also be applicable in the case of Javindas Khimji v. Smt. Narbada Rai, (AIR 1959 Cal 519) (supra).

10. In view of the above, I hold that the petition in the facts and circumstances of the case to be not maintainable in the absence of the said Panchayat which have a juristic character.

11. The petition is thus rejected.
Petition dismissed.

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N. C. MUKHERJI AND B. C. RAY, JJ.

Mahasukrai Ramrichpal, Appellant
v. Kishori Charan Law, Respondent.

Second Appeal No. 22 of 1972, D/-
18-1-1977.

(A) Transfer of Property Act (1882),
Sections 108, 114-A — Monthly tenancy
on holding over after the expiry of lease
— Ejectment — Notice under S. 114-A —
Necessity. (W. B. Premises Tenancy Act
(12 of 1956), S. 13).

In case of monthly tenancies, provisions of the West Bengal Premises Tenancy Act apply and the landlord is not required to serve a notice under Section 114-A of the Transfer of Property Act before filing a suit for ejectment on the ground of breach of clauses (m), (o) and (p) of Section 108 of the Transfer of Property Act. (Para 5)

(B) Transfer of Property Act (1882),
Section 106 — Monthly tenancy after
holding over to commence on 2nd of a

month to the 1st of following month —
Notice calling upon a tenant to deliver
possession on the expiry of the month of
November 1963 or at the end of a month
of his tenancy which would expire next
after one month from the receipt of the
notice — Notice to quit is good and valid.

AIR 1953 Cal 352, Followed. (Para 6)
Cases Referred: Chronological Paras
AIR 1975 SC 1111 = (1975) 1 SCWR 581

6
AIR 1953 Cal 352 = 88 Cal LJ 118 6
AIR 1949 All 173 = 1948 Oudh WR 279

6
AIR 1932 PC 279 = 37 Cal WN 1 6
AIR 1921 Pat 307 = 2 Pat LT 178 6

Guruprasad Ghosh and Sundarananda
Pal, for Appellant; Abhijit Banerjee, for
Respondent.

N. C. MUKHERJI, J.:— This is an
appeal against the judgment and decree
passed by the learned Additional District
Judge, 12th Court at Alipore in Title Ap-
peal No. 1038 of 1970 dated 30th April
1971 affirming those of the learned Sub-
ordinate Judge, 6th Court at Alipore in
Title Suit No. 67 of 1963 passed on 19th
June 1970. The facts of the case may
briefly be stated as follows:—

The respondent filed a suit for eject-
ment and mesne profits against the de-
fendant, who was a monthly tenant at a
rent of Rs. 400/- payable according to the
English calendar month. According to
the terms of the tenancy, the defendant
was not to make any addition or altera-
tion to the premises without the consent
of the plaintiff in writing. The plaintiff
was informed that the defendant has con-
structed a pucca temple and two sheds
with pucca walls etc. with C. I. roof on
the suit premises. These structures are
of permanent nature and have been il-
legally made without the knowledge and
consent of the plaintiff. Thus the defen-
dant has acted contrary to the provisions
of Clauses (m), (o) and (p) of Section 108
of the Transfer of Property Act and is
liable for ejectment.

2. The defence is that the struc-
tures in question were made in the year
1958 and in the first part of 1959 with the
knowledge and consent of the plaintiff.
The defendant also challenges the lega-
lity and validity of the notice of eject-
ment. Both the Courts below found that
the notice of ejectment was legal and
valid and the defendant violated the pro-
visions of Clauses (m), (o) and (p) of Sec-
tion 108 of the Transfer of Property Act
and is liable for ejectment. Being ag-

grieved, the defendant has preferred the present appeal.

3. Mr. Guruprasad Ghosh, learned Advocate appearing on behalf of the appellant takes several points, most of which were not taken in the Courts below. In the first place, Mr. Ghosh contends as no notice of forfeiture was given by the landlord to the defendant according to the provisions of the Transfer of Property Act the suit is not maintainable. Mr. Ghosh submits that in the present case the lease was for five years which was to expire on 1-5-1958. But after the expiry of the lease, the defendant continued in possession with the consent of the plaintiff on payment of rent and thereby became a monthly tenant by holding over. But in such a case if the plaintiff wants to evict the defendant on the ground that he has violated the provisions of Clauses (m), (o) and (p) of Section 108 of the Transfer of Property Act, the landlord is required to serve a notice upon the defendant according to the provisions of Section 114-A of the Act. This section provides that "Where a lease of immovable property has determined by forfeiture for a breach of an express condition which provides that on breach thereof the lessor may re-enter, no suit for ejectment shall lie unless and until the lessor has served on the lessee a notice in writing— (a) specifying the particular breach complained of; and (b) if the breach is capable of remedy, requiring the lessee to remedy the breach.....".

4. Mr. Abhijit Banerjee, learned Advocate appearing on behalf of the respondent contends that the landlord is not required to serve a notice under Section 114-A in case of monthly tenancy on holding over after the expiry of lease. In such a case the tenancy is governed under the provisions of the West Bengal Premises Tenancy Act. This is a self contained Act and the provisions of the Act fully apply in case of monthly tenancies and that being so, when there is specific provision for ejectment for breach of the Clauses (m), (o) and (p) of Section 108 of the Transfer of Property Act under the West Bengal Premises Tenancy Act it is not required for the landlord to serve a notice under Section 114-A of the Transfer of Property Act. Mr. Banerjee in this connection also draws our attention that all along in the Courts below the tenant took up the position that the West Bengal Premises Tenancy Act applies. Order No. 33 dated 8th of February 1965 is an order by which the plain-

tiff's application under Section 17 (3) of the West Bengal Premises Tenancy Act was allowed and the defendant's application against delivery of possession was struck off. The defendant at the time of hearing of the said application filed certain challans to show that certain amounts were deposited. The Court considered those deposits and was of the opinion that the defendant did not comply with the provisions of Section 17 (1) of the Act.

5. Mr. Banerjee next refers to Order No. 51 dated 25th of April 1966. That was an order passed on the defendant's application filed under Section 17-A of the West Bengal Premises Tenancy Act. This application was rejected after contested hearing. Again it is seen from Order No. 76 dated 14th of January 1969 that the defendant filed an application under Section 17-C of the West Bengal Ordinance No. VII of 1967. That application was disposed of by the learned trial Court by ordering the defendant to deposit in Court the total sum of Rs. 7,600 within 60 days from date. Mr. Banerjee submits that this being the stand taken by the defendant, the defendant now cannot be allowed to say that the provisions of the West Bengal Premises Tenancy Act do not apply. We have considered the legal position and we are of the opinion that in case of monthly tenancies provisions of the West Bengal Premises Tenancy Act apply and the landlord is not required to serve a notice under Section 114-A of the Transfer of Property Act before filing a suit for ejectment on the ground of breach of Clauses (m), (o) and (p) of Section 108 of the Transfer of Property Act.

6. In the next place, Mr. Ghosh submits that the notice of ejectment which was served by the plaintiff on the defendant is illegal and invalid as after the holding over, the monthly tenancy was from second of a month to the first of the following month. The notice which sought to determine the tenancy by the end of the month cannot, therefore, be considered as a valid notice. In the present case the lease was for five years and was to expire on 1st of May 1958. The registered deed of lease is Ext. 2. Mr. Ghosh submits that according to the provisions of Section 110 of the Transfer of Property Act where the time by a lease of immovable property is expressed as commencing from a particular day, in computing that time such day shall be excluded. That being so the lease termi-

nated on 1st of May 1963 and the monthly tenancy after holding over commenced from 2nd of May. The notice of ejectment is Ext. 3. Notice is dated 18th of October 1963. Mr. Ghosh contends that as by the notice the defendant was asked to deliver vacant and peaceful possession on the expiry of the month of November 1963, the notice is bad because the monthly tenancy was from second of a month up to the first of the following month. In support of his contention Mr. Ghosh refers to the decisions reported in 37 Cal WN 1 = (AIR 1932 PC 279), (Benoy Krishna Das v. Salsiccioni) and AIR 1975 SC 1111, (Dattonpant Gopalarao Devakate v. Vithalrao Marutirao). Both the cases support the contention raised by Mr. Ghosh. But in this particular case we are to consider carefully the expressions used in the notice. The relevant portion of the notice reads as follows:—

"You are hereby given notice to quit and vacate the premises No. 10, Kali Prosanna Singhee Road, Cossipore and deliver vacant and peaceful possession thereof to my client immediately on the expiry of the month of November 1963 or at the end of a month of your tenancy which would expire next after one month from the receipt of this notice".

If the landlord simply asked the defendant to deliver possession on the expiry of the month of November 1963 then according to the decisions referred to above the notice must be held to be invalid. But in this case alternatively it has been stated that the defendant is required to deliver possession on the expiry of the month of November 1963 or at the end of a month of his tenancy which would expire next after one month from the receipt of this notice. In this connection Mr. Banerjee refers to a decision reported in AIR 1953 Cal 352, (Jatindra Nath v. Malai Ram Show). The facts of the case are almost similar. P. N. Mookerjee, J. referred to the passage occurring in Mulla's Transfer of Property Act, Edition 3 at page 653 which runs thus: "It is usual after mentioning the date of the anniversary of the tenancy to add in the alternative some general words as at the end of the year of the tenancy which will expire next after the end of one half year from the date of the service of this notice". That passage suggests that demand for possession in the alternative form is perfectly valid and well recognised in law. His Lordship relying on some English decisions was of the opinion that "There is also nothing, either in principle or in the

authorities, which runs counter to the suggestion of the learned Author and, accordingly, I am inclined to accept the same". His Lordship on this point relied on two other decisions Sankar Ram v. Tulsi Bhagat, AIR 1921 Pat 307 and Ganga Prasad v. Prem Kumar, AIR 1949 All 173, and came to the conclusion that the notice to quit was good, valid and sufficient. The relevant portion of the notice in the case before his Lordship is as follows:—

"Notice is hereby given to you to vacate and deliver up possession of the said two rooms with the end of 31-7-1945 or at the end of a month of your tenancy which would expire next after 15 days from the receipt of the notice".

We have already referred to the relevant portion of the notice in the present case and we find that the terms of the relevant portion of the notice are almost similar. We therefore negative the contention raised by Mr. Ghosh.

7. Mr. Ghosh next contends that the structures said to have been constructed by the defendant are of temporary nature and as such no decree for ejectment ought to have been passed. Both the Courts below have considered this question and have come to the conclusion that the structures are of permanent character. They have also come to the conclusion that the structures were made without the knowledge and consent of the plaintiff. This being the concurrent finding of the Courts below we are not inclined to interfere in the second appeal.

8. Mr. Ghosh lastly submits that by acceptance of rent the landlord has waived the right of forfeiture. We have already held that the present case is governed by the provisions of the West Bengal Premises Tenancy Act and that a statutory tenant is required to pay or deposit rent and by acceptance of that rent the landlord does not waive his right of forfeiture. For the reasons stated above all the contentions raised by Mr. Ghosh fail and accordingly the appeal fails.

9. In the result, the appeal is dismissed. There will be no order as to costs.

B. C. RAY, J.:— I agree.

Appeal dismissed.

AIR 1977 CALCUTTA 125

M. N. RAY, J.

Sri Gouri Sankar Mukherjee, Petitioner v. State of West Bengal and others, Respondents.

Civil Rule No. 9913 (W) of 1976, D/-17-1-1977.

Civil P. C. (1908), Order 6, Rule 15 and Order 19, Rule 3 — Affidavit affirming petitions — Object of — Affidavits affirmed by Tadbirkars — Petitions under Article 226 should be verified by Petitioner. (1) High Court Rules and Orders — Calcutta High Court (Original Side) Rules, Chapter VII, Rule 8; (2) High Court Rules and Orders — Calcutta High Court Rules relating to Application under Article 226, Rule 13).

The purpose of having an affirmation of a petition or application under the provisions of Order 6, Rule 15, Civil P. C., Rule 8 of Chapter VII of Original Side Rules of Calcutta High Court and under Rule 13 of the Rules relating to the applications under Article 226 of the Constitution is to fix the responsibility about the validity of the statements as made on the maker of the same and affidavits shall be confined to such facts as the deponent would be able of his own knowledge to prove or may prove the source from which he derived such knowledge. If such purpose is not achieved in an affidavit then the very purpose of having the affidavit would be frustrated. Affidavits on all matters other than purely interlocutory one must be restricted to facts which are within the personal knowledge of the deponent. Affidavits should also clearly express, how much is a statement of the deponents knowledge and how much is a statement of his information and belief and must also state the source and the grounds of information or belief with sufficient particulars without which an affidavit would be no affidavit at all. AIR 1934 Cal 694; AIR 1952 SC 317; (1910) ILR 37 Cal 259; AIR 1967 SC 295; AIR 1970 SC 652 and (1972) 1 SCC 826, Rel. on. (Para 6)

Since the right which can be enforced under Article 226 of the Constitution must ordinarily be the right of the petitioner himself and since Tadbirkars are available who for small gain affirm affidavits, where affidavits are affirmed by such Tadbirkars, Courts should be slow in exercising their discretion without being satisfied about the affidavit or

the affirmation thereof. Therefore in spite of the provisions in the Rules for applications under Article 226, it is desirable and expected that verifications should not be done by Tadbirkars or persons who are not in a position to testify the statements as verified. (Paras 7 & 8)

Cases Referred : Chronological Paras

(1972) 1 SCC 826 = (1972) 3 SCR 955	6
AIR 1971 SC 2320 = (1971) 2 SCC 163	7
AIR 1970 SC 652 = (1970) 3 SCR 121	6
AIR 1967 SC 295 = (1966) Supp SCR 311	6, 7
(1967) 71 Cal WN 385	9
AIR 1964 SC 72 = (1964) 4 SCR 733	7
AIR 1964 SC 685 = (1964) 1 SCWR 186	7
AIR 1963 SC 507 = (1962) 2 SCR 711	7
AIR 1962 SC 1044 = (1962) Supp 3 SCR 1	7
AIR 1962 SC 1183 = (1962) Supp (2) SCR 76	7
AIR 1952 SC 317 = 1952 Cri LJ 1269	6
AIR 1934 Cal 694 = 38 Cal WN 771	6
(1910) ILR 37 Cal 259 = 6 Ind Cas 666	6

Mrs. Diptikana Bose and G. S. Sarkar, for Petitioner; Bholanath Bhattacharjee, for Respondents.

ORDER :— On July 19, 1976, a Rule against notices in Annexures "B" and "C" to the petition was issued by this Court whereby suo moto proceedings were initiated under the provisions of the West Bengal Land Reforms Act, 1955. The said petition was signed and verified by one Ananda Bhairab Ghose claiming to be the Karmachari and Tadbirkar of the petitioner. All statements in the said petition excepting those made in paragraphs 6 and 11 to 19 were affirmed as true to his knowledge. There has of course been a certificate by the learned Advocate that the said deponent was the authorised Karmachari of the petitioner and was competent to affirm the affidavit and sign the petition on his behalf.

2. At the time of issuing the Rule, this Court was pleased to grant an order maintaining status quo as on July 19, 1976 for a period of six weeks, with liberty to the petitioner to apply for extension of the said order on the petition of motion with notice to the Respondents. The petitioner was further directed to file an affidavit of service after communication of the gist of the order as made along with the copy of the petition. Such affidavit of service appears to have been filed on September 16, 1976. The affidavit of service was of course affirmed by another Tadbirkar of the petitioner whose name is

Bishnupada Chakrabartty. It further appears that another Rule being Civil Rule No. 8865 (W) of 1976 was also obtained by the petitioner against certain orders made and passed under the provisions of the West Bengal Estates Acquisition Act, 1953 on June 24, 1976. The affidavit to that petition was affirmed by one Shri Purushottam Samanta, another Tadbirkar of the petitioner. There is also a certificate appended to that petition that the said Tadbirkar, Shri Purushottam Samanta was duly authorised by the petitioner to sign the petition and also to swear the affidavit. A petitioner may have any number of Tadbirkars as there is no legal restriction on such numbers.

3. Since at different stages different Tadbirkars have affirmed affidavits on behalf of the petitioner, I wanted to satisfy myself whether the Tadbirkar of the present petition viz., Shri Ananda Bhairab Ghose was really authorised and whether the affirmations made by him were correct and whether in a writ proceedings, where a petitioner would be asking for high prerogative writs or orders, affidavit by such Tadbirkar should be made.

4. For the purposes as aforesaid, I directed the said Tadbirkar Shri Ananda Bhairab Ghose to appear before me, since the High Court has power to be satisfied when it is required to exercise its discretion in this jurisdiction on the affidavit as filed and on January 6, 1977, his deposition was recorded. From his deposition it appears that although the said deponent had affirmed the affidavit as Tadbirkar and was working under the petitioner for a long time yet he had very little or scanty knowledge about the happenings and the statements as contained in the petition, which he affirmed as true to his knowledge were without any real or little knowledge, about them. In fact he had to admit that the statements as made by him in the petition were really based on informations from his employer. Thus it is apparent that there is no proper affirmation of the petition and on the basis of such improper affidavit this Court cannot and should not direct the issue of such high prerogative writs or orders as have been prayed for.

5. Under Order 6, Rule 15 of the Code of Civil Procedure, a pleading may be verified by one of the parties pleading or by some other person proved to the satisfaction of the Court to be acquainted with the facts of the case. Under Rule 8 of Chapter VII of the Original

Side Rules, where any person, other than a party pleading, verifies a pleading under Order 6, Rule 15 of the Code of Civil Procedure, his fitness or authority to so verify shall be proved by his affidavit. Under Rule 13 of the Rules relating to applications under Article 226 of the Constitution of India every petition must be signed and dated by the petitioner or his duly authorised agent and Rule 14 requires that all petitions shall be verified by the solemn affirmation made by the petitioner or a person or persons having cognizance of the facts stated and shall state clearly with reference to paragraphs of the petition whether the statements are based on knowledge, information and belief or on records. Where a statement is based on information, the source of information should be disclosed and where the statements are based on records, sufficient particulars should be given to identify the records. Where the petitioner is a Company or a Corporation, under Rule 15 of the Rules there should be appended an affidavit of competency and where the petitioner or a respondent is a Corporation, the provisions of Order XXIX of the Code of Civil Procedure in so far as they are applicable, shall apply.

6. The purpose of having an affirmation of a petition or application under the provisions as mentioned hereinbefore is to fix the responsibility about the validity of the statements as made on the maker of the same and affidavits shall be confined to such facts as the deponent would be able of his own knowledge to prove or may prove the source from which he derived such knowledge. If such purpose is not achieved in an affidavit then the very purpose of having the affidavit would be frustrated. Affidavits on all matters other than purely interlocutory one must be restricted to facts which are within the personal knowledge of the deponent. Affidavits should also clearly express, as has been held in the case of *Durgadas v. Nalin Chandra*, 38 Cal WN 771 = (AIR 1934 Cal 694), how much is a statement of the deponents' knowledge and how much is a statement of his information and belief and must also state the source and the grounds of information or belief with sufficient particulars without which an affidavit would be no affidavit at all. This Court in the case of *Padmabati Dasi v. Rasik Lal Dhar*, (1910) ILR 37 Cal 259 observed that the source of information should be clearly disclosed and that view was upheld by the Supreme

Court in the case of *State of Bombay v. Parshottam Jog Naik*, AIR 1952 SC 317 and observed that verification should invariably be modelled on the lines of Order 19, Rule 3 of the Civil Procedure Code, whether the same applies in terms or not. Thereafter, in the case of *Barium Chemicals Ltd. v. Company Law Board*, AIR 1967 SC 295 "slipshod verifications" in an affidavit was deprecated. In the cases of *A. K. K. Nambiar v. Union of India*, (1970) 3 SCR 121 = (AIR 1970 SC 652) it has further been observed by the Supreme Court that the importance of verification is to test the genuineness and authenticity of allegations or statements and also to make the deponent responsible for them. It has further been observed by the Supreme Court in the case of *Virendra Kumar Saklecha v. Jagjiwan*, (1972) 1 SCC 826 that the grounds of sources of information are to be set out in an affidavit whether the Code of Civil Procedure applies or not. So relying on the tests as laid down in the cases as mentioned above it is an admitted position that there was or has been no proper affidavit in this case on the basis of which discretion in this jurisdiction can be exercised. The little evidence which was recorded practically disclosed that all the statements in the petition were at best true to the information of the deponent and not true to his knowledge i.e. the way in which he has affirmed the affidavit. Mrs. Bose, when requested to ask questions to the deponent, did not do so but submitted that since the deponent is not a professional Tadbirkar but an old employee of the petitioner, orders may be passed on the basis of his affidavit. She further and in the alternative submitted that the affidavit is at best an ill drafted one and for that the learned Advocate, who drafted the same, may be cautioned but no order should be passed which would prejudice the case of the client. It is very difficult to visualise what is meant by the term "Professional Tadbirkar" as used by Mrs. Bose. In legal parlance such term is not or has not yet been recognised. But one thing is certain that such Tadbirkars are available, who for some small gain, affirm affidavits and perhaps that is the reason why in proceedings taken by the petitioner we find three different Tadbirkars and at least two of them do not reside anywhere near the addresses as given by the petitioner in the petitions in the two Rules as referred to hereinbefore. This is all the more reason that where affidavits are

affirmed by such Tadbirkars, Courts should be slow in exercising their discretion without being satisfied about the affidavit or the affirmation thereof. The learned lawyers in my view have also a solemn duty and obligation not only to Courts but also to their clients to have proper affidavits filed as otherwise their clients' cause may suffer or be prejudiced and as such they should also be slow or think twice before filing affidavits through such Tadbirkars. While making this observation, I am also conscious of the fact that the Rules relevant for matters under Article 226 as framed by this Court do authorise petitions to be filed through persons duly authorised or verified by persons having cognizance of the facts. But in all such cases the Courts as stated hereinbefore, should be satisfied about the authority of the persons making the affidavit and the veracity of the statements made and affirmed by them, the more so when the term "Professional Tadbirkar" as used by Mrs. Bose presupposes that Tadbirkars for some small gain are available.

7. The petitioner, in the Rule has asked for the issue of writs of Mandamus and Certiorari. A writ of Mandamus is not a writ of right but purely a writ of discretion, whereas a writ of Certiorari is a writ of right. The right which can be enforced under Article 226, as held by the Supreme Court in the cases of *Kalyan Singh v. State of U. P.*, AIR 1962 SC 1183; *State of Punjab v. Suraj Prakash*, AIR 1963 SC 507; *State of Orissa v. Ramchandra*, AIR 1964 SC 685 and *Jonala v. State of U. P.*, (1971) 2 SCC 163 = (AIR 1971 SC 2320) must ordinarily be the right of the petitioner himself. In other words, in terms of the determination of the Supreme Court in the cases of *Calcutta Gas Co. v. State of West Bengal*, AIR 1962 SC 1044 and *Pratap Singh v. State of Punjab*, AIR 1964 SC 72, the right which is the foundation of an application, is a personal and individual right. In view of the above, the verification of such a petition or an affidavit as held in the case of *Barium Chemicals Ltd. v. Company Law Board* (AIR 1967 SC 295) (supra) should be modelled on the lines prescribed in Order 19, Rule 3 of the Civil Procedure Code even though the Code does not in terms apply.

8. In view of the above, even in spite of the provisions in the Rules for applications under Article 226, it is desirable and expected that verifications should

not be done by Tadbirkars or persons who are not in a position to testify the statements as verified.

9. Even though the verification in the instant case was improper and irregular, the petition on that ground in my view, following the determination in the case of *Mishri Debi Agarwal v. Asst. Collector of Central Excise*, (1967) 71 Cal WN 385, should not be dismissed and the more so when Mrs. Basu has categorically stated that for such defective verification, if any one is to be blamed, is the draftsman of the affidavit and not the deponent and I feel further that for such defective drafting, over which the petitioner had no control, his case should not be prejudiced.

10. In that view of the matter, although I hold that this Court cannot and should not act on such defective verification by the Tadbirkar (yet I am granting liberty to the petitioner and an opportunity to him to have the petition verified afresh by reaffirming the same or to file necessary supplementary affidavit for such purpose. I direct that steps in the light of the directions as mentioned above should be taken within 3 weeks, failing which the petition would be dismissed, as being not in form.

Order accordingly.

AIR 1977 CALCUTTA 128

MASUD, J.

Ramani Mohan Barman, Petitioner v. Sm. Gouri Rani Barman and others, Respondents.

Matter No. 1050 of 1976, D/- 14-1-1977.

Arbitration Act (1940), S. 34 — Stay of suit — Dissolution of partnership — Relief is discretionary — Arbitration clause as to dispute vague — Firm carrying on not a big business — All issues could be decided in the suit — Suit ought not to be stayed.

There is an element of judicial discretion in staying a suit under Section 34 of the Arbitration Act. The language of this section shows that the Court may make an order saying legal proceedings provided it is satisfied (a) there is no sufficient reason why matter should not be referred to arbitration and (b) the party seeking arbitration was ready and willing to take recourse to the arbitration

proceeding at the time when the suit or proceeding is filed in a Court of law by other party. (Para 4)

In the case of a partnership firm where the language of the arbitration clause is vague in respect of disputes in connection with dissolution of the partnership firm and also valuation of its assets and all the issues can best be decided in the suit which is comprehensive enough to decide the issues between the parties coupled with the fact that the partnership firm is not carrying a big business and the partners are also close relations it is not desirable that the parties should have their disputes decided by two arbitrators whose award may again be referred to an Umpire. A decision on the disputes between the parties before the Arbitrators would delay the matter and would not be advantageous to the parties. (Para 7)

Cases Referred: Chronological Paras

AIR 1971 Cal 317	7
ILR (1951) 2 Cal 140	7

Mrs. Banerjee, for Petitioner.

ORDER:— This is an application under Section 34 of the Arbitration Act, 1940 for stay of a suit filed by the respondent Sm. Gouri Rani Burman for dissolution of a partnership firm under S. 44 (d) and (g) of the Partnership Act. The facts of the case may, briefly, be stated as follows:

2. On August 7, 1964, a registered partnership was constituted between Gouri Rani Debi, respondent No. 1, Ramani Mohan Burman, the petitioner, and 3 children of Gouri Rani, namely, Kumari Sajal Rani Burman, Kumari Bharati Burman and Kumari Bani Burman who were 15 years, 13 years and 11 years old in 1964. On December 1, 1973, the petitioner wrote a letter to the said Gouri Burman expressing his wish to discontinue as a partner of the said firm. In the said letter he has suggested her to buy his share in the partnership firm for a sum of Rs. 30,000/-. Thereafter, long correspondences took place till November 20, 1975, for settling the amount which would be payable to the petitioner as the value of his share. On November 11, 1976, a suit was filed by the said Gouri Burman and her children against Ramani Mohan Burman which is pending in this Court.

3. The said partnership agreement contained an arbitration clause which reads as follows:

"21. All disputes arising between the partners in any matter relating to the partnership business or regarding the interpretation of these presents shall be referred to the arbitration of two Arbitrators—one to be appointed by each of the parties hereto of the first and third part and the decision of the said Arbitrators or in case of difference between them the decision of the Umpire to be appointed by them shall be final and binding upon the partners."

4. It is well settled that there is an element of judicial discretion in staying a suit under Section 34 of the Arbitration Act. The language of this section shows that the Court may make an order staying legal proceedings provided it is satisfied (a) there is no sufficient reason why matter should not be referred to arbitration and (b) the party seeking arbitration was ready and willing to take recourse to the arbitration proceeding at the time when the suit or proceeding is filed in a Court of law by other party. In the facts of this case, I am satisfied that the stay of the said suit for dissolution of the partnership firm should not be granted. The reasons why I have come to the said conclusion are as follows:

5. At no stage before the suit was filed against the petitioner, the latter expressed any desire to go for arbitration although disputes were raised from December, 1973 till November, 1975 in large number of letters regarding the valuation of the petitioner's share. Thus, it cannot be said that the petitioner was ready and willing to decide the dispute by arbitration before the suit was filed.

6. It has been contended by Mrs. Banerjee, Counsel for the petitioner, that by the said letter dated December 1, 1973, the petitioner has expressed his desire to retire from the partnership firm and, as such, the partnership firm has already been dissolved, inasmuch as, the partnership consisted of two persons and 3 minors, who were only given the benefits of partnership. Reliance has been placed by her on *Irch Mehta v. M. Mehta*, AIR 1971 SC 1953. This contention of Mrs. Banerjee cannot be accepted. There are five partners three of whom were minors in 1964. They all have become majors in 1970 under Section 30 (5) of the Partnership Act. Further, no formal notice of dissolution has been given by the petitioner although he suggested to do the same in his lawyer's letter dated March 7, 1974. Thus, it is not correct to

say that by petitioner's letter dated 1-12-73, the petitioner has expressed his desire to dissolve the partnership under Sec. 32 (1) (c) of the Partnership Act, 1932. The Supreme Court decision cited by Mrs. Banerjee is distinguishable. There, the arbitration clause was expressed in the widest possible language, and the petitioner expressed his readiness and willingness to go to arbitration at a very early stage. Further, admittedly, that was a case where dispute arose between two partners.

7. I am also satisfied that there are sufficient grounds for not referring disputes raised between the parties to arbitration. The arbitration clause in this particular case, is not wide enough to decide the question of the issues relating to dissolution of partnership or whether notice of dissolution under Section 32 (1) (c) has been served. Nor the Arbitrators have been empowered to decide the valuation of the petitioner's share as in the said Supreme Court case, where arbitration clause covered disputes raised before and after the dissolution of the partnership firm. Further, there is nothing to show that the petitioner ever expressed his desire to retire from the partnership firm to the other three partners, who have attained majority by operation of law, as set out above. The three children who have become adult partners have not been given in the arbitration clause their right to choose their own nominees as arbitrators. As there has been no formal notice of dissolution before the suit was filed, the respondent Gouri Burman has exercised her statutory right under Section 44 (d) and (g) of the Partnership Act. It is to be remembered that the plaint in this suit amounts to notice of dissolution: *Vide Sailendra Nath Kumar v. V. Chillar Ramia*, ILR (1951) 2 Cal 140 (141). The disputes between the parties should conveniently be decided in a suit which has been filed by Gouri Burman. In any event the language of the arbitration clause is vague in respect of the disputes in connection with dissolution of the partnership firm and also valuation of its assets. All the issues can best be decided in the suit which is comprehensive enough to decide the issues between the parties. Further, the partnership firm is not carrying a big business and the partners are also close relations. It is, therefore, not desirable that the parties should have their disputes decided by two arbitrators whose award may again be referred to an Umpire. Thus, in my view, a decision

on the disputes between the parties before the Arbitrators would delay the matter and would not be advantageous to the parties. Reference may also be made to Ganesh Chandra Dey v. Kamal Kumar Agarwal, AIR 1971 Cal 317.

8. For all the reasons stated above, there will be no order on this application. The application is dismissed. Costs of this application be costs in the pending suit.
Application dismissed.

AIR 1977 CALCUTTA 130

SALIL KUMAR DATTA AND H. N. SEN, JJ.

Nitya Kumar Chatterjee, Petitioner v. Sukhendu Chandra, Opposite Party.

C. R. No. 2896 of 1975, D/- 24-11-1976.

(A) Arbitration Act (1940), S. 34 — Stay of suit — No stay when there are serious allegations of fraud and a prima facie case of fraud is proved — Desirable that matter should have trial in Court. Case law discussed. (Paras 8, 9)

(B) Arbitration Act (1940), S. 34 — Stay of suit — Suit for dissolution of partnership on ground that it is just and equitable — Court's jurisdiction to give appropriate relief not ousted by provision for arbitration in partnership deed — Matter of judicial discretion — (Partnership Act (1932), S. 44 (g)) — AIR 1971 Cal 317, AIR 1917 PC 116, Foll.; (1959) 2 All ER 220, (1974) 1 All ER 412, Ref.

(Paras 10, 12, 13)

Cases Referred: Chronological Paras
AIR 1974 Andh Pra 278 6

(1974) 1 All ER 412 = (1974) 1 WLR 719 12

AIR 1971 Cal 317 12

AIR 1967 Mad 201 = 78 Mad LW 681 6

(1966) Award No. 105 of 1966, D/- 7-10-1966 (Cal) 12

(1959) 2 All ER 220 = (1959) 1 WLR 551 12

AIR 1955 SC 53 = 1955 SCJ 200 5

ILR (1946) 1 Cal 203 8

AIR 1943 Cal 238 = ILR (1942) 2 Cal 539 8

AIR 1924 Cal 796 = 39 Cal LJ 504 8, 9

AIR 1917 PC 116 = 45 Ind App 61 10, 13

(1880) 14 Ch. D. 471 = 49 LJ Ch 268 8

Sakti Nath Mukherjee and Ramapati Roy, for Petitioner; Kalipada Chakravarti, for Opposite Party.

SALIL KUMAR DATTA, J.:— The opposite party instituted a suit in the

LT/LT/E624/76/ABO

Third Court of Subordinate Judge, Alipore on March 24, 1975 registered as Title Suit No. 59 of 1975 for a decree of dissolution of partnership of the business called "United Syndicate" carried on by the parties and for accounts, for appointment of a Commissioner for accounts and of Receiver for running partnership business, day to day administration thereof and for collection of assets. The allegations were in short that the defaulting partner, who is the defendant in the suit and the petitioner before us, had been committing serious breaches of agreement of partnership which had been set out in the paragraph 9 of the plaint. It was submitted that as by reason of his conduct it had not been practicable for the plaintiff to carry on the partnership business, it was just and equitable that the partnership should be dissolved.

2. As the notice of the suit was served on the defendant he filed an application on 7th April, 1975 not verified by affidavit, stating that under the terms of the written partnership agreement all disputes arising out of the partnership should be referred to the Arbitration. Accordingly the Court had no jurisdiction to entertain the suit which should be stayed. Thereafter the petitioner filed another application on April, 18, 1975, which was also not verified by affidavit and it was stated therein that "the defendant was and is ready and willing to go to Arbitration." On this application the learned trial Judge passed an order on May 7, 1975 allowing the application and stayed the suit and he further directed that the suit be referred to Arbitration of two Chartered Accountants named in the partnership deed.

3. On appeal the learned District Judge, Alipore, by his order dated July 4, 1975 allowed the appeal and rejected the petitioner's application for stay of the suit under Section 34 of the Arbitration Act. This Rule is against this order.

4. Mr. Saktinath Mukherjee learned Advocate appearing for the defendant petitioner submitted that the Appellate Court was wrong in rejecting the application of the defendant on the ground that it was not verified by affidavit. He submitted that this point was not taken in the Trial Court and if there was any defect in verification, the Court should have given an opportunity to the defendant to take necessary steps to remove the alleged defect instead of rejecting the same on technical ground.

5. Under Section 34 of the Arbitration Act there must be the following conditions for grant of stay of suit as laid down in *Anderson Wright Ltd. v. Moran & Co.*, AIR 1955 SC 53.

(i) The proceeding must be initiated by a party to arbitration agreement against another party to such agreement.

(ii) The legal proceeding sought to be stayed must be in respect of matter to be referred to Arbitration.

(iii) The applicant who must not take any step in suit, was at the time of commencement of proceedings and still remains ready and willing to do all things necessary for proper conduct of the Arbitration.

(iv) The Court must be satisfied that there is no sufficient reason why the matter should not be referred to arbitration.

6. Our attention has been drawn to the decision in *Padmanabhan v. Srinivasan*, AIR 1967 Mad 201 where the Court found that the averment for arbitration was insufficient. In *Sri Venkateswara Constructions v. Union of India*, AIR 1974 Andh Pra 278, even though there was absence of averment by the defendant about his readiness and willingness to go to arbitration and the other party's attention was merely drawn to arbitration clause, in the context in which such statement was made, the Court felt satisfied that the defendant was ready and willing to go to arbitration. In the case before us, the petitioner does not categorically and unequivocally or even at all say that he was always at the material time ready and willing to do all things for the proper conduct of arbitration and such readiness is not to be inferred by implication. An insufficient averment cannot be rectified by amending the verification only. We are conscious that this defect was condoned by the appellate Court for reasons we find difficult to accept and it seems to us to be too patent to be ignored.

7. Mr. Mukherjee next challenged as untenable the conclusion of the learned Judge that when grave charges of fraud, misappropriation and unfair conduct of the partner are alleged, such matters should conveniently be dealt with by a Court instead of by an arbitrator. It was said that the averments of fraud are only general allegations instead of being specific as is required. We have considered the pleadings and we find that the allegations cannot be said to be not specific as is

required in pleadings. Sub-clauses (b), (c), (e), (f) and (g) of paragraph 9 of the plaint at least appear to be sufficiently specific allegations of fraudulent conduct which has to be established in evidence during trial.

8. It was then submitted on authority that the defendant against whom charges are made in such case has a choice of forum which is not available to the plaintiff. Reliance was placed on the decision in *Manindra Chandra v. Low & Co. Ltd.*, AIR 1924 Cal 796, where it was held that the Court should refuse to send the dispute to arbitration when the party charged wants a public trial in Court while the Court would be less inclined to send it to public trial at the desire of the party making the charges instead of arbitration. It was also held in *Eastern Steam Navigation Co. Ltd. v. India Coastal Navigation Co. Ltd.*, ILR (1942) 2 Cal 539 = (AIR 1943 Cal 238), that in case of charge of conspiracy and fraud which is directly an issue between the parties such charge should be publicly investigated in the suit if so desired by the party charged. In *Ballavdas Acharjya v. Shyam Sundar*, ILR (1946) 1 Cal 203, this Court followed the principle in *Russell v. Russell* 1880-14 Ch D 471, laying down that when objection to arbitration is by the party charging the fraud, the Court will never accede to the objection unless a prima facie case of fraud is proved. The Court in that case granted a stay as upon affidavits no prima facie case was at all made out.

9. Even in *Manindra Chandra's* case, (AIR 1924 Cal 796) the Court noticed that in *Russell's* case it was decided that where a prima facie case of fraud is made out, the action will be allowed to proceed. In view of the above authorities and in the case before us of the grave charges of fraudulent conduct on the part of the defendant, we also consider it desirable that the matter should have the trial in Court, as arbitration is not the most suitable method of determining the questions raised between the parties.

10. Next question relates to the scope, ambit and effect of Sec. 44 of the Indian Partnership Act, 1932 on arbitration. Assuming that the arbitration clause in the partnership agreement includes the question of dissolution, which we think it does, even so when party approaches the Court to dissolve the partnership on ground that it is just and equitable to do, the jurisdiction of the Court is always there to give appropriate relief notwith-

standing the provision for arbitration. In *Rehmatunnissa Begum v. Price*, AIR 1917 PC 116, the Privy Council observed:

"A partner's claim to decree for dissolution rests, in its origin, not on contract, but on his inherent right to invoke the Court's protection on equitable grounds, in spite of the terms in which the rights and obligations of the partners may have been regulated and defined by the partnership contract."

11. This proposition of law has since found its expression in Section 44 of the Partnership Act, 1932 and the Court's power to order dissolution of partnership under provisions of Section 44 is not conditioned by an agreement between the partners to the contrary. The jurisdiction, which a Court will exercise in such case, will however always be a judicial discretion in the context of pleadings and facts of a case against the background of the provisions for arbitration in the partnership agreement and the propositions of law set out by judicial decisions. In the case before us, we are of opinion that the judicial discretion was rightly exercised in the circumstances of the case.

12. Mr. Mukherjee referred us to the refusal of stay to arbitration in cases coming under Section 35 (f) of English Partnership Act, 1890 (our Section 44 (g)) asking for exercise of Court's discretion on just and equitable grounds and for appointment of receiver and manager laid down as a proposition of law in *Olver v. Hillier*, (1959) 2 All ER 220 and recorded as such in Supreme Court Practice, 1973. This principle in the attending circumstances of the respective cases was followed by A. N. Sen, J. in Award No. 105 of 1966 dated October 7, 1966 (unreported) and also in *Ganesh Ch. Dey v. Kamal Kumar*, AIR 1971 Cal 317. Mr. Mukherjee submitted that the above proposition of law as laying down that a stay to arbitration must be refused when there is a claim for dissolution on just and equitable grounds with prayer for appointment of Receiver/Manager was doubted in *Phoenix v. Pope*, (1974) 1 All ER 412 as it was observed, there could be no inevitable exercise of discretion.

13. In view however of the law enunciated by the Privy Council in *Rehmatunnissa's* case (AIR 1917 PC 116) and of the provisions of Section 44, we are of opinion that the Court's jurisdiction in appropriate cases is not ousted by any provisions for arbitration in the

partnership agreement. The exercise of such jurisdiction being a matter of judicial discretion in the context of attending circumstances, there can be no inevitability in the exercise of jurisdiction by a Court of law.

14. For the reasons already indicated we are of opinion that the stay was rightly refused by the appellate Court.

15. The rule accordingly fails and is discharged. There will be no order for costs in the circumstances.

H. N. SEN, J.:— I agree.

Rule discharged.

AIR 1977 CALCUTTA 132

NIRMAL CHANDRA MUKHERJI AND
BANKIM CHANDRA RAY, JJ.

Abdul Sattar Ostarar and another, Appellants v. Abu Bakkar Ostarar and others, Respondents.

A. F. A. D. No. 1950 of 1961, D/- 20-9-1976*.

(A) Civil P. C. (1908), Section 100 — Question of law — Parting of possession by a Mohamedan while making gift in a particular case is a question of law and can be gone into in second appeal. (Mohamedan Law — Gifts). (Para 10)

(B) Mohamedan Law — Gift — Parting of possession not necessary when father makes gift of the dwelling house to his sons and donor and the donees are residing therein. Case law discussed. (Para 9)

Cases Referred: Chronological Paras
AIR 1974 Pat 54 = ILR (1974) 53 Pat 452 7
AIR 1964 SC 275 = (1964) 4 SCR 549 7
AIR 1959 SC 57 = 1958 Andh LT 834 10
AIR 1958 Mad 527 = (1958) 1 Mad LJ 14 6
(1946) 50 Cal WN 81 8
AIR 1935 Bom 34 = 36 Bom LR 1151 9
AIR 1932 PC 13 = 59 Ind App 1 4
(1905) ILR 29 Bom 468 = 7 Bom LR 443 8
(1888) 16 Ind App 205 = ILR 11 All 460 (PC) 6
(1885) ILR 9 Bom 146 5

Ranjit Kumar Banerjee, Ganga Narayan Chanda, Sailendra Nath Roy, for Appellants; S. K. Bagchi and S. K. Kar, (for Nos. 1 and 2), Golam Kibria, (for Nos. 4-18, 10-12 and

* (Against decree of A. P. Das Addl. Dist J., 5th Extra Court Alipore, Zillah 24 Parganas in Title Appeal No. 1137 of 1959, D/- 27-1-1961).

14-16), Himangsu Kr. Bose, (for No. 17) Mukul Gopal Mukherji and Sudhansu S. Basu, (for No. 18), for Respondents.

N. C. MUKHERJI, J.:— This is an appeal against the judgment and decree passed by the 5th Extra Court of the Additional District Judge, Alipore in Title Appeal No. 1137 of 1959 reversing the judgment and decree dated 21st August 1959 passed by the Subordinate Judge of 7th Court, Alipore in Title Suit No. 38 of 1956.

2. The respondents Nos. 1 and 2 filed a suit alleging that Sekandar Ostagar, predecessor of the plaintiffs and the defendants Nos. 1 and 2 and Abdul Ostagar, predecessor of the defendants Nos. 3 to 14 were relations. By a registered patta dated 26-11-1909 they took a lease of the disputed property at a rental of Rs. 22/- and had eight annas share each in the property. Abdul Ostagar died first leaving the defendant No. 3 and one Amena Bibi, predecessors of the defendants Nos. 4 to 14 as his daughters. Those heirs began to possess the property in ejmali with Sekandar Ostagar. Then the latter died leaving the defendants Nos. 1 and 2 as sons by his first wife, the plaintiff No. 3 as his daughter, the plaintiff No. 1 as his third wife and the plaintiff No. 2 as his son by the latter. After Sekandar's death Amena Bibi died leaving the defendant No. 16's wife Sayera Bibi, the defendants Nos. 4, 11, 12, 13, 14 and one Golam Kader as his heirs. Subsequently Golam Kader died leaving the defendants Nos. 5 to 10 as his heirs. The plaintiffs requested the defendants to effect an amicable partition. But the defendants Nos. 1 and 2 claimed that they are the 16 annas owners of the property and the C. S. Khatian was prepared accordingly. In fact, Sekandar Ostagar managed the property after Abdul Ostagar died. Later the defendants Nos. 1 and 2 used to manage the property on behalf of their co-sharers. Hence such erroneous entry was made in the C. S. Khatian. The defendants Nos. 1 and 2 gave out that Sekandar Ostagar had gifted the property to them and they alone owned the property to the exclusion of others. The plaintiffs, however, assert that Sekandar Ostagar did not make any gift and the alleged gift was never acted upon. Even if such a deed was executed by Sekandar Ostagar it was obtained from the latter by practising fraud, misrepresentation and undue influence. As such the defendants Nos. 1 and 2 acquired no interest on the basis of the alleged gift. The defendants Nos. 1 and 2 denied the plaintiffs' allegations. It has been alleged that Abdul Ostagar had no interest in the property. Abdul Ostagar was at best a tenant who had

no paramount interest. The property belonged to Sekandar Ostagar alone and he gifted the property to the defendants Nos. 1 and 2 by a registered deed dated 29th Kartick 1328 B. S. and since then they are in possession of the property. They permitted the plaintiffs Nos. 1 to 3 to live on the property but that licence was revoked by the registered letter dated 12-6-1956. The C. S. Khatian was correctly prepared in their favour.

3. The learned Subordinate Judge disbelieved the case of the plaintiff and held that Sekandar Ostagar, in fact, executed a deed of gift in favour of the defendants Nos. 1 and 2 and the said deed of gift was acted upon. In that view of his finding the learned Subordinate Judge dismissed the suit. Being aggrieved the plaintiffs preferred an appeal. The learned appellate court below was of the opinion that it is true that a deed of gift appears to have been executed by Sekandar Ostagar, but Sekandar Ostagar never parted with the possession of the property and that being so, there was no valid gift and the deed of gift was not acted upon. Such being the finding, the learned appellate court below reversed the judgment and decree passed by the learned Subordinate Judge and decreed the suit. Being aggrieved, the defendants Nos. 1 and 2 have come up before this Court.

4. Mr. Ranjit Kumar Banerjee, learned Advocate appearing on behalf of the appellants, in the first place submits that the plaintiffs being the heirs of Sekandar Ostagar cannot challenge the deed of gift which has been admittedly executed by Sekandar Ostagar on the ground that possession has not been delivered to the defendants Nos. 1 and 2, the donees. The heirs of the donors are bound by the averments made in the deed of gift. The plaintiffs made out a case in the plaint that the deed of gift was obtained by practising fraud and misrepresentation but that case was abandoned by the plaintiffs. Mr. Banerjee next submits that the learned court below failed to see that in this particular case the gift was made by the father to his two sons, one of whom was minor. Admittedly, the father and the sons were living in the same homestead and in such circumstances it cannot be said that after executing the deed in favour of the sons the father is required to vacate the dwelling house. Moreover, Mr. Banerjee submits on perusal of the deed it will be clear that Sekandar Ostagar very much intended to make a gift of the property in favour of his sons, defendants Nos. 1 and 2, and the recitals are very clear to show that. In fact,

Sekandar Ostagar has in an unambiguous expression stated that he has been divested of all right, title and interest of the properties and from the date of the execution of the deed all right, title and interest devolved on the donees. He has further stated that the donees and their heirs and successors will enjoy the property as full owners. In such circumstances Mr. Banerjee submits that simply because Sekandar Ostagar or the plaintiffs were residing in the same dwelling house after the execution of the deed of gift, it cannot be said that the deed of gift is invalid because there was no delivery of possession. In support of his contention Mr. Banerjee draws our attention to the provisions of the Mohamedan Law and refers to us Tyabji's Mohamedan Law, 4th Edition and Hedya Book 30 Vol. 3 Chapter 2 Mr. Banerjee also cites before us several authorities to support his contention. He first refers to a decision reported in 59 Ind App 1 = (AIR 1932 PC 13) (Mohammad Sadiq Ali Khan v. Fakhr Jahan Begam). In this case a Mohamedan executed in favour of his wife a deed of gift of immovable property which declared that he delivered possession over it to her as absolute owner. The deed was handed to and retained by her, but there was no mutation of names. She did not take actual possession until after her husband's death but during his life she frequently resided with him on the premises. It was held that "Having regard to the declaration in the deed and its handing over to the donee, the gift was valid. In the case of an intended gift by a husband to his wife, Mohamedan law does not require an actual vacation by the husband and an actual taking of separate possession by the wife." Their Lordships further observed that "in the facts of the case it was unnecessary to decide whether, as held by High Courts in India, that principles applied universally between a Mohamedan donor and donee in joint occupation of immovable property." Mr. Banerjee submits that the High Courts in India in several cases have held that this principle applies between a Mohamedan donor and donee in joint occupation of immovable property specially when the donor and the donee are near relations.

5. Mr. Banerjee next relies on a case reported in (1885) ILR 9 Bom 146 (Shaik Ibham v. Shaik Suleman). In this case it has been observed "For the purposes of completing a gift of immovable property by delivery and possession, no formal entry or actual physical departure is necessary: it is sufficient if the donor and donee are present on the premises, and an intention on the part of the donor to transfer has been unequivocally

manifested". In this case it may be mentioned that the donor and the donee were not related to each other. The donor made a gift stating "as my wife is dead, and as I have no issue, Ibham has done and will do service for me as son, and I, therefore, give the property to him." Mr. Banerjee with much emphasis states that the real point to see in such case is the intention on the part of the donor and that intention can be gathered from the recitals made in the deed, Ext. B.

6. Mr. Banerjee next refers to a case reported in AIR 1958 Mad 527 (S. V. S. Muhammad Yusuf Rowther v. Muhammad Yusuf Rowther) to substantiate his point that the recitals in the deed are binding on the heirs of the donor. It has been laid down "It is no doubt true that delivery of possession of gifted properties is an essential condition of the validity of the gift and its operative nature under the Muslim Law and it would be for the donees to establish it. But where in the deed of gift executed by the deceased, there is a recital that the possession of the property which is the subject-matter of the gift is delivered to the donees, it is an admission binding on the deceased and those claiming under him. Consequently the burden lies on those who claim under the deceased to prove that no delivery of possession was in fact effected in favour of the donees. Burden in such a case is not on the donees to prove the delivery of possession to them". Mr. Banerjee contends that in the present case the onus was wrongly placed by the appellate court below on the donees to establish that the delivery of possession was actually effected. The plaintiffs being the heirs of the donor, they are bound by the recitals and the burden that no delivery of possession was made lies on them. Mr. Banerjee also refers to a decision reported in (1888) 16 Ind App 205 (PC) (Sheikh Muhammad Mumtaz Ahmad v. Zubaida Jan). At page 216 of the said report it has been laid down that if possession was once taken and the deed of gift took effect no subsequent change of possession would invalidate it. Mr. Banerjee submits that in this case there is ample evidence to show that the appellants were in possession of the property, their names were recorded in the C. S. record and that being so, any subsequent change with regard to possession cannot invalidate the deed of gift.

7. The next case referred to by Mr. Banerjee has been reported in AIR 1974 Pat 54 (Ismail v. Idrish). In this case it was held that "Where a deed of gift of certain lands contains a clear recital that the donor has

divested all his interest in the gifted lands and put the donees in possession treating them as full owner, the gift is valid and binding on the donor's heirs and the fact that subsequently one of the heirs of the donor who is disputing the validity of the gift is found in possession of the gifted lands cannot detract from the completeness of the gift." This is a Bench decision and their Lordships in order to come to the above conclusion relied on the case reported in AIR 1964 SC 275 (*Kathessa Umma v. Naravanath Kunhamu* (deceased) and after him his legal representatives and others). In the Supreme Court case a Hanif made a gift of properties including immovable property by a registered deed to his minor wife who had attained puberty and discretion, and the gift was accepted on her behalf by her mother in whose house the husband and wife were residing, when the minor's father and father's father were not alive and there was no executor of the one or the other. It was held that such a gift must be accepted as valid and complete although the deed was handed over to the minor's mother and possession of the property was not given to a guardian specially appointed for the purpose by the Civil Court. In this case there was no question that there was a complete intention to divest ownership on the part of the husband, the donor, and to transfer the property to the donee. Mr. Banerjee asserts that in the present case the recitals of the deed and the facts and circumstances clearly show that there was definite intention on the part of the donor to transfer the property in favour of the donees.

8. The next case cited by Mr. Banerjee has been reported in (1905) ILR 29 Bom 468 (*Bibi Khaver Sultan v. Bibi Rukhia Sultan*). In this case it has been held "As to the delivery of the house, the principle is to be borne in mind, that when a person is present on the premises proposed to be delivered to him, a declaration of the person previously possessed puts him into possession. He occupies certain part, and this occupation becoming actual possession by the will of the parties, extends to the whole which is immediate connection with such part where the possession is rightfully taken. An appropriate intention where two are present on the same premises may put the one out as well as the other into possession without any actual physical departure or formal entry and effect is to be given, as far as possible, to the purpose of an owner whose intention to transfer has been unequivocally manifested". Mr. Banerjee also cites before us a case reported in (1946) 50 Cal WN 81 (*Sk. Golam Gous v. Sk. Raujan*). It has been held that

"under the Muhammadan law where a property the subject-matter of a gift is in actual possession of the donor and the donee, who are related and the donor declares in unequivocal language that he has divested himself of ownership and authorises the donee to take possession, the character of the donee's possession which already existed is altered and for all formal purposes the gift must be considered to have been perfected by such delivery of possession as is feasible in the circumstances".

9. Mr. Manindra Nath Ghosh, learned Advocate appearing on behalf of the respondents draws our attention to the deed of gift Ext. B. He refers to the recitals in the deed and contends that from the recitals it cannot be said that the donor delivered possession to the donees. The relevant portion of the recitals is quoted below:—

"From this day all my right, title and interest will devolve on you . . . you and your successors enjoy the property happily."

From the recitals at best it can be gathered that the donor gave out that he was divested of right, title and interest of the property and the same devolved on the donees. But from the recitals it cannot be concluded that the possession was also intended to be delivered or in fact delivered to the donees. Mr. Ghosh submits that in order to make a deed of gift valid under the Mohamedan law it is absolutely necessary that the possession should be delivered. Mr. Ghosh refers to several Articles in Tyabji's Mohamedan Law, 4th Edition to support his contention. In this connection Mr. Ghosh submits that the donor must in clear terms state "I give delivery of possession". Mr. Ghosh refers to a decision reported in AIR 1935 Bom 84 (*Sugrabai v. Mohamedalli Ahmedalli*). It has been held in this case that in order to constitute a valid gift by a father in favour of his minor children, it is not necessary to transfer possession, but proof of bona fide intention to give must be established. But where the trust is not merely for the benefit of the minor children of the settlor, but also of others and where the settlor has not constituted himself the sole trustee, but there are other persons appointed trustees, the transfer of possession is necessary under the Mohamedan Law". Mr. Ghosh submits that in the present case it is true that one of the donees was minor son but the other donee was major, and the major son was described as guardian of the minor son in the deed of gift. This being the position, it was absolutely necessary to transfer possession. But in the present case it must be remembered that both the donor

and the donees were residing in the same house which was the subject matter of the deed of gift and that being so, on the authority referred to above it cannot be said that it was necessary for the father after executing the deed to vacate the said dwelling house.

10. Mr. Ghosh next submits that whether possession was delivered or not or what happened after the execution of the deed with regard to possession of the gifted property is a question of fact which has been decided by the final court of facts, and that being so, according to the provisions of Section 100 of the Code of Civil Procedure there is no jurisdiction to entertain the second appeal on the ground of erroneous finding of fact. In support of his contention Mr. Ghosh refers to a decision reported in AIR 1959 SC 57 (Deity Pattabhramaswamy v. S. Hanumayya). We are of the opinion that in the facts of the case whether it was necessary to part with possession on the part of the donor is a question of law and on that point there has been difference of opinion between the courts below. In such circumstances we hold that this point can very much be agitated in the second appeal.

11. With regard to possession the C. S. record of rights is in favour of the appellants. There are also rent receipts and Municipal tax receipts in the name of the appellants. The case of the appellants is that they allowed the plaintiffs Nos. 1 to 3 to occupy the disputed land. The plaintiff No. 3 examined herself as P. W. 1 and she stated in examination-in-chief that her mother plaintiff No. 1 and brother Abu Bakkar, plaintiff No. 3, are too poor and they were permitted by her brothers, defendants Nos. 1 and 2 to live on the disputed land. The plaintiff No. 2 states in cross-examination that he asked his brothers Jabbar and Sattar (defendants Nos. 1 and 2) and they pointed out where his hut would be erected and that thereafter he erected the hut at the place pointed out by the former. These statements very clearly show that the plaintiffs Nos. 1 to 3 were permitted by the defendants Nos. 1 and 2 to live on the disputed land as licensee. Considering the facts and circumstances of the case and evidence on record we are of the opinion that the learned lower appellate court was wrong in reversing the judgment of the trial court.

12. In the result the appeal is allowed. The judgment and decree passed by the learned appellate court below are set aside and those of the learned Subordinate

Judge are restored. There will be no order as to costs in this appeal.

B. C. RAY, J.:— I agree.

Appeal allowed,

AIR 1977 CALCUTTA 136

S. K. BHATTACHARYYA AND A. K.

JANAH, JJ.

Balai Chandra Hazra, Appellant v. Shewdhari Jadav, Respondent.

Letters Patent Appeal No. 184 of 1974, D/- 12-8-1976*.

(A) Letters Patent (Cal) Clause 15 — Ordinarily no question of law or fact to be pleaded for the first time in Letters Patent appeal. Where parties allowed to make fresh pleadings fresh issues arise and new point can be pleaded. AIR 1971 SC 2468, Foll.

(Para 10)

(B) West Bengal Premises Tenancy Act (1956), Sec. 13 (1) (f) and (ff) — Reasonableness of requirement — Comparative inconvenience of tenant not required to be considered. AIR 1973 Cal 515 Overruled.

Clause (f) of Section 13 (1) of the present Act as it stood before the amendment, was on identical terms with the provisions of clause (h) of Section 12 (1) of the West Bengal Premises Rent Control (Temporary Provision) Act, 1950, which is the forerunner of the present Act. In Clause (h) of Section 12 (1) of the 1950 Act, there was an explanation, which required the court in determining the reasonableness of requirement of accommodation to have regard to the comparative advantage or disadvantage of the landlord or the person for whose benefit the premises were held and of the tenants. This guideline has been deleted from clause (f) of Sec. 13 (1) of the 1956 Act as it stood before the amendment. Consequently, these considerations which were imperative for the Court to consider are no longer in the statute and the Courts are, therefore, free to consider the reasonableness of the requirement in Clause (f) (now clauses (f) and (ff)) without advert-ing to the comparative advantage or disadvantage of the tenant or the landlord. The legislature advisedly dropped the explanation occurring in clause (h) of Section 12 (1) of the old Act at the time of re-introducing clause (f) of Section 13 (1) of the new Act on substantially identical terms and it is no

* (Against judgment of Murari Mohan Dutt J. in A. F. A. D. No. 1162 of 1967, D/- 27-8-1973).

longer the legislative intent to test the reasonableness of the requirement of the landlord on the touchstone of the tenant's advantage or disadvantage. AIR 1973 Cal 515, Overruled. (Para 12)

(C) West Bengal Premises Tenancy Act (1956), Section 13 (1) (ff) — Expression 'reasonably required' — Test of reasonableness — Standard of requirement of a reasonable man under similar circumstances — Mere desire of landlord not sufficient — Need must also be established.

The expression 'reasonably required' in clause (ff) has not been defined in the Act. Such a requirement in order to be reasonable must have some relation to the actual need of the person for such kind of occupation and the test, must relate to the standard of requirement of a reasonable man under circumstances occurring in the particular case. The inconvenience caused to the tenant should not play any part although the landlord is bound to prove the reasonableness of his requirement, which signifies not merely a desire on the part of the landlord but he is further required to establish that there is an element of need, besides making out that he was not in possession of a reasonably suitable accommodation already. (Para 13)

Cases Referred: Chronological Paras
AIR 1975 SC 1146 = (1975) 2 SCR 774 8,
9, 10
AIR 1973 Cal 515 11
AIR 1971 SC 2468 = (1971) 2 SCWR
316 10

S. C. Dasgupta and Tapan Kumar Sen-
gupta, for Appellant; Manindra Nath Ghose
and Jamini Kumar Banerjee, for Respondent.

S. K. BHATTACHARYYA, J.:— This appeal by the defendant under clause 15 of the Letters Patent is directed against the judgment and decree passed by M. M. Dutta, J. in Second Appeal No. 1162 of 1967 affirming the decision of the Courts below decreeing the plaintiffs' suit for ejectment against the defendant.

2. The suit out of which this appeal arises was for eviction of a monthly tenant-at-will upon service of notice to quit on the ground of reasonable requirement.

3. The plaintiffs' case, in brief, is that the defendant appellant had been in occupation of two rooms, kitchen and bath, in the ground floor of premises No. 16/1A, Ram Ratan Bose Lane, Shyambazar at a rental of Rs. 37/- per month payable according to English Calendar which was purchased by the plaintiff with the tenants in the premises. There were two other tenants, one in the first floor and another in the second floor and the plaintiff filed three suits of ejectment

against three tenants separately. The plaintiff alleged that he was living in a rented house with his family and dependents and the accommodation therein was wholly insufficient. The plaintiff accordingly purchased the suit premises for better accommodation alleging that he reasonably required the same for his own use and occupation and thereafter caused a notice to quit to be served on the defendant-appellant requiring him to quit and vacate the disputed premises with effect from a certain date, but as the defendant failed and neglected to comply, the instant suit was instituted.

4. The defendant contested the suit raising various objections but in so far as the instant appeal is concerned, the defendant-appellant disputed the reasonableness of the plaintiffs' requirement and further contended that the plaintiff was already in possession of a reasonably suitable accommodation and as such was not entitled to a decree for ejectment. No other point was pressed in this appeal.

5. The learned Munsif on a consideration of the evidence adduced in this case found in favour of the plaintiff and decreed the suit.

6. On appeal by the defendant, the learned Additional District Judge, 5th Court Alipore, agreed with the learned Munsif that the plaintiff has been able to establish his case of reasonable requirement of the suit premises for his use and occupation and accordingly dismissed the appeal.

7. The defendant thereupon preferred a second appeal to this Court. In the said appeal, the defendant prayed for adducing certain additional evidence and further contended that the requirement of the plaintiff stood satisfied as he has already recovered possession of four rooms in the suit premises and constructed two other rooms on the top floor. It was further contended on behalf of the plaintiff that the suit having been instituted within a period of three years of the acquisition of landlord's interest by the plaintiff, was hit by the provisions of sub-section (3-A) introduced in the West Bengal Premises Tenancy Act, 1956 (to be hereinafter referred to as the Act) by the West Bengal Premises Tenancy (Second Amendment) Act, 1969. All these contentions were overruled by the learned Judge, who agreed with the Courts below on the question of reasonable requirement of the plaintiff. In that view of the matter, the learned Judge dismissed the appeal and affirmed the judgment and decree passed by the Court below. Hence, this appeal with special leave,

8. Whilst this appeal was pending in this Court, the Supreme Court in the case of *B. Banerjee v. Anita Pan* reported in AIR 1975 SC 1146 held that Section 13 of the West Bengal Premises Tenancy (Amendment) Act, being Act 34 of 1969 read with Section 4 of the Amending Act shall have effect in respect of suits, including appeals, pending at the commencement of the Act and the courts were bound to give effect thereto in pending actions, regardless of isolated anomalies and individual hardships. By Section 4 of the Amending Act, clause (f) of sub-section (1) of Section 13 of the Original Act was substituted by two new clauses (f) and (ff) and sub-section (3A) was introduced in the Statute Book prohibiting for a period of three years from the date of acquisition of a property, suits by new acquirers of landlord's interest in the premises, for recovery of possession on any of the grounds mentioned in clauses (f) and (ff). The Supreme Court further pointed out that as the plaintiff landlord did not seek eviction on the ground mentioned in amended clause (ff), the suit should have been dismissed on account of the omnibus inhibition on recovery of possession contained in Section 13 of the Act, but in working out the mechanics of this subsequently imposed ban and in order to give effect to the amendment, the Supreme Court permitted the parties therein to file fresh pleadings setting out the grounds under the amended clauses if they so wished. Accordingly, the plaintiff was permitted to amend the plaint in the instant appeal and the defendant also filed an additional written statement which were accepted and fresh issues, arising from the fresh pleadings were framed by us in the following terms:—

1. Is the premises in dispute reasonably required by the plaintiff-respondent for his own occupation and for the occupation of the members of his family?

2. Is the plaintiff-respondent in possession of any reasonably suitable accommodation?

9. Mr. Dasgupta the learned Advocate appearing for the appellant seeks to assail the decision of the courts below mainly on three grounds. It is contended in the first place that the reasonableness of the requirement of the landlord in the context of the subsequent pleadings stands self-condemned inasmuch as in the initial pleading the respondent-landlord set out a case for requirement of 18 persons, which could not be established in evidence for more than 11 persons, but at the time when the additional pleadings were filed in this court, pursuant to the decision of the Supreme Court in the

case of *B. Banerjee v. Anita Pan* (AIR 1975 SC 1146) (supra) the landlord opened his mouth too wide and set out a case for requirement of 35 persons. This tailored requirement, according to Mr. Dasgupta, saw the light of the day only after the Supreme Court decision became known in or about June, 1975 and the landlord's requirement as such, was mala fide and motivated. In the next place, Mr. Dasgupta contended that even if the reasonableness of the requirement of the landlord is accepted, he has patently failed to establish that he was not in possession of a reasonably suitable accommodation already. On the contrary, Mr. Dasgupta contends that the existing accommodation available to the landlord at premises Nos. 16/1A, Ram Ratan Bose Lane, Shyambazar and 2/1A, Bhupen Bose Avenue Shyampukur is not only reasonably suitable but more than satisfied the requirement of the plaintiff on the basis of the case originally made out in the plaint. Mr. Ghose the learned Advocate appearing on behalf of the respondent landlord, on the other hand, contended that the reasonable requirement of the landlord can never be static and during the 12 years that the suit and the appeal are pending this requirement of the landlord increased several fold as the family has grown and the business of the plaintiff has expanded, with the result he now has to cater to the requirement of a larger number of persons daily, quite apart from the members of his own family. In the next place, Mr. Ghose contended that the appellant not having taken or canvassed any ground in the second appeal that the existing accommodation available to the plaintiff at that date was sufficient to satisfy his requirement and was also reasonably suitable, the appellant cannot now be permitted to contend that the accommodation available at Bhupen Bose Avenue premises, in which the plaintiff had a precarious stake, being a *bharatia* under a *thika* tenant in respect of a *mud kotha*. Mr. Ghose further contended that this being a Letters Patent appeal, the appellant cannot be permitted to increase its scope than he would have been entitled to in a second appeal.

10. To take up Mr. Ghose's last objection first, it is to be pointed out that ordinarily in an appeal under Cl. 15 of the Letters Patent a point whether involving a question of law or on fact cannot be allowed to be agitated when that point was never taken in the courts below or even in the second appeal before the High Court at any earlier stage. We need refer only to one case in this connection, namely the case of *Shan-*

baggakannu v. Muthu Bhattar, reported in AIR 1971 SC 2468, but in the said appeal the Supreme Court pointed out that the question for consideration would be otherwise, if fresh pleadings are put in and the other party is granted a proper opportunity to meet such a case. In the instant case the plaintiff, pursuant to the decision of the Supreme Court in the case of B. Banerjee v. Anita Pan (AIR 1975 SC 1146) (supra), had been allowed to be amended by us and in our view, it would now be open to both parties to canvass those points that arise out of those fresh issues, even though those may not have been taken up at any earlier stage of the present proceeding including the second appeal in this Court.

11. Let us now examine the contention put forward by Mr. Dasgupta in so far as the reasonableness of the requirement of the plaintiff and the availability of a suitable accommodation by him is concerned. Before we advert to the evidence adduced in this case, it will be necessary to dispose of a point of law canvassed by Mr. Dasgupta in this connection. Mr. Dasgupta contends that the reasonableness of the requirement of the landlord under Section 13 (1) of the Act is not merely subjective, but also objective and should be ascertained by the court as a ground for eviction of the tenant not only by emphasizing the benefits to the landlord by way of his financial gain or convenience to his business, but by weighing his genuine or real requirement with the inconvenience that the tenant will suffer by his eviction. In support, Mr. Dasgupta relied on the decision of a learned single Judge of this Court in the case of Bimalendu Bhusan Das v. Firm Mitra and Ghose reported in AIR 1973 Cal 515. Applying the above standard, the learned single Judge in the above-cited case came to the conclusion that the requirement of the landlord was not a reasonable one. This decision, in our view, cannot be regarded as correct.

12. Clause (f) of Section 13 (1) of the present Act as it stood before the amendment, was on identical terms with the provisions of clause (h) of Section 12 (1) of the West Bengal Premises Rent Control (Temporary Provision) Act, 1950, which is the forerunner of the present Act. In clause (h) of Section 12 (1) of the 1950 Act, there was an explanation, which required the court in determining the reasonableness of requirement of the landlord for purposes of building or rebuilding to have regard to the comparative public benefit by extending or diminishing accommodation and for determining the reasonableness of requirement of

accommodation the court was to have regard to the comparative advantage or disadvantage of the landlord or the person for whose benefit the premises were held and of the tenants. This guideline, which enjoined on the court to take into consideration the comparative advantage or disadvantage of both the landlord and the tenant in determining the reasonableness of the requirement of the landlord for his occupation has been deleted from clause (f) of Section 13 (1) of the 1956 Act as it stood before the amendment. Consequently, these considerations which were imperative for the court to consider in determining the reasonableness of requirement whether for the purpose of building or rebuilding or for the purpose of occupation is, in no longer in the statute and the Courts are, therefore, free to consider the reasonableness of the requirement in clause (f) (now clauses (f) and (ff)) without adverting to the comparative advantage or disadvantage of the tenant or the landlord. The legislature advisedly dropped the explanation occurring in clause (h) of Section 12 (1) of the old Act at the time of re-introducing clause (f) of Section 13 (1) of the new Act on substantially identical terms and it appears to us that it is no longer the legislative intent to test the reasonableness of the requirement of the landlord on the touchstone of the tenant's advantage or disadvantage. The decision of the learned single Judge in the case of Bimalendu Bhusan Das failed to take into consideration this material change in the provision of Section 13 (1) (f) of the 1956 Act.

13. The expression 'reasonably required' in clause (ff) has not been defined in the Act. The requirement postulated by the legislature must be reasonable requirement of the landlord for his own occupation if he is the owner by which it must be taken to mean that the landlord requires it for the purposes of his occupation. Such a requirement in order to be reasonable must have some relation to the actual need of that person for such kind of occupation and the test, in our view, must relate to the standard of requirement of a reasonable man under circumstances occurring in the particular case and not to his whim or caprice. Judged by that consideration plaintiff's requirement has to be tested in the light of the requirement of a reasonable man with a family similar to that of the plaintiff. We, therefore, do not think that the inconvenience caused to the tenant should play any part in our consideration, although the landlord is bound to prove the reasonableness of his requirement, which signifies not merely a desire on the part of the landlord but he is further required to es-

establish that there is an element of need, besides making out that he was not in possession of a reasonably suitable accommodation already.

14. The examination of the evidence adduced by the parties in this case both at the trial stage and in this court would undoubtedly show that the case as originally made out by the plaintiff in the plaint and in his evidence in the trial court has undergone substantial change. Admittedly, the plaintiff purchased the premises in suit on October 1, 1963 with the appellant and two other tenants in occupation of the suit premises. In 1964 he filed three suits for ejectment against the three tenants and obtained three decrees for eviction on the ground of reasonable requirement in each case. The premises contains six rooms, two in each floor besides kitchen, bath, privy and other amenities. At the time when the premises was purchased, the plaintiff with part of his family and some employees were putting up in a *matkotha* at 2/1A, Bhupen Bose Avenue as a *bharatiya* under one Shyamlal Sahu, who was a *thika* tenant. There is no denying the fact that the interest of this Shyamlal Sahu has since been terminated and the plaintiff has temporarily become a tenant under the landlord of the said premises *Sm. Renuka Bose*. The *matkotha* at No. 2/1A, Bhupen Bose Avenue contains three rooms and a kitchen, the size of each room, according to the plaintiff, being about 10 feet x 8 feet and that of kitchen being 6 feet x 4 feet. From the Commissioner's report submitted in this case it appears that the size of the rooms in the said premises was 10 feet 6 inches x 9 feet 6 inches, whilst the six rooms in the disputed premises at No. 16/1A, Ramratan Bose Lane, according to the Commissioner, measures more or less 12 feet x 8 feet 4 inches on the ground floor (one of the rooms being irregular in size), but according to the plaintiff the size of the six rooms in the said premises is 12 feet x 9 feet and that of the *thakurghar* on the top floor is 9 feet x 7 feet. Of these six rooms in premises No. 16/1A, Ramratan Bose Lane, plaintiff respondent admittedly obtained possession of four rooms after the disposal of the connected first appeals. Consequently, the plaintiff is now in possession of two rooms on the first floor, two rooms on the second floor and the *thakurghar* on the top floor of the premises plus four rooms at the tenanted premises at No. 2/1A, Bhupen Bose Avenue, Calcutta. This accommodation, according to Mr. Dasgupta, satisfied the tailored requirement of plaintiff in terms of clause (ff) of Section 13 (1) of the Act, Mr.

Dasgupta accordingly contends that as the plaintiff is already in possession of a reasonably suitable accommodation, he is not entitled to a decree for eviction against the present appellant on the ground of his reasonable requirement. We are unable to accept this contention of Mr. Dasgupta. Apart from the fact that all the three courts have found that the requirement of the plaintiff would not be satisfied by his occupation of five rooms of the disputed premises and the plaintiff really requires all the six rooms (now seven) of the said premises for his own use and occupation. It does not appear that in the second appeal the defendant took the position that the plaintiff's requirement would be fully satisfied by possession of the five rooms in the disputed premises together with occupation of the four rooms of the tenanted premises at No. 2/1-A, Bhupen Bose Avenue. We do not think that the accommodation at No. 2/1-A, Bhupen Bose Avenue should be taken into consideration in assessing the reasonableness of the requirement of the plaintiff in this case; for to do so would have the effect of splitting up of the family of the plaintiff into two parts, which the law does not require. There are no materials on record to show how far and at what distance is one premises from the other, Mr. Dasgupta concedes that the walking distance from one premises to the other would not be less than five minutes. That by itself would show that the family of the plaintiff perforce would have to be split up into two parts with all its attendant evil effects. Besides, the plaintiff has stated in his evidence that he has been permitted by the owner Renuka Bose to stay in the said premises till he recovers possession of his house at Ramratan Bose Lane, Calcutta. We, therefore, do not think that the accommodation available to the plaintiff at 2/1A, Bhupen Bose Avenue should be taken into consideration in assessing the suitability or otherwise of the accommodation now available to the plaintiff.

15. But the main argument of Mr. Dasgupta is that the plaintiff's requirement has been tailored to make it look reasonable and in his cross-examination, the plaintiff has opened his mouth very wide. For this purpose Mr. Dasgupta drew our attention to the case made out by the plaintiff in the original plaint where the requirement was for 18 persons, of whom 11 persons were the members of the family and 7 were employees. The same requirement has now been enlarged to accommodate 36 persons, of whom 22 are members of the family and 14 are stated to be employees. This according to Mr.

Dasgupta renders the plaintiff's case mala fide and motivated. The plaintiff in his evidence before this Court admitted that he when he filed the suit in 1964, he pleaded for the requirement for 18 persons but asserts that at present he had 36 members of whom 22 are members of his family and 14 are his employees engaged by him on weekly or monthly basis (vide answer to questions 240 and 245). The plaintiff was asked to produce the ration cards for the members of his family and his dependents and he produced 24 permanent ration cards of whom 17 belonged to the members of his family and 7 to persons employed by him. After the plaintiff obtained possession of the first and second floor rooms of Ramratan Bose Lane premises, 17 or 18 persons are stated to have shifted to that house and started living there and about 7 persons continued to live in the Bhupen Bose Avenue premises. The names of those persons, who were living at Ramratan Bose Lane premises were given out by the plaintiff in answer to question No. 97. On being asked to explain why there is a variation in his requirement, the plaintiff in answer to question No. 105, stated that when he instituted the suit, the number of the members of his family were 11. Subsequently children were born to his sons and the family increased. Not only the size of the family increased, but he also started a second shop and the number of the employees also increased. This was further elaborated in answer to question No. 52 where the plaintiff stated that some members of his family used to stay at his native place and one party would come here and stay for about three or four months and would then go back and another party would come and stay. It was mostly the ladies of the family, who continued to come in this fashion by rotation, because it was difficult to keep them all at the same time due to paucity of accommodation. Mr. Dasgupta sought to point out that the ration cards held by the plaintiff, particularly for his employees and also for some members of his family would show that they had been taken out recently and the case sought to be made out by the plaintiff cannot therefore be accepted. In answer to question No. 134, the plaintiff admitted that as against the ration cards, some of the holders were not at present residing with him, but in place of the old employee, a new employee was there and he used to draw ration for them against cards standing in the name of his old employees. This conduct on the part of the plaintiff may not have been strictly in accordance with the provisions of the rationing regulations, but we do not think, it should have an impact on

his requirement here. It is not difficult to see that a man placed in a predicament as the plaintiff was placed, would probably have acted in more or less similar fashion. We therefore propose to scrutinise the case on the basis of the basic minimum requirement of the plaintiff. There is little doubt that the plaintiff's family has increased considerably since the institution of the present suit in 1964 and the volume of his business has also increased considerably. Instead of having one shop, he now owns two shops dealing in foodgrains and other edibles, both in retail and wholesale and his standing in the business has been fully made out before us. He has adduced evidence to show that he pays considerable amount by way of income and sales-taxes. We need not enter into the details of these evidence, but there can be little doubt that the plaintiff's family now consists of self, wife, father Deonandan, three married sons Sew Sankar, Uma Sankar and Rabi Sankar, one unmarried son, three married daughters-in-law, eight children of his eldest son and one very young child of his third son and his unmarried daughter Sharmila. Besides, he claims to have a durwan, a cook, a servant and a maid servant, who of course do not stay in the house. If we leave aside the employees, who according to the convention of the plaintiff's business, are to share accommodation and food in his family, the plaintiff's family as made out in evidence and as accepted by all the courts below, would certainly require six rooms, if not more, for their accommodation. The plaintiff and his wife between themselves would certainly require one room and his three married sons with their respective wives would also require a room each. The children numbering nine, (of whom two only are below five years) would require at least one room, if not more, for their study (and many of them are school going), one room for kitchen and another for the unmarried daughter. This would account for all the rooms in the premises and neither the servant nor other relations or visitors would have any accommodation for them left in the premises. So, for the basic minimum requirement of the plaintiff, he would require all the six rooms plus a thakurghar on the top floor and the existing accommodation whether in Ramratan Bose Lane premises singly or conjointly with that of premises No. 2/1A, Bhupen Bose Avenue would not satisfy the requirement of a reasonably suitable accommodation for the plaintiff. There are at least 7 persons residing in the Bhupen Bose Avenue premises, who by reason of convention or long-standing practice are required to reside with the plain-

tiff and have their meals with him. The defendant did not seriously dispute the existence of the number of members of plaintiff's family, but it was asserted by him that many of them usually stays or resides in his native village in Uttar Pradesh. Plaintiff has explained the circumstances why he had to keep a part of his family in his native village and we are satisfied that he was compelled to do so in the circumstances in which he found himself placed. The defendant further attempted, somewhat belatedly, to show that the plaintiff had some other alternative accommodation in the city, but in this he has totally failed. Such a case was not made out even in his additional written statement nor was it suggested to the plaintiff in his cross-examination in this court. Except for the muthkoti at Bhupen Bose Avenue, no other accommodation is available to the plaintiff in the City and this accommodation, we have already found, is not a reasonably suitable accommodation. In any view of the matter, therefore, we must hold that the plaintiff has been able to make out a case of reasonable requirement of the suit premises for his own use and occupation and it must further be held that the plaintiff does not have a reasonably suitable accommodation already. These two issues are, therefore, answered in plaintiff's favour.

16. It follows, therefore, that the instant appeal must fail and is accordingly dismissed. The judgment and decree of all the courts below are hereby affirmed.

17. The defendant appellant is granted time till 30th of November 1976 to vacate the premises in dispute provided that the defendant appellant continues to deposit an amount equivalent to the rate of rent month by month according to English Calendar by the 15th of each month in the trial court, the first of such deposits is to be made by the 15th August 1976 and the rent for the month of November 1976 is to be deposited by the 30th November 1976, failing which the plaintiff respondent would be at liberty to execute the decree.

18. In the circumstances of the case there will be no order as to costs in this appeal.

JANAH, J.:— I agree.

Appeal dismissed.

AIR 1977 CALCUTTA 142

R. BHATTACHARYA AND A. K. JANAH, JJ.

K. Vasudeva Rao, Appellant v. Jadu Nandan Trivedi, Respondent.

Letters Patent Appeal, No. 79 of 1974, D/- 27-7-1976.

(A) Letters Patent (Cal), Cl. 15 — Civil P. C. (1908), Section 100 — Interference with findings of fact in Letters Patent appeal. AIR 1964 Pat 76 and AIR 1965 Pat 472 (FB), Dissent. from.

Section 100 C. P. C. is not strictly applicable to a Letters Patent appeal. The Bench is not barred by law from interfering with findings of fact in respect of a judgment of a Single Judge in first appeal, though in case of concurrent findings of fact it will be slow to interfere. In proper cases it has a right to review findings of fact for proper decision and ends of justice. AIR 1964 Pat 76 and AIR 1965 Pat 672 (FB), Dissent. from; AIR 1958 Punj 260 and AIR 1967 Delhi 128, Rel. on. C. A. No. 232 of 1961, D/- 11-1-1963 (SC), Foll. (Paras 4, 4A, 5, 7).

(B) West Bengal Premises Tenancy Act (12 of 1956), Section 13 (1) (f) and (ff) — Amendment introducing Section 13 (1) (ff) after institution of suit — No other suitable accommodation — Issue not framed — Plea already taken in plaint and answered in written statement and evidence adduced as well — Findings given by trial Court and appellate Court on the point by application of mind squarely covering the requirement of clause (ff) — No injustice or prejudice caused — Question of amendment of plaint that plaintiff landlord was not in possession of any other suitable accommodation, did not arise. AIR 1966 SC 735 and AIR 1977 Cal 99, Rel. on; AIR 1976 SC 479, Foll.

(Paras 9, 10)

(C) West Bengal Premises Tenancy Act (12 of 1956), Section 13 (6) — Transfer of Property Act (1882), Sections 106 and 111 — Legality of second notice determining tenancy when first notice not acted upon by both parties.

Once a notice of termination of tenancy is given it cannot be unilaterally retracted by the landlord and when determination of tenancy is accepted by both parties the tenant cannot continue the tenancy again without the approval or consent of the landlord. But when the tenant does not accept the determination of that tenancy and the landlord also does not act upon that notice the question of consent of the tenant for giving a second

notice does not arise. AIR 1968 SC 471, Dist. (Para 12)

Where even after the notice of determination of tenancy, the tenant asserts himself as a tenant and the landlord treats him as such, the first notice is waived. In such a case there is no illegality in the second notice given by the landlord. (Para 13)

(D) West Bengal Premises Tenancy Act (12 of 1956), Section 13 (1) (ff) — Word 'owner' not qualified or limited — Includes co-owner or co-sharer. (1975) 1 Cal LJ 413, Foll. (Para 14)

(E) West Bengal Premises Tenancy Act (12 of 1956), Section 13 (1) (ff) — Plaintiff-landlord co-owner — Other co-owners not necessary parties. (Civil P. C. (1908), Order 1, Rule 10).

Where there are other co-owners of a building and if the plaintiff is one of the co-owners letting out the premises to the tenant, then the other co-owners have no locus standi to bring a suit for eviction against a person who is not a tenant under them. They are neither proper nor necessary parties.

(Para 14)

Cases	Referred:	Chronological	Paras
AIR 1977 Cal 99 = 80 Cal WN 753			10
AIR 1976 SC 479 = (1976) 2 SCR 205			10
AIR 1975 SC 1146 = 1975 Ren CR 293			8
(1975) 1 Cal LJ 413			14
AIR 1974 Cal 80 = 77 Cal WN 613			14
AIR 1968 SC 471 = (1968) 2 SCR 20			12
AIR 1967 Delhi 128 = 69 Pun LR 297			(D) 6
AIR 1966 SC 735 = (1966) 2 SCR 286			10
AIR 1965 Pat 472 = 1965 BLJR (FB)			300 5
AIR 1964 Pat 76 = 1964 BLJR 34			5
(1963) C. A. No. 232 of 1961, D/- 11-1-1963 (SC)			6
AIR 1958 Punj 260 = 60 Pun LR 27			4A

B. C. Dutt, and Ganpati Chunder, for Appellant; Tapas Roy and S. M. Mukherjee, for Respondent.

R. BHATTACHARYA, J.— The defendant, K. Vasudev Rao, has come up with the instant Letters Patent Appeal challenging the decision arrived at in the first appeal before this Court affirming the judgment and the decree passed in favour of the plaintiff-respondent Jadu Nandan Trivedi in the original suit started in the City Civil Court at Calcutta.

2. Briefly stated, the plaintiff's case is that he is the owner of the premises No. 25A, Chittaranjan Avenue, Calcutta and that the defendant was a monthly tenant under him in respect of a room on the ground floor of the said premises at a monthly rental of

Rs. 70/- payable according to the English Calendar. The plaintiff's allegation is that he reasonably requires the suit room for his own use and occupation because it is necessary for the use of his eldest son. Gaya Prosad Trivedi, a member of his family as his chamber in connexion with his legal practice. It has been stated that Gaya Prosad is in urgent need of a room on the ground floor to receive his clients. Other grounds for eviction of the tenant are that the defendant has been creating nuisance and annoyance to the plaintiff and other occupants of the house and neighbours by using a grinding machine, that he is guilty of acts of waste resulting in material deterioration of the condition of the house and that he made substantial additions and alterations of permanent nature by raising a wall, removing the door and digging out the floor of the room without the landlord's permission and consent. The defendant appeared and challenged the allegations made by the plaintiff. He has denied that the plaintiff requires reasonably the room in suit as alleged or that he did any act of waste or material deterioration of the house by making any construction or by digging the floor or by removing the door as alleged. The trial court on evidence found that the defendant is not guilty of either any nuisance or annoyance or of any act of waste or material deterioration of the house by making additions, alterations etc. as alleged. The learned Judge of the City Civil Court, however, was satisfied that the plaintiff required the suit premises reasonably for his own use and occupation as stated in the plaint. Ultimately the suit was decreed. In the first appeal taken by the defendant before this Court, one of our learned brothers, M. M. Dutt, J. on consideration of the contentions raised and materials on record held that the trial court had been justified in passing the decree on the ground of reasonable requirement of the plaintiff and affirmed the decision thereof. Against that decision the present appeal has been filed.

3. We have heard Mr. Dutt, the learned Advocate appearing on behalf of the appellant and Mr. Roy for the respondent.

4. The first point that has been urged by Mr. Dutt on behalf of the appellant is that the learned Judge in the first appeal as well as the trial court did not properly consider the evidence on record regarding the alleged reasonable requirement of the plaintiff and for that purpose Mr. Dutt wants to discuss the evidence once again of each and every witness examined in the trial court, Mr. Roy from the side of the respondent, however, contends that in this Letters Patent Ap-

peal Mr. Dutt cannot reargue the questions of fact, which according to Mr. Roy, have been finally settled in the first appeal before Mr. Justice M. M. Dutt. The respondent's contention is that the appeal before us is as good as second appeal and, therefore, the findings of fact as to the question of reasonable requirement of the plaintiff cannot be reopened at this stage and this Court cannot go into the evidence to reassess the same for its own finding. Mr. Dutt has replied, however, that the High Court, while dealing with an appeal under Clause 15 of the Letters Patent, will be at liberty to reconsider the evidence on the question of fact and should come to an independent finding. In this connexion we may consider some of the decisions referred to by the learned Advocates of both the parties regarding the scope of the Court in a Letters Patent Appeal relating to the finding of fact arrived at in the first appeal.

4A. In the case of *M/s. Bholabhai v. Ratan Chand* reported in AIR 1958 Punj 260 decided by a Division Bench, the powers of a Bench hearing an appeal under Clause 10 of the Letters Patent were considered. In that connexion the view of the learned Judges appears in the following words :

"Although there is not such rule either of procedure or practice by which a Bench hearing an appeal under Clause 10 of the Letters Patent is debarred from examining and reversing a finding on a question of fact given by the learned Single Judge, nevertheless, the appeal court would be reluctant to interfere with that finding unless there are very strong reasons for doing so."

5. There is the Full Bench decision of the Patna High Court in the case of *Sm. Asho Devi v. Dhuki Shaw* reported in AIR 1965 Pat 472 (FB). This is an appeal against the judgment of a single Judge of the Patna High Court reversing the judgment of the 3rd Subordinate Judge, Patna and dismissing the plaintiff's suit for recovery of certain amount. This Full Bench decision affirmed the decision of a Division Bench of the Patna High Court in *Ram Swarup Singh v. Muneshwar Singh* reported in AIR 1964 Pat 76, where it was held, on a construction of Clause 10 of the Patna Letters Patent, that in an appeal against the first appeal judgment of a single Judge the restrictions imposed by Section 100 of the Code of Civil Procedure would apply and that the Division Bench will not be justified in interfering with mere findings of fact.

6. Our attention has also been drawn to the Division Bench decision of the Delhi High Court in *Pt. Devi Charan v. Durga Prosad Chhannulal* (AIR 1967 Delhi 128).

There also the question arose whether a Division Bench of a High Court, while hearing the Letters Patent appeal from a first appeal which was heard by a single Judge of the High Court, can review even a finding of a fact. The Bench is, however, of the view that a Division Bench of a High Court in hearing a Letters Patent Appeal from a first appeal heard by a single Judge of the High Court can reconsider the findings of fact, particularly, when the judgment by the learned single Judge is not of affirmance, but of reversal of the judgment of the trial Court. In this connexion a reference was made to an unreported decision of the Supreme Court dated 11-1-1963 in C. A. No. 232 of 1961 *Alopati Kashi Biswanathan v. A. Sivarama Krishnaiya*. A portion of the unreported decision of the Supreme Court has been quoted in the judgment. No other reported decision of the Supreme Court in this respect has been brought to our notice. We, however, quote the relevant portion of the unreported Supreme Court decision as follows:

"A Letters Patent appeal from the judgment of a Learned Single Judge in a first appeal to the High Court is not exactly equivalent to a second appeal under Section 100 of the Civil Procedure Code and, therefore, it cannot be held that a Letters Patent Appeal of this kind can only lie on a question of law and not otherwise. The matter would have been different if the Letters Patent Appeal was from a decision of a learned Single Judge in a second Appeal to the High Court. In these circumstances, it will be open to the High Court to review even findings of fact in a Letters Patent Appeal from a first appeal heard by a learned Single Judge, though generally speaking the Letters Patent Bench would be slow to disturb concurrent findings of fact of the two courts below. But, there is no doubt that in an appropriate case a Letters Patent Bench hearing an appeal from a learned Single Judge of the High Court in a first appeal heard by him is entitled to review even findings of fact".

7. On consideration of the judicial practice, the provisions of law and the decision of the Supreme Court, there can be no doubt for us to hold that S. 100 of the Code of Civil Procedure cannot be strictly and legally speaking applicable to an appeal to be heard by the Letters Patent Bench. This Bench will have powers to reconsider the findings of fact. This interference with the finding of fact is not barred by law in respect of a judgment of a single Judge in the first appeal. In the case of concurrent findings of fact both in the trial court and in the first appeal, the Letters Patent Bench will be slow

to interfere. In proper cases the Bench will have right to review the findings of fact for proper decision and for ends of justice. Such occasion may arise when, for example, the impugned finding of fact is based upon misreading of evidence or the pleadings or it is based on no evidence or it is based on evidence illegally admitted and in other cases where it is perverse and utterly unreasonable. The instances may not be exhaustively enumerated.

8. Mr. Dutt has contended that in view of the amendment of Section 13 (1) (f) of the West Bengal Premises Tenancy Act, 1956 made in 1969 by introduction of Section 13 (1) (ff), the suit should be dismissed or at least the appeal should be sent back on remand for amendment of the plaint in view of the decision of the Supreme Court in *B. Banerjee v. Anita Pan* reported in AIR 1975 SC 1146. Going through the decision of that case we have no doubt to hold that there is no ground either of the dismissal of the suit or of sending back the case on remand, as contended by Mr. Dutt for amendment of the plaint. First of all, we should note that in that case the Supreme Court found that the suit as originally brought was defective since it did not contain averments complying with the new clauses (f) and (ff) of sub-s. (1) of Section 13. In the appeal before us, there is no question of transfer of ownership of the suit premises by the landlord within three years indicated in sub-section (3A). Secondly the old clause (f) of sub-section (1) of Section 13 of the West Bengal Premises Tenancy Act was as follows:—

“(f) Where the premises are reasonably required by the landlord either for purposes of building or rebuilding or for making thereto substantial additions or alterations or for his own occupation if he is the owner or for the occupation of any person for whose benefit the premises are held.”

By the Amending Act XXXIV of 1969 previous clause (f) was practically sub-divided and substituted in its place by the two following clauses:

“(f) Subject to the provisions of sub-section (3A) and Section 18-A, where the premises are reasonably required by the landlord for purposes of building or rebuilding or for making thereto substantial additions or alterations, and such building or rebuilding, or additions or alterations, cannot be carried out without the premises being vacated;

(ff) Subject to the provisions of sub-section (3A) where the premises are reasonably required by the landlord for his own occupation if he is the owner or for the occupation

of any person for whose benefit the premises are held and the landlord or such person is not in possession of any reasonably suitable accommodation”.

We are concerned with clause (ff) of Section 13 (1). Mr. Dutt's contention is that when the present suit was filed in the year 1968, there was no existence of clause (ff), and unless the plaintiff makes an amendment inserting in the plaint that he was not in possession of any other reasonably suitable accommodation, than the room in suit, the plaintiff cannot get any decision on that point and if the defendant is not given an opportunity to make a submission on that point or challenge the said ground, no proper decision can be arrived at. In this connexion Mr. Dutt has submitted that in the absence of the allegation in the pleading that the plaintiff was not in possession of any other reasonably suitable accommodation and in the absence of any issue on that point giving the opportunity to the defendant to adduce evidence, the defence case would be prejudiced and injustice would be done. To appreciate the contention raised, we have gone through the plaint and the written statement filed in this case. In paragraphs 5 and 6 of the plaint, the plaintiff has stated that his eldest son, Gaya Prosad, passed LL.B. examination and applied for enrolment as an Advocate and intends to practise at Calcutta. It has been further stated that his son Gaya Prosad is in urgent need of a room for his chamber to entertain his clients on the ground floor. It has also been clearly stated that the plaintiff has no other accommodation save and except what is mentioned to accommodate Gaya Prosad for the purpose of having a chamber. In the written statement the defendant has stated that he is not aware whether Gaya Prosad passed LL.B. examination or that he intends to practice as an Advocate. The defendant has denied that the suit room is required for the purpose of his chamber. He has asserted that the plaintiff has got not only more than sufficient accommodation, but also more than reasonable accommodation. The defendant has denied that the plaintiff got no other accommodation to use as a chamber. It is stated that the plaintiff has got sufficient accommodation to be used as a chamber. We, therefore, find that the plaintiff pleaded in the plaint that he had no other reasonable accommodation as required for the ground mentioned in cl. (ff), sub-sec. (1) of Section 13 of the West Bengal Premises Tenancy Act and in fact the defendant was aware of that pleading and asserted that the plaintiff had more than sufficient accommodation at his disposal. The

question of amendment of plaint does not arise in the present case.

9. With regard to the submission of Mr. Dutt that unless there was the issue in particular as to whether or not the plaintiff had in his possession any other reasonable accommodation besides the room in suit the defence case would be prejudiced. We have considered the evidence adduced by the parties in this case and also the contentions raised in the trial court as well as in the first appeal. The plaintiff has been examined in this case. During evidence he affirmed on oath that he had no other accommodation save and except the room in suit on the ground floor for converting the same into a chamber for his son Gaya Prosad who had been practising as an Advocate of this Court. On the question of other accommodation, the plaintiff was cross-examined by the defendant. Several suggestions were thrown to the plaintiff from the side of the defendant to show that the plaintiff had other reasonable accommodation, but those suggestions were not accepted by any of the courts. The defendant during his evidence stated that the rooms which were in occupation of the plaintiff were sufficient for his accommodation and that the plaintiff's son was using a lobby on the 4th floor as his chamber. It appears that the trial court decreed the suit in April, 1971, long after the amendment of Section 13 of the West Bengal Premises Tenancy Act. From the judgment of the learned Judge, City Civil Court, it appears that the effect of amendment of Section 13 (1) (f) by the introduction of clause (ff) was considered and the parties were heard on that point. It further appears that the learned Judge quoted the relevant portion of the amended clause which says that the landlord is to prove that he is not in possession of any reasonably suitable accommodation. The learned Judge applied his mind and he was satisfied in spite of such amendment that the plaintiff proved that he reasonably required the suit premises in possession of the defendant on the ground floor for being used as a chamber of Gaya Prosad. In the first appeal before Mr. Justice Dutt, the defendant-appellant filed a petition to take note of the subsequent events that the plaintiff had other rooms at his disposal when some of the tenants left the premises. That application was challenged and on consideration of the affidavits submitted by the parties, the allegations made by the defendant were not accepted. It was held that the plaintiff had been able to prove that he reasonably required the suit premises and the decision of the trial Court was affirmed.

10. From the facts and circumstances there can be no doubt, therefore, that the plaintiff had all along been saying that he had no other reasonably suitable accommodation except the room in suit and that the defendant had been challenging the same. It also appears that the parties led evidence in this respect and both the parties knew about the contentions of their adversaries. There is no necessity for framing separate issue whether the plaintiff had, besides the room in suit, any other reasonably suitable accommodation for the purpose of using as the chamber of a lawyer. The general issue framed in this case relating to the reasonable requirement alleged by the plaintiff for his own use and occupation was there and both the parties fought throughout on the question whether the plaintiff had some other reasonably suitable accommodation besides the room in occupation of the defendant. The parties knew what the matter in issue was and they fought over it. In these circumstances, no particular issue as suggested by Mr. Dutt was necessary and in the absence of such an issue, the case of neither of the parties was prejudiced and no injustice has been done. In this connexion the decision of the Supreme Court in the case of *Bhagavati v. Chandramaul* appearing in AIR 1966 SC 735 may be looked into on the question of framing issues. This Bench had occasion to discuss about the non-striking of issues and the effect thereof in the case of *Saraswati v. Satya Narayan Gupta* reported in 80 Cal WN 753 = (AIR 1977 Cal 99). In that case Mr. Dutt, the learned Advocate for the appellant before us in the present appeal represented one of the parties. We may further refer to the decision of the Supreme Court in the case of *Maulavi Abdur Rub Firoz Ahmed and Co. v. Jay Krishna Arora* reported in AIR 1976 SC 479. In that case an ejectment suit was filed in October, 1969 and subsequently the Second Amendment Act (West Bengal Act XXXIV of 1969) was introduced and came into force. There was also a ground for eviction of the tenant by the landlord under clause (f) of sub-sec. (1) of Section 13 of the West Bengal Premises Tenancy Act. There it was held by the Supreme Court:

"The High Court has recorded a finding in this case which squarely covers the requirement of clause (ff) introduced by the Amendment Act. The learned trial Judge has found, which finding was upheld by the High Court, that the respondent not only required the suit premises for his own occupation but was not in possession of any other reasonably suitable accommodation".

Similarly on consideration of the facts and circumstances in the present case, we can say that the findings of the trial Court as well as in the appeal squarely cover the requirement of clause (ff) introduced by Amendment Act of 1969. There has been no illegality in our view nor any prejudice to any of the parties in spite of the Amendment Act of 1969 and the contentions raised by Mr. Dutt as mentioned above cannot be accepted.

11. It has been next contended by Mr. Dutt on behalf of the appellant that the findings of the trial court in the appeal regarding the reasonable requirement of the plaintiff for his occupation of the room in suit are not acceptable. We have been taken through the evidence of the witnesses as also the judgments of the trial court as well as in the appeal. We find that the said findings are based upon proper evidence and in our view those findings are correct. We cannot say that the said findings are either perverse or unreasonable or without any basis. In this connexion our attention has been drawn to two applications filed by the appellant — one for additional evidence and the other for consideration of subsequent events as alleged in the petition. The alleged subsequent events, on which the respondent wants to rely, have been denied by the appellant. The said facts are disputed. Moreover, in the first appeal some facts were considered on an application by the defendant-appellant. But, no relief was granted. The contention of the defendant-appellant was rejected. In view of the fact that the events relied upon by the tenant are unaccepted and disputed by the plaintiff, they cannot be relied upon by this Court in the Letters Patent Appeal. Moreover, on a consideration of the allegations made regarding subsequent events we find that the rebutting statements of the plaintiff-respondent before us are acceptable. The fact of an ex parte partition decree is, however, admitted. The materials on record are sufficient to decide the suit as has been done by the trial court and duly confirmed by the learned Judge in the first appeal. We accordingly dispose of the two applications of the appellant as mentioned above. We also find no reason to interfere with the concurrent findings arrived at in the trial court and in the first appeal. It has been clearly proved that the plaintiff requires the room in suit for the use as chamber by his son, a practising Advocate of this Court. It has also been proved that there is no other reasonably suitable accommodation in possession of the plaintiff.

12. It has been further contended by Mr. Dutt that the notice of ejectment relied

upon by the plaintiff is illegal and ineffective. The fact is that in 1965 the plaintiff served a combined notice upon the defendant under Section 106 of the Transfer of Property Act and under Section 13 (6) of the West Bengal Premises Tenancy Act, 1956 determining the monthly tenancy on the expiry of the last day of March, 1965. That notice was not acted upon. Subsequently, the plaintiff served another such combined notice dated 19-6-1967 determining the tenancy on the expiry of the last day of July, 1967. The argument of Mr. Dutt is that in view of the decision of the Supreme Court in *Calcutta Credit Corporation Limited v. Happy Homes Private Limited* reported in AIR 1968 SC 471, the second notice is bad and did not determine the tenancy because no consent of the defendant had been obtained for the second notice. According to him, the first notice subsists. The principle laid down by the Supreme Court in the case relied upon is not applicable to the case before us. In that case a building was let out to the tenant for a period of 12 years. After the expiry of the period, the tenant continued to hold over the premises. On 12-8-1953 the tenant M/s. Allenbery and Co. Ltd. served a notice in writing upon the landlord intimating their intention to vacate the premises on 31-8-53 at 3-30 p. m. and requested the landlord to arrange to take delivery of possession. Later on by a letter dated 26-8-1953 the tenant-Company informed the landlord that they did not intend to vacate the premises as already notified. The landlord informed the tenant that the earlier notice dated 12-8-1953 could not be withdrawn except by mutual consent. In that case the Company gave notice about their quitting the tenanted premises thereby determining the tenancy and the said notice was accepted by the landlord. When the determination of tenancy was accepted by both the parties, the tenant cannot whimsically continue the tenancy again after such determination without the approval or consent of the landlord. In that case it was held that the notice determining the tenancy given by the tenant under the circumstances mentioned could not be waived by the tenant unilaterally without the consent of the landlord. In the present case, the evidence is that after the ejectment notice given in 1965, the defendant did not accept the determination of that tenancy, but in fact, paid rents in favour of the plaintiff asserting himself as a tenant. The plaintiff also did not act upon that notice. Subsequently, however, when the plaintiff felt that he required the suit premises for his son living with him in his family, he served the second notice in 1967. The first

notice was, therefore, not accepted by the defendant nor followed up by the plaintiff at that time. In the circumstances the question of consent of the defendant for giving the second notice does not arise.

13. Moreover, a lease of immovable property as mentioned in Section 111 of the Transfer of Property Act determines on the expiration of a notice to determine the lease or to quit or of intention to quit the property leased duly given by one party to the other. In the present case the second notice under Section 106 of the Transfer of Property Act was served on the defendant as already mentioned. Section 113 of the said Act says that a notice under Section 111, clause (h), as in the present case, is waived, with the express or implied consent of the person to whom it is given, by any act on the part of the person giving it showing an intention to keep the lease as subsisting. There are two illustrations under this section. I have already mentioned about the conduct of the parties as indicated in illustration (a). After the expiration of the notice period as mentioned in the notice of the year 1965, the defendant asserted himself as a tenant under the plaintiff and the plaintiff also treated the defendant as such. Illustration (b), in addition, is applicable to the present case. Illustration (b) is as follows:—

“A, the lessor, gives B, the lessee, notice to quit the property leased. The notice expires, and B remains in possession. A gives to B as lessee a second notice to quit. The first notice is waived”.

In the present case also after the expiration of the notice of 1965, the defendant remained in possession of the suit room. The plaintiff again gave a notice in 1967. The first notice was, therefore, waived. There is no illegality in the second notice given by the plaintiff and served upon the defendant in 1967.

14. Lastly, it has been contended by Mr. Dutt that the suit ought to have failed for non-joinder of necessary parties, namely, the co-sharers-owners of the building in which the defendant is a tenant in respect of one room. To substantiate this argument copies of the decree and the judgment passed by the Subordinate Judge at Keonjhar in Orissa in Title Suit No. 25/66-I have been filed. This is a partition suit filed by Ramanandan Trivedi and Abhinava Kumar Trivedi against the present plaintiff Jadunandan Trivedi and some others in respect of several properties including the premises No. 25-A, Chittaranjan Avenue, Calcutta. The room-in-suit is a part of this building and the plaintiff

claims this property as exclusively his. There is no dispute that a decree has been passed ex parte against the plaintiff. Attempt was made to set aside that ex parte decree, but having failed in Orissa Courts, the plaintiff has filed a Title Suit in the City Civil Court, Calcutta for a declaration that the suit premises belongs to him exclusively and to no other person. This suit has been started to nullify the effect of the partition decree. According to the partition decree passed in Orissa Court, the plaintiff appears to be one of the co-owners of the property. The admitted fact again is that the defendant took the tenancy from the plaintiff and even in the written statement the defendant has stated “that the defendant submits that he is still a tenant under the plaintiff in respect of a room (back portion) on the ground floor on 25-A, Chittaranjan Avenue, Calcutta-13”. Nowhere has it been stated in the written statement that the defendant had any other co-landlord. In fact the defendant has been always accepting the plaintiff as his landlord and he deposited rents in favour of the plaintiff alone as his landlord. Mr. Dutt’s point is that the sole landlord being a co-owner cannot evict the tenant under him unless all the co-owners of the suit property join as plaintiffs to evict the defendant. At the same time it has been argued that a co-owner cannot claim that he requires the suit room for his occupation because he is not the sole owner of the property in question. For this purpose Mr. Dutt has relied upon a Single Bench decision of this Court in *Sriram Pasrisha v. Jagannath* reported in 77 Cal WN 613 = (AIR 1974 Cal 80). According to that decision “it is not possible to hold that the part owner of the property in the circumstances is the owner as contemplated in Section 13 (1) (ff)”. This very decision relied upon by Mr. Dutt has been set aside by a judgment in a Letters Patent Appeal decided by a Division Bench of this Court appearing in (1975) 1 Cal LJ 413. There, according to Division Bench, the term “owner” in its ordinary sense as well as in its legal concept means and includes a co-sharer owner and in this connexion there has been a long discussion on the subject. We agree with the decision of the Division Bench and hold that a co-owner or a co-sharer owner of the property comes under the purview of clause (ff) of sub-section (1) of Section 13 of the West Bengal Premises Tenancy Act. In the present case, the plaintiff let out the shop room to the defendant. There is no dispute and also it is proved that the plaintiff is the sole landlord of the defendant. According to the sub-section (1) of Section 13 of the Act, the landlord can obtain a decree

for recovery of possession against his tenant on several grounds mentioned in different clauses. According to clause (ff) the landlord is entitled to evict the tenant when he reasonably requires the suit premises for his own occupation if he is the owner and further if the landlord is not in possession of any reasonably suitable accommodation. In the present case, even if it is assumed that the plaintiff is a co-sharer owner, it cannot be stated that for his own reasonable requirement for occupation he cannot get a decree for eviction of the tenant unless he is the sole owner. In clause (ff) the word "owner" is not qualified or limited. The word does not, therefore, exclude a co-owner. Moreover, according to law, the landlord is entitled to bring an action for eviction of the tenant. If there be other co-owners of a building and if the plaintiff be one of the co-owners letting out the premises to a tenant, the other co-owners have no locus standi to bring any suit for eviction against a person who is not a tenant under them. Those co-owners are neither proper nor necessary parties. The last contention of Mr. Dutt also fails.

15. In the result, the appeal is dismissed on contest with costs and the prayers of the appellant in the petitions for additional evidence and for noting the subsequent events as alleged have been dealt with in the judgment and are thus disposed of.

16. The records of the trial court may be sent down as early as possible.

A. K. JANAH J.:— I agree.

Appeal dismissed.

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MASUD AND S. K. MUKHERJEE, JJ.

Hirendra Kumar Mitter, Appellant v. Sudhangshu Shekhar Paul, Respondent.

Appeal No. 207 of 1972, Suit No. 69 of 1963, D/- 21-5-1976.

Letters Patent (Cal), Cl. 15 — "Judgment" — Meaning of — Calcutta High Court Rules, Chap. 36, Rule 72 — Order under — Whether judgment — Appeal against — Whether maintainable.

A notice of motion was taken on behalf of the defendant and a bill of costs in respect of the notice of motion was taxed as a chamber application. In a review under Chapter 36 R. 72 of High Court Rules, the Court confirmed the order. The appeal was filed against this order. It was contended on behalf of respondent that the order of the Court under Chapter 36 Rule 72 was final and no

appeal could lie against the order. It was further contended that the appeal was not maintainable under Clause 15 of the Letters Patent because it provides for an appeal against a final order deciding the issue between parties. In the instant case, the dispute was between the Solicitor and his client and not between original parties in the suit.

Held, that meaning of the word "parties" in Clause 15 of the Letters Patent was not restricted to the original parties. To decide the question whether an order was a "judgment" it was enough if the Court was satisfied that the order under appeal involves a final determination of a lis between two parties. In the instant case the Court finally decided that the appellant was to pay costs as those of Chamber application. The order under Chap. 36 R. 72 Calcutta High Court Rules was therefore "judgment" under Cl. 15, Letters Patent and the appeal was maintainable against that order. (Para 5)

Cases Referred: Chronological Paras
(1959) 63 Cal WN 877 6
AIR 1933 Cal 715 = 37 Cal WN 641 3

MASUD, J.:— We delivered a judgment in this appeal on January 6, 1976 allowing the appeal, after hearing the Counsel for the appellant. On that day nobody appeared on behalf of the respondent. Thereafter, the matter was mentioned by the Counsel for the respondent and the said judgment and order were recalled. The facts of the case may, briefly, be stated as follows:

2. Suit No. 69 of 1963 was filed in this Court by Himangshu Sekhar Paul against Kishori Lal Paul and others. A consent decree was passed on August 21, 1964, whereby, inter alia, a special Referee was appointed to go into the accounts between the parties. On April 1, 1966, the Special Referee allowed the plaintiff to file additional statement of facts on his oral application. On May 9, 1966 a Notice of Motion was taken by M/s. J. N. Mitter and Co., on behalf of one of the defendants to set aside the above order of the Special Referee. On August 8, 1966, A. N. Sen J. set aside the order of the Special Referee and directed a formal application to be made before the Special Referee for the purpose of filing additional statement of facts. On April 26, 1969, a bill of costs in respect of this Notice of Motion dated May 9, 1966 was taxed. The Assistant Taxing Officer allowed the costs as those of the Notice of Motion as of a Chamber application. On April 29, 1969, an exception was taken before the Registrar of this Court against the said order of the Assistant Taxing Officer. On August 12, 1970, the said exception was al-

lowed by the Registrar who held that the costs should have been allowed as those of a Notice of Motion. On September 7, 1970, a Master's Summons was taken out before R. M. Datta J. who after hearing the parties confirmed the order of the Assistant Taxing Officer. Thereafter, this appeal has been filed against the said order of R. M. Datta J.

3. Mr. Sen, Counsel for the respondent, has raised a preliminary point that this appeal is not maintainable under the Rules of this Hon'ble Court. Relying upon *Kaluram Marwari v. Matilal* AIR 1933 Cal 715, he has argued that there is no scope for an appeal against the order of R. M. Datta J. The learned Judge has passed the order under Chapter XXXVI Rule 72 of the Original Side Rules. Under the said Rules, according to him, a Judge can only review the taxation made by the Registrar and once the learned Judge passed the order under the said Rule, his decision is final. The Rules forming a self-contained Code, there is nothing in the Rules which would enable the party to prefer an appeal against such order of the learned Judge. He has also substantiated his argument by referring to Chapter VI R. 15 and Chapter XXXVI Rules 70, 71 and 72 where the words "appeal" and "review" have been used. He has also argued that in any event the appeal is not maintainable under Clause 15 of the Letters Patent inasmuch as the said Clause provides for an appeal against a final order deciding the issues between the parties. In this matter the dispute is between the Solicitor and his client and not between the original parties in the suit.

4. In our view, there is no substance in the demurrer. Under Chapter XXXVI Rule 116, the Taxing Officer includes any Assistant Registrar in the Taxing Office save and except where the words "Taxing Officer" have been mentioned in certain Rules of this Court which include Rules 70, 71 and 72 in the said Chapter. In the present case, the Assistant Registrar who happens to be the Assistant Taxing Officer has decided that the costs of the application before Sen J. should be taxed as those of a Chamber application. Against the said order the Registrar as a Taxing Officer reviewed the order of the Assistant Taxing Officer under Chapter XXXVI Rules 70 and 71. The Registrar set aside the order of the Assistant Taxing Officer and held that the cost of the application should be as those of a Notice of Motion. The respondent thereafter made an application under Rule 72 of the same Chapter before the learned Judge who reviewed the order of the Registrar and set aside the order of the Registrar. But Chapter XXXVI Rule 72 does

not provide that no appeal would lie against an order passed under Rule 72 or that the order made on an application under Rule 72 would be final or conclusive. The relevant provisions of the said Rules are as follows:

"Any party, who may be dissatisfied with the decision of the Taxing Officer as to any item may apply to a Judge in Chambers for an order to review the taxation as to the same item..... and the Judge may thereupon make such order as to him may seem just; but the taxation of the Taxing Officer shall be final and inclusive of all matters which shall not have been subjected to in manner aforesaid". It is clear from this Rule that the Judge may confirm or modify or set aside the order of the Taxing Officer under this Rule but it does not say that the order of the said Judge is final. This Rule only provides that there is a finality of the taxation of the Taxing Officer in respect of those items in the bill of costs which have not been objected to by any of the parties. In the instant case, there was a dispute between the appellant and the respondents as to the costs in respect of the said application before Sen J. from the initial stage.

5. Nor can it be said that the order under appeal is not a "judgment" under Clause 15 of the Letters Patent. From the order of Sen J. it is clear that the learned Judge has directed that the parties would bear their own respective costs and the said order was made, admittedly, upon a Notice of Motion taken out by a defendant other than the appellant. Nobody raised any objection that the said application should have been made on a Master's Summons. All the parties proceeded on the basis that an application for setting aside an order of the Taxing Officer could be made by a Notice of Motion. In fact, the formal order, as drawn up, expressly mentions the fact that the learned Judge passed his order upon a Notice of Motion. Not only the parties treated the said application as one which could be made on a Notice of Motion, the learned Judge decided that the parties would bear their respective costs as those of an application made by a Notice of Motion. The said order of Sen J. has not been challenged either. Under these circumstances, the learned Judge having made a decision that the costs of this application should be treated as those of an application by a Notice of Motion, the Assistant Taxing Officer had no jurisdiction to take a contrary view. The decision of Sen J. on the nature of application, though not expressly made, is clear and his order of costs is final and binding on the Assistant Taxing

Officer. Thus, Datta J. and the Assistant Taxing Officer had no jurisdiction to make an order contrary to the order made by Sen J. It is well settled that when an order is made without jurisdiction appeal would always lie against such order. It is also contended that the present dispute is not between the original parties, and as such it cannot be a "judgment" under cl. 15 of Letters Patent. But, in my view, the meaning of the word "Parties" in clause 15 of the Letters Patent is not restricted to the Original Parties. To decide the question whether an order under appeal is a "Judgment" it is enough if the Court is satisfied that the order under appeal involves a final determination of a lis between two parties. As stated above, by order of Datta J. it has been finally decided that the appellant is to pay costs as those of a chamber application. The result is that the appellant solicitor and not the respondent will have to pay fees personally to the Counsel briefed in application before Sen J. The dispute here is between attorney and client, who are the parties before Datta J. This contention of Mr. Sen, therefore, also fails.

6. Mr. Sen has next argued that the application before Sen J. under Rules of this Court could not be made under a Notice of Motion and as the learned Judge has not specifically decided that point the Assistant Taxing Officer has correctly exercised his jurisdiction under the Rules. In our view, this contention also cannot be accepted. Chapter VI Rule 11 expressly mentions matters which can be disposed of in Chambers by a Judge. Item No. 18 of the said Rule reads as follows:

"Such other matters as are not expressly required to be disposed of in Court and which the Judge thinks fit to be heard in Chambers, and such other applications as are directed to be made in Chambers".

This item makes it clear that any matter other than matters mentioned in Items Nos. 1 to 17 may also be disposed of in Chambers, if the Judge thinks fit to be heard in Chambers. In the present case, no learned Judge has directed or thought fit that the said application before Sen J. should be heard in Chambers. Reliance may be placed upon *Gobinda Das Bhattar v. Pran Kumar Das* (1959) 63 Cal WN 877, 882. In Appendix Z to the Rules a long list of matters or applications other than those in Chapters VI and XI have been set out which could be dealt with or made in Chambers. The appellant in his application before Sen J. has asked for the following prayers:

"(e) The orders by Special Referee for filing an additional or amended state of facts by oral application on behalf of the plaintiffs may be set aside.

(f) In the alternative, Special Referee do file a special report as to why the plaintiff is allowed to file the additional state of facts in the manner sought to be done and at this stage".

Prayer (e) cannot be said to be one of the matters which is included in either Chapter VI Rule 11 or in Appendix Z and therefore the application before Sen J. could only be taken by a Notice of Motion under Chapter XX Rule 3, relevant portions of which read as follows:

"Except where otherwise provided by Statute or prescribed by these Rules all applications, which in accordance with these Rules cannot be made in Chambers, shall be made on Motion after notice to the parties affected thereby

7. Mr. Sen has drawn our attention to paragraph 21 of the petition before Sen J. which reads as follows:

"The Special Referee was requested by the Counsel on behalf of the defendants to make a special report before allowing the plaintiff to alter or amend the state of facts by filing an additional state of facts on oral application but the special Referee declined to make a special report."

As the Special Referee declined to make a special report, Mr. Sen has argued that under Chapter XXVI Rule 51 the said prayer (f) can only be granted in an application under Master's Summons as set out in the Rules. But Mr. Sen has overlooked the fact that Sen J. has passed the order in terms of prayer (e). Prayer (f) has been sought for as an alternative relief. Even assuming that the Special Referee has refused to make a Special Report the learned Judge has exercised his power to treat a Chamber matter as a matter to be decided by Judge in Court under Chapter VI Rule 10 of the Rules. In the instant case, the parties admittedly, by their conduct, represented to the Court that the application should be heard by a Notice of Motion. Even assuming that the said application may be treated as an application to be moved before a Judge in Chambers, Sen J. has finally adjudicated that the matter should be disposed of in Court. If the Parties were of opinion that the application should be treated as an application before a Judge in Chambers, Counsel could have asked for a Certificate that the application was

a fit and a proper one where Counsel should have been briefed. In conclusion, I would like to state that I have read the judgment of my learned brother and respectfully agree with the same.

8. Lastly, Mr. Sen has urged that the application before Sen, J. was made in a proceeding under a decree or order and, as such, the said application should be treated as a Chamber application under Ch. VI R. 13. It is not necessary for me to decide the question whether the application could have been made in chambers under the said Rule, inasmuch as the learned Judge for reasons stated above disposed of the said application as an application under notice of motion and not as a chamber application.

9. I, therefore, hold that the appeal is allowed and the order of the learned Judge is set aside. The respondent shall pay costs of the appeal and the Court below to the appellant. It is certified that the application before R. M. Datta J. is a fit case for engaging a Counsel.

10. S. K. MUKHERJEE, J.:— I agree that the order should be as proposed by my Lord. I also agree that the order dated January 6, 1976 by which the learned Judge set aside the order of the Registrar and restored the order of the Taxing Officer on an application made under Rule 72 of the Chapter XXXVI of the Original Side Rules, is appealable under Clause 15 of the Letters Patent. The order is a 'judgment' because it finally determines an independent proceeding for taxing the attorney's bill of costs to which the attorney and his client are parties. Clause 15 provides that an appeal shall lie from an order of a single Judge of the High Court, not being a judgment passed in the exercise of appellate jurisdiction by a Court subject to the superintendence of the High Court and not being an order made in the exercise of revisional jurisdiction. In the present case, the order was made on an application for review under Chapter XXXVI Rule 72, and not in exercise of revisional jurisdiction. Moreover, the order of the Registrar which was reversed by the learned Judge is not an order made by a Court subject to the Superintendence of the High Court.

11. It was contended that an order made on an application under Rule 72 is final and conclusive. The Rule does not say so. It merely says that the decision of the Taxing Officer as to any item or part of any item which has not been objected to by any party before him, shall be final and conclusive. In

this context reference may be made to R. 63 of Order XXI of the Code of Civil Procedure which lays down that where an objection is preferred under Order 21 Rule 58 the party against whom an order is made may institute a suit to establish the right which he claims to the property in dispute but subject to the result of such suit, if any, the order shall be conclusive. It has been held that the language of Rule 63 bars an appeal. The provisions of Rule 72 of Chapter XXXVI have nothing in common with Rule 63 of Order XXI of the Code in language.

12. The other argument, namely, that the order is in the nature of one made under Order XLVII of the Code of Civil Procedure is equally of no substance. The legal situation spoken of in Order XLVII is a far cry from the situation which Rule 72 of Chapter XXVI envisages. The procedure prescribed for review in Order XLVII is also radically different from the procedure enjoined in Rule 72.

13. The Assistant Taxing Officer, as also the learned Judge have relied on a rule of practice, which we were told, is being followed by the Taxing Office since 1917 pursuant to the directions of Chitty and Chaudhury JJ. The practice/direction is said to be as follows:

"Note by the Regr. (Mr. Hechle as Taxing Officer on 14-5-1917) I suggest that the profession should be informed that in future if applications which can be made in Chambers are made in Court the Taxing Office will in the absence of a certificate, tax the costs of the application as of a Chamber application.

"I see no particular objection to the Registrar in writing to the Incorporated Law Society to remind them of what are properly Chamber matters but I think the attorneys ought to learn the Rules for themselves. I do not allow them to evade responsibility or to plead ignorance of the Rules with regard to paragraph 2 of the note (I felt that I must take it that the Court considered that the application in question was proper for disposal in court) I think that counsel should not be allowed on taxation unless there has been a special certificate to that effect. This should apply to matters which have by inadvertence been dealt with in Court though they were really Chamber matters. It is the duty of the Counsel and Attorneys to see that the application is made in the proper place."

C. W. Chitty,
16-5-17"

Chaudhury J.

"I do not think it is any use to write to the incorporated Law Society. Chamber application, if made in Court, should be taxed as Chamber application unless otherwise directed by the Court. The mere fact that they are disposed of in Court sometimes, does not affect the question of taxation. I do not usually certify for Counsel in Chamber Applications.

A. Chaudhury
17-5-17"

"The Taxing Office will please note and act accordingly.

J. H. Hechle
22-5-17".

14. We asked for production of the original notes but were told that they were not available. The notes are capable of meaning that an application by chamber summons, if made in Court, should be taxed as chamber application. There is no unequivocal direction given by either of the learned Judges, and certainly not by Chaudhury J., that in the absence of any specific direction by Court, the costs of a motion should be taxed as of a chamber application, if the Taxing Officer is of opinion that the application should have been made not by a notice of motion but by a chamber summons. The application was made before A. N. Sen, J. by a notice of motion. No objection was raised from any quarters either before or during the hearing. The learned Judge, by his order dated 8th August, 1966, directed that each party do bear and pay its own costs, of and incidental to the application to be, if necessary, taxed by the Taxing Officer. The order recites that the application was made by a Notice of Motion. Assuming that the application should have been properly made by chamber summons, the application must be deemed to have been treated as a motion by Sen J. In that context, we must hold that Sen, J. by necessary intendment, directed that the bill of costs should be taxed as of a motion. No appeal was preferred from the order. With utmost respect, we are unable to subscribe to the proposition that the Assistant Taxing Officer, the Registrar or for that matter the learned Judge who heard the application for review under Order, Rule 72 of Ch. XXXVI of the Original Side Rules had any power or jurisdiction to direct taxation of the bill of costs in derogation of the order of Sen, J. No Rule of practice, if any such Rule exists, can invest a Taxing Officer with jurisdiction to revise by implication an order of a learned Judge of this Court.

15. An order of G. K. Mitter J. made in Hanumatmull Boid v. Federation Bank of India in Suit No. 2020 of 1947 was relied upon in support of the order of the Assistant Taxing Master. We closely looked into the judgment and order of G. K. Mitter J. and found, as did counsel on either side, that the judgment and order have no relevance to the facts of this case.

16. In these circumstances, the appeal succeeds. In future, Taxing Officers are directed to tax bills of costs according to the tenor of the Court's order. It is not for them to decide whether an application which is made by a notice of motion should have been made by chamber summons and vice versa. Their clear duty is to implement the Court's order and nothing more.

Appeal allowed.

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S. K. BHATTACHARYYA AND A. K.
JANAH, JJ.

Murari Mohan Mitra and others, Appellants v. Indra Narayan Kundu, Respondent.

A. F. O. D. No. 939 of 1969, D/- 1-4-1976*.

(A) West Bengal Premises Tenancy Act (12 of 1956), Section 17 (2) — Condonation of delay — Section 5 of the Limitation Act applicable in suitable cases — (Limitation Act (1963), Section 5) — AIR 1976 SC 105, AIR 1972 SC 749 and AIR 1972 Cal 430, *Foll.* (Para 5)

(B) West Bengal Premises Tenancy Act (12 of 1956), Sections 17 (4), 17 (1) and (2) — Tenant not entitled to protection of Sec. 17 (4) unless he complies with requirements of Section 17 (1) and (2). AIR 1972 Cal 524 (SB) and AIR 1973 Cal 204, *Dist.* (Para 7)

(C) West Bengal Premises Tenancy Act (12 of 1956), Section 17 (2B), Section 17 (1) (2) and (2A) — Protection of Section 17 (2A) inserted by Ordinance VI of 1967 — Not available unless Section 17 (1) or (2) complied with.

Application under Section 17 (2B) for extension of time to pay or for grant of instalments under sub-sections (2A) (a) and

* (Against decree of Talukadar J. 10th Bench City Civil Court Calcutta in Ejectment Suit No. 545 of 1967, D/- 11-2-1969.)

KT/LT/E301/75/ABO/VBB

(2A) (b) respectively must be made within the time stipulated by sub-section (1) or (2) or sub-section (1) as the case may be, irrespective of when the Ordinance amending Section 17 may have come in force, otherwise those applications cannot be entertained. AIR 1968 Cal 532 and AIR 1972 Cal 430, Foll.

(Para 8)

Benefits under Ordinance VI of 1967 are available only to certain categories, and tenants whose time to make an application under sub-section (2-A) has already run out within the meaning of sub-section (1) are left without any remedy. It is not for the court to stretch the express language of statute to confer benefits on such amounts. AIR 1968 Cal 532 Foll.

(Para 11)

(D) West Bengal Premises Tenancy Act (12 of 1956), Section 17 (4) — Proviso.

Benefit of proviso to Section 17 (4) not available unless tenant conforms with requirements of sub-section (4). (Para 11)

Cases Referred: Chronological Paras
AIR 1976 SC 105 = 1976 Cri LJ 179 5
AIR 1973 Cal 204 = 77 Cal WN 278 7
AIR 1972 SC 749 = (1972) 2 SCJ 42 5
AIR 1972 Cal 430 = 76 Cal WN 486 5, 8
AIR 1972 Cal 524 = 77 Cal WN 30 (SB) 7
AIR 1968 Cal 532 8, 11

Monmohan Mukherjee and Manick Chandra Banerjee, for Appellants; C. Tandon and Mrs. Gian Kaur, for Respondent.

S. K. BHATTACHARYYA, J.:— This appeal by the tenant defendant is directed against the judgment and decree passed by the Judge, 10th Bench, City Civil Court, Calcutta decreeing the plaintiff-respondent's suit for ejectment of the defendant-appellant. The respondent sued the appellant for eviction from premises No. 53, Mahatma Gandhi Road, Calcutta-9 on the ground of default in the matter of payment of rent as also for subletting a portion of the premises without the prior consent of the landlord, after service of a notice to quit. The plaintiff alleged that the defendant had failed or neglected to comply with the said notice served on him on September 26, 1966 and accordingly the suit was instituted on March 28, 1967. In the said suit the defendant entered appearance on May 17, 1967 and filed his written statement disputing the default and denying the alleged subletting. On May 23, 1967 the defendant filed an application under Sec. 17 (1) of the West Bengal Premises Tenancy Act, 1956 (hereinafter referred to as 'the Act') for permission to deposit rent for the month of April and May 1967 and also for subsequent months. On the said permission being granted, the defendant deposited the rent for those months in court. On May 24, 1967 the defen-

dant filed another application under Sec. 17 (2) of the Act raising a dispute as to the amount of rent in arrears and further contended that he had already over-paid a certain sum to the plaintiff. The plaintiff duly filed his objection against the defendant's application under Section 17 (2) of the Act on June 13, 1967 and simultaneously the plaintiff filed another application under Sec. 17 (3) of the Act for striking out the defence against delivery of possession. On September 25, 1967 the defendant filed an application under the provisions of the West Bengal Ordinance VI of 1967 inter alia praying that if the court finds any amount payable by the defendant as arrears of rent, the defendant prayed for payment of the said sum by instalments. To this application the plaintiff also filed his objection on January 27, 1968. On July 13, 1968 the defendant filed an application under Section 5 of the Limitation Act for condonation of delay in filing the application under Section 17 (2) of the Act and an objection thereto was filed by the plaintiff on August 19, 1968. On September 6, 1968 the court below heard the application under Section 17 (2) of the said Act read with Section 5 of the Limitation Act and after hearing the learned Advocates of the parties rejected the application on the ground that Section 5 was not attracted to the facts of the instant case and besides the defendant had not been able to satisfactorily explain the delay in filing the application. On the same date, the court passed an order under Section 17 (3) of the Act striking out the defence of the defendant against ejectment and thereafter the suit was heard and decreed ex parte on February 11, 1969. Against this decision the defendant preferred the instant appeal.

2. Mr. Mukherjee, learned Advocate appearing for the appellants in this appeal, has contended before us that the learned Judge was in error in rejecting the defence application under Section 17 (2) on the ground that it was barred by limitation. His contention was that the provisions of Section 5 of the Limitation Act should have been made applicable by the learned trial Judge and in the circumstances explained on behalf of his client, delay of two days in preferring the application under Section 17 (2) of the Act, should have been condoned. In the next place, Mr. Mukherjee contended that assuming that the tenant was a defaulter in the matter of payment of rent, he not having obtained any such relief in respect of the premises on an earlier occasion, is entitled to the benefit of the proviso to sub-section (4) of Section 17 of the Act and the decree pass-

ed in the instant suit cannot, therefore, be sustained. Lastly, Mr. Mukherjee challenged the notice of ejectment which according to him did not specify anything about the termination of the tenancy of the defendant.

3. Mr. Tandon appearing for the respondent in this appeal joined issue on all the three points canvassed by Mr. Mukherjee before us and took us through the relevant materials on record. Mr. Tandon contends that even assuming that Section 5 of the Limitation Act is applicable to an application under Section 17 (2) of the Act, the tenant defendant would not be entitled to any relief inasmuch as his initial application for making deposit under Section 17 (1) of the Act was also barred by limitation and the subsequent deposit of rent for the month of April 1968 made by him on 18-5-1968 was also beyond time. Consequently, the tenant defendant was not entitled to claim the benefit of the proviso to sub-section (4) of Section 17 of the Act.

4. Coming now to the question of notice, it has to be pointed out that a composite notice of ejectment and of suit was issued on the defendant on September 21, 1966 and the same was received by defendant on September 26. The notice has been marked Ext. 1. This notice after reciting that the defendant was a monthly tenant under the plaintiff in respect of premises No. 53 Mahatma Gandhi Road at a certain rental, stated that the defendant was a defaulter in the matter of payment of rent since April 1964 and he had also sublet a portion of the premises without the previous consent in writing of the landlord. In para 4 of the said notice it was stated that the defendant should deliver quiet, peaceful and vacant possession to his landlord of the demised premises excluding the ground floor shop room on the expiry of the last day of October, 1966 and for non-compliance of the said notice a suit for ejectment would be filed against the defendant for recovery of possession. This notice, in our view, cannot be regarded as invalid or insufficient and it clearly requires the defendant to make over possession on the expiry of the last day of the particular month of the tenancy. The notice as such cannot be regarded as insufficient and invalid and the objection of Mr. Mukherjee on this score cannot, therefore, be accepted.

5. It was admitted by Mr. Mukherjee that the application under Sec. 17 (2) was filed two days beyond time but in

view of the materials on record he contended that it had been improperly rejected by the learned Judge. The writ of summons in the instant case was served on the defendant on April 22, 1967 and the defendant entered appearance on May 17, 1967. Thereafter he filed two applications, one under Section 17 (1) and another under Section 17 (2) of the Act, respectively on 23rd and 24th May, 1967. Both the applications, it would appear, were barred by time inasmuch as Section 17 (1) contemplates that on a suit or proceeding being instituted by the landlord, the tenant shall subject to the provisions of sub-section (1) within one month of the service of writ of summons on him deposit in court an amount calculated at the rate of rent at which it was last paid. Since the writ of summons was admittedly served on April 22, 1967, one month would expire on the corresponding day in the following month, which was a Monday. As the Court was open on that day both the applications under Sections 17 (1) and 17 (2) would thus appear to be beyond time. In fact the defendant filed an application for condonation of two days' delay in respect of his application under Section 17 (2) of the Act long afterwards, but no such prayer was made in so far as the application under Section 17 (1) was concerned. Section 17 (2) of the Act provides that where there is a dispute as to the amount of rent payable by the time fixed, the tenant shall within the time specified in sub-section (1), deposit in court the amount admitted by him to be due from him together with an application for determination of the rent payable. In the instant case the defendant no doubt raises a dispute, but at the time of hearing of the said application, it was admitted on behalf of the tenant defendant that he was in arrears to the tune of Rs. 4315.35 P. (Vide order No. 34/37 dated 6-9-1968). This amount was accepted by the learned Advocates of both the parties as representing the arrears of rent at the rate of Rs. 203.50P. per month calculated upto March 1968 after adjustment of all payments, including payments towards Corporation taxes. Thus the admitted position was that the defendant was in arrears to the tune of Rs. 4315.35 P. and this sum had not been deposited by the defendant within time. Mr. Mukherjee contends that since his application under Section 5 of the Limitation Act read with Section 17 (2) of the Act was pending, he did not have an opportunity of making the deposit before the court and that at any rate, he was entitled to protection under the proviso to sub-section (4) of Section 17. When the application under Section 17 (2)

of the Act came up for hearing before the learned Judge, he rejected the application on two grounds. In the first place he held that Section 5 did not apply to a case like this and in the second place he found that no adequate reason for delay in filing the application beyond time had been made out. Mr. Mukherjee assailed the decision of the learned Judge on both the grounds. In so far as the first ground is concerned, he has relied upon the decision of the Supreme Court in the case of *Mangu Ram v. Delhi Municipality* (AIR 1976 SC 105). That case arose out of an appeal filed under Section 417 of the Code of Criminal Procedure against an order of acquittal and the Supreme Court therein held that the provisions of Section 5 of the Limitation Act, 1963 would be available to the appellant. It was held therein that unless any special or local law expressly excluded the applicability of Section 5, it would be available for extension of the period in view of the departure made in the Limitation Act, 1963 in so far as provisions contained in Section 29, sub-section (2) were concerned. In another case before the Supreme Court, the words 'sufficient cause' in Section 5 of the Limitation Act it was pointed out, should receive a liberal interpretation (*State of West Bengal v. Administrator, Howrah Municipality* (1972-2 SCJ 42) = (AIR 1972 SC 749). In *M/s. Gurudayal v. Sagarmal Bengani* (76 Cal WN 486) = (AIR 1972 Cal 430), a Division Bench of this court had laid down that the provisions of the Limitation Act of 1908 attracts the provisions of Section 5 of the Limitation Act, 1963 to the appropriate provisions of the Premises Tenancy Act including Section 17-B (1) of the West Bengal Premises Tenancy Act. The Division Bench pointed out that the intention of the Legislature had always been that Section 5 of the Limitation Act could be availed of in suitable cases. In view of the above authorities, it must be held that the learned Judge was not correct in coming to the conclusion that the provisions of Section 5 of the Limitation Act, 1963 did not apply to a case like this and we hold that this provision would be available to the tenant defendant in an application under Section 17 (2) of the Act in suitable cases.

6. The question as to whether the delay in the instant case has been satisfactorily explained, is a matter on which we do not find any reason to differ from the learned Judge of the court below, even if the expression "sufficient cause" is liberally interpreted in this case. Mr. Mukherjee sought to contend that the tenant defendant was an old and ailing man, having had several heart at-

tacks and his case should therefore, have been viewed with a little more compassion by the learned Judge. It, however, appears from the record that in spite of his illness, the tenant defendant was not precluded from filing his defence on the date on which he appeared before the court and also in making an application under Section 17 (1) of the Act earlier to the application under Section 17 (2). In spite of his alleged illness, it appears from the verification of the application under Section 17 (2) of the Act that he attended his Advocate's chamber at 6, Madan Street, Calcutta on May 24, 1967 and again on September 25, 1967 at the City Court premises for signing the verification in connection with the application filed under Ordinance VI of 1967. It has not been satisfactorily explained and it does not also stand to reason why the tenant in the circumstances could not file the application within time and we see no reason to differ from the finding of the learned trial Judge that in spite of his illness, he was not precluded from filing the application under Section 17 (1) of the Act and his defence several days earlier. The tenant defendant, in our view, has not been able to make out a satisfactory ground for condonation of delay in the instant case and the application in the circumstances must be held to have been rightly rejected.

7. Mr. Mukherjee's next contention is that not having obtained relief on any previous occasion in respect of the above premises, his default, if any, was to be condoned under the proviso to sub-section (4) of Sec. 17 of the Act and in support of this contention he relied upon the Special Bench decisions in the cases of *S. K. Mukherjee v. N. Ram Puria* (77 Cal WN 30) = (AIR 1972 Cal 524 (SB)) and *Jamuna Prosad Chaurashia v. K. L. Poddar* (77 Cal WN 278) = (AIR 1973 Cal 204). In the first cited case the proviso to Section 17 (4) came under challenge as unreasonable and unconstitutional and the Special Bench held that the provisions of Act IV of 1968 or Act XXX of 1969 by which the proviso to sub-section (4) of Section 17 was amended, could not be considered as unreasonable or unconstitutional. In the last cited case the Special Bench in interpreting the amended proviso to Section 17 (4), no doubt held that the tenant will have to go only if he, having already obtained the relief against eviction provided under sub-section (4) of Section 17, has again committed a default in the payment of rent for four months within a period of twelve months. In the instant case we are not called upon to enter into that aspect of the matter, inasmuch as, the tenant defendant has patently failed to

comply with the requirements of sub-sections (1) and (2) of Section 17, and as such, he was not entitled to any protection under sub-section (4) of Section 17 of the Act.

8. This apart, the application by the defendant under the provisions of Ordinance VI of 1967 came to be filed before the court on September 25, 1967, that is long after the time stipulated in sub-section (1) or sub-section (2) of Section 17 of the Act. Mr. Mukherjee contends that the Ordinance VI of 1967 came to be promulgated on August 26, 1967 and he has filed the application within one month from the date of such promulgation. According to Mr. Mukherjee an application for extension of time as contemplated in Section 17 (2B) of the Act could only be made after the Ordinance amending Section 17 came into force and it would be unreasonable to expect any one to make an application for extension of time within the period stipulated in Sec. 17 (2B). Sub-section (2B) provides for the making an application for extension of time for deposit of payment of any amount under sub-section (2A) (a) or for making an application for the grant of instalments under sub-section (2A) (b) and no such application shall be entertained unless it was made before the expiry of the time specified therefor either in sub-section (1) or (2) or sub-section (1) as the case may be. It is evident from the above provisions that the applications for extension of time or for the grant of instalments, as the case may be, must be made within the period stipulated in sub-section (1) or (2) of Section 17 no matter at what point of time the Ordinance may have come into existence. Undoubtedly it operates harshly with regard to a particular class of defaulters, but we do not think we can stretch the language to give relief to any particular category of tenants. The identical point came up for consideration before a Division Bench of this Court in the case of *Parekh Bros. v. Kartick Chandra Saha* (AIR 1968 Cal 532). In that case, a verbal prayer was made before the court for extension of time specified in sub-section (1) or (2) of Section 17 of the Act as amended by the West Bengal Premises Tenancy (Amendment) Ordinance, 1967. The Division Bench held that the application for extension of time for making the deposit or payment of any amount has to be made before the expiry of the time specified therefor in sub-section (1) or (2) of Section 17 and since there was no such application for extension of time, the appellant was not entitled to any extension for this purpose. It was pointed out by the Division Bench that the Ordinance has been framed in such a manner

that very few tenants would derive any benefit from it, but it was not for their Lordships to speculate about the reasons as to why the Ordinance was drafted in that manner. Almost a similar view was taken by another Division Bench in the case of *M/s. K. Gurudaya v. Sagarmal* (AIR 1972 Cal 430) (supra). In that case the Division Bench was considering the applicability of the provisions of Section 17B of the Act originally introduced as Section 17C by the West Bengal Ordinance VI of 1967. The Division Bench after discussing the different Ordinances and Acts promulgated or enacted in this connection and after reciting the history of legislation of that particular section, held that an application under Section 17-B (1) could be made only from August 26, 1967. No other date had any relevance to the applicability of that section. The result of this interpretation may have led to an impossible situation, but it was not for the court but for the legislature to intervene and set the matter right.

9. The provisions of Ordinance VI of 1967 which was published in the Gazette (Extraordinary) on August 26, 1967, introduced material amendments in Section 17 of the West Bengal Premises Tenancy Act, 1956. By Section 2 of that Ordinance, after sub-section (2) of Section 17 two other sub-sections; being (2-A) and (2B), were introduced and the proviso to sub-section (4) was substituted. The introduction of the other sub-sections is not relevant for our purpose. Sub-section (2-B) provided that no application for extension of time for the deposit or payment of any amount under clause (a) to sub-section (2-A) shall be entertained unless it was made before the expiry of the time specified therefor in sub-section (1) or sub-section (2) and no application for the grant of instalment under clause (b) of sub-section (2-A) shall be entertained unless it is made before the expiry of the time specified in sub-section (1).

10. It will be evident from a reading of this section that three classes or categories of cases could be contemplated to be in existence at the date when the Ordinance came into force, namely on August 26, 1967. In the first class would come those cases, where application for extension of time for making deposit or payment in terms of sub-sec. (2-A) (a) or grant of instalments in terms (2-A) (b) is yet to run out within the meaning of sub-section (1) or sub-section (2) as the case may be. In the second class would come those cases where the time for making application for extension of time or grant of instalments under the above clauses of sub-section (2-A)

had actually run out within the meaning of sub-section (1) or sub-section (2) as the case may be and the third category of cases would be those where the defence against delivery of possession had already been struck off.

11. In so far as the first and third categories of cases are concerned, no difficulty arises; for the tenants of the first category would be entitled to make an application for extension of time or grant of instalments under sub-section (2B) and in so far as the third category is concerned, they would be entitled to proceed or apply under Sec. 17-B (1) as introduced by Section 4 of the Ordinance. In so far as the second category of cases is concerned, it appears to us that they would be left without any remedy and the instant case unfortunately falls within the second category. It is exactly such a case that was in contemplation of the Division Bench that decided *Parekh Bros. v. Kartick Chandra* (AIR 1968 Cal 532) (Supra) and their Lordships pointed out that it was not for them to speculate about the reasons why the Ordinance was drafted in that manner. Unfortunately for Mr. Mukherjee the instant case falls within the second class. Benefits available under the proviso to sub-section (4) of Section 17 would only be available to a tenant, if he conforms to the requirements of sub-section (4). Since the tenant in the instant case did not comply with the requirement of sub-section (4) benefits under the proviso is not available to him. For the reasons discussed above by us, we are unable to accept the contention raised by Mr. Mukherjee that he is entitled to relief under the proviso to sub-section (4) of Section 17 in view of the promulgation of Ordinance VI of 1967 on August 26, 1967.

12. In the result, therefore, this appeal fails and the appellants are not entitled to any relief. The appeal is accordingly dismissed. The judgment and decree of the court below are affirmed but the decree shall not be executed till the 31st of October, 1976 provided the appellants continue to deposit an amount equivalent to the rate of rent month by month by the 15th of each succeeding month according to English Calendar in the court below, the first of such deposits is to be made by the 15th of May, 1976. The rent for the month of October, 1976, is, however, to be deposited by the 31st of October, 1976. In default of any of these deposits the decree will become executable at once. There will be no order as to costs in this appeal.

13. No order is necessary on the application filed under Section 17 as amended

by Act XXX of 1969 which was filed by the appellants in this Court on 24-3-1976.

JANAH, J.:— I agree.

Appeal dismissed.

AIR 1977 CALCUTTA 158

SALIL KUMAR DATTA AND G. N. RAY, JJ.

State of West Bengal, Appellant v. Smt. Jyotsna Bhowmik and others, Respondents.

C. R. No. 954 of 1972, D/- 8-2-1977.

(A) Constitution (Forty-second Amendment) Act (1976), Section 40 — Scope — Amendment to Article 227 is prospective — Cases pending in High Court on 1-2-1977 not affected.

There being no express provision making the amendment to Article 227 retrospective and there being no provision whereby it can be held that by implication the provisions of Section 40 have been made retrospective, the amendment to Article 227 is not retrospective and will not affect the proceedings pending in the High Court on 1st February 1977 when the amendment was brought into effect. The right to move the High Court against orders of Tribunals under Article 227 is a substantive right and can only be taken away by express provision of the new statute or by a clear intention to vary such rights.

(Para 5)

(B) W. B. Estates Acquisition Act (1 of 1954), Section 44 (2a) — Entry in record of rights — Revision by Revenue Officer — Held, proceedings under Section 44 (2a) were invalid.

Certain lands were settled under a deed and the names of beneficiaries were entered in the record of rights. Subsequently the Revenue Officer started suo motu proceedings and struck off the names of beneficiaries on the ground that they were not in actual possession of the lands and the deed was not acted upon on the basis of bargadars' evidence that they delivered the settlor's share of crops to the manager of the settlor.

Held that mere fact of delivery of settlor's share of crops to his manager was no proof that the lands were not in possession of settlers under the deed and that the materials on record did not indicate a prima facie case for initiating proceedings under Sec. 44 (2a). AIR 1965 SC 271, Foll. (Paras 6, 7)

Cases Referred: Chronological Paras
AIR 1965 SC 271 = (1964) 6 SCR 1 7

BU/CU/A574/77/GGM

P. K. Sen Gupta and S. N. Dutta, for Appellant; Sk. Tabarak Ali, for Respondents.

SALIL KUMAR DATTA, J.:— This Rule is directed against an appellate order passed by the Tribunal under Section 44 (3) of the West Bengal Estates Acquisition Act whereby the order of the learned R. O. under Section 44 (2a) of the said Act of Jadavpur C Camp 3 in Case No. 3 of 1970 was set aside.

2. The facts in brief are as follows:—

On 6-8-1970, the Revenue Officer concerned started a suo motu proceeding under Section 44 (2a) giving rise to Case No. III of 1970. It was stated in the order initiating the proceeding that whereas it had been brought to his notice that the finally published khatian No. 147 of Mouza Debipur-gurguria P. S. Joynagar had not been properly recorded, he directed the Peshkar to put up the relevant papers for his examination on 10-8-1970. On the said date the Revenue Officer recorded as follows:—

“Examined the R. O. Rs. and connected papers and records. I am satisfied that there is prima facie case for starting formal proceeding suo motu under Section 44 (2a) of the West Bengal Estates Acquisition Act, 1953 for revision of R. O. Rs. in respect of the khatians concerned.”

Thereafter notices were issued and at the hearing some bargadars in respect of the lands were examined. It was held by the Revenue Officer that a total area of 64.92 acres of land was recorded in the name of Bankim Chandra Bhowmick at a rental of Rs. 168-6-0. During the R. S. operation in respect of the said khatian 12 as 16 gds. share was recorded in the name of (1) Jyotsna Bhowmick, (2) Bijali Bhowmick, (3) Sabyasachi Bhowmick and (4) Chandan Bhowmick each with 3as 4 gds share and the remaining 3as 4gds share were recorded in the name of Bankim Chandra Bhowmick. It was further found that the above 12as 16 gandas were recorded in the names of the said persons who were the two wives of the two sons of Bankim and two of his grandsons. According to the opposite party Deba Prosad Bhowmick, son of Bankim, appeared and stated that his father was the owner of the above lands who executed a registered deed of settlement on 16-10-1952 and by that deed out of the total lands, about 52 acres were given to the two wives of his two sons and his two grandsons and the remaining 3as 4gds share continued to remain with Bankim. Bankim died on 12th April, 1953 before the date of vesting and as a result of vesting this remaining 3 annas 4

gandas were recorded in the name of his sons. The Revenue Officer examined the deed of settlement and found that the intention for the execution of the deed was not properly described therein and in order to evade payment of agricultural income-tax he might have purported to create this settlement in favour of the family members. The Revenue Officer further recorded that there was evidence on record to prove that the settlor Bankim was in possession of the land till his death which according to him, happened only a few years ago. On the evidence of the bargadars who deposed at the hearing, it was found that all the receipts given to them were in the name of Deba Prosad Bhowmick and others and only from 1375 BS. the names of Jyotsna and others were noted as ‘malik’. The Revenue Officer was of opinion that the beneficiaries under the deed of settlement were not in possession of the land otherwise their names would have been disclosed in the receipts and from the very recitals the deed of settlement appear to be a sham transaction being motivated. Further no satisfactory evidence was adduced to prove the genuineness of the deed of settlement which was found not to have been acted upon. Accordingly by the order dated 29-9-1970 he corrected the record of rights holding the deed of settlement to be a void document and directed that the khatian was to be recorded in favour of the four sons of Bankim each with 4 annas share. The names of the beneficiaries under the deed of settlement were directed to be struck off from khatian No. 147 and the Khanda khatian No. 415 in the name of Jyotsna was treated as cancelled and also was directed to be in ija Khatian of 147. There were further consequential orders recording that as the sons of Bankim were found to possess lands in excess of the ceiling and they did not exercise their right to retain the lands in B Form, the lands were directed to be vested.

3-4. An appeal was taken by Jyotsna and others to the Tribunal and the said Tribunal by its order dated the 16th September, 1971 allowed the appeal holding that the finding of the R. O. A. S. O. that the lands were inherited by the sons of Bankim overlooking the registered deed of settlement was beyond the scope of an enquiry under Section 44 (2a). The appeal, as already stated, was allowed on contest and the decision of the R. O. A. S. O. was set aside. The State has moved against this appellate order under Article 227 of the Constitution on which the present Rule has been issued.

5. During the pendency of the Rule in this Court, there has been far-reaching

changes in law by way of amendment to the Constitution. By the Constitution (Forty Second Amendment) Act, 1976 which received the assent of the President on 18-12-1976 there has been substantial amendments to Article 227 of the Constitution. The amendments brought out by Section 40 are as follows:—

40. In Article 227 of the Constitution.—

(a) for clause (1), the following clause shall be substituted, namely:—

“(1) Every High Court shall have superintendence over all courts subject to its appellate jurisdiction.”;

(b) after clause (4), the following clause shall be inserted, namely:—

(5) Nothing, in this article shall be construed as giving to a High Court any jurisdiction to question any judgment of any inferior court which is not otherwise subject to appeal or revision.”

A question arose in course of hearing as to whether the amendment is prospective or has to be considered as having a retrospective effect so as affect pending proceedings. Mr. P. K. Sen Gupta, learned Government Pleader submitted that the amendment brought to Article 227 of the Constitution under Section 40 is prospective in absence of any express provision or clear intention to indicate that it is to be deemed as retrospective. It has been laid down in Maxwell's Interpretation of Statutes, 12th Edition, page 220 as follows:—

“In general, when the substantive law is altered during the pendency of an action, the rights of the parties are decided according to the law as it existed when the action was begun, unless the new statute shows a clear intention to vary such rights.”

Section 6 of the General Clauses Act, 1897 also preserves the previous operation of any enactment so repealed as also a right accrued thereunder unless a different intention appears in the new enactment repealing earlier provisions. We may mention here as has been pointed out by Mr. Sen Gupta that there has been substantial changes in respect of Article 226 also under Section 38 of the said Act. These changes have been made retrospective as will appear from the provisions of Section 58 (1) of the Constitution (Forty-second Amendment) Act, 1976 Section 58 provides as follows:

Section 58— (1) Notwithstanding anything contained in the Constitution, every petition made under Article 226 of the Constitution before the appointed day and pending before any High Court immediately before that day (such petition being referred to

in this section as a pending petition) and any interim order (whether by way of injunction or stay or in any other manner) made on, or in any proceedings relating to, such petition before that day shall be dealt with in accordance with the provisions of Article 226 as substituted by Section 38.

(2) In particular, and without prejudice to the generality of the provisions of sub-section (1) every pending petition before a High Court which would not have been admitted by the High Court under the provisions of Article 226 as substituted by Section 38 if such petition had been made after the appointed day, shall abate and any interim order (whether by way of injunction or stay or in any other manner) made on, or in any proceedings relating to, such petition shall stand vacated.....”

It may also be remembered that when any retrospective effect was intended to be given to any provisions of the Constitution, the Constitution Amendment Acts expressly provided for such retroactive operation. Reference may be made to Articles 19 (2) and 31-A (1) for purpose of illustration as also to other statutes. There is no express provision making the amendment to Article 227 retrospective and we do not find any provision whereby it can be held that by implication the provisions of the section of the said Articles have been made retrospective. In this view of the matter, we are of the opinion that the amendment to Article 227 are not retrospective and will not affect the proceedings pending in this Court on 1st February, 1977 when the amendment was brought into effect. The right to move the High Court against orders of Tribunals under Article 227 is a substantive right and can only be taken away by express provision of the new statute or by a clear intention to vary such rights which is not the case here.

6. We shall now consider the case on merits. It appears from a perusal of the order sheet of the Revenue Officer that on examination of the connected papers and records he was satisfied that there was a prima facie case for starting a suo motu proceeding under Section 44 (2a). The records of the case were produced before us and as far as we can see therefrom there were no materials on record to indicate that there was a prima facie case for starting a formal proceeding. We therefore do not find that there was any ground for satisfaction of the Revenue Officer to initiate proceedings under Section 44 (2a).

7. It will be seen that the evidence of the bargadars influenced the decision of the Revenue Officer to a great extent, The

bargadars stated that they delivered the landlord's share of crop to the Manager of Bankim Chandra Bhowmick. That has led the Revenue Officer to conclude that there was no actual possession taken of the lands by the beneficiaries and the deed of settlement was not acted upon. The mere fact that the landlord's share of crops was being received by the Manager does not by itself indicate that the lands were not in possession of the land settlees under the deed. We may refer in this connection to the decision in *Kanakarathanammal v. V. S. Loganatha Mudaliar* reported in AIR 1965 SC 271 in which the Court observed that the rent was paid by the tenant and accepted by the appellant's father. It was held that would be consistent with what ordinarily happens in such matters in an undivided Hindu family. If the property belongs to the wife and the husband manages the property on her behalf, it would be idle to contend that the management by the husband of the properties is inconsistent with the title of this wife to the said properties. The court further observed that what has been said about the management of the properties would be equally true about the actual possession of the properties, because even if the wife was the owner of the properties, possession may continue with the husband as a matter of convenience. We are accordingly of opinion that the bargadars' evidence is not sufficient for holding that the properties were in possession of the original settlor or his heirs and that the document was not acted upon. It may further be noted that the deed of settlement was of October 16, 1952 long before the date even provided under Section 5-A and it could not be said that the settlement was a sham transaction to defeat the provisions of the Act without sufficient evidence.

8. It will further be seen that the Revenue Officer was of the view that Bankim retained possession of the land for years till his death only a few years ago. The judgment of the Revenue Officer is of 1970 and as we have already seen, it is now the admitted position that Bankim died on 12th April, 1953. The learned Revenue Officer therefore was under the impression that Bankim was alive long after the settlement till few years before the passing of the order and that he was in possession thereof during the period which had thus no factual basis. For all these reasons we are unable to sustain the order of the Revenue Officer. The Rule accordingly fails and is discharged. There will be no order as to costs.

G. N. RAY, J.:— I agree.

Rule discharged.

AIR 1977 CALCUTTA 161

SALIL KUMAR DATTA AND H. N. SEN, JJ.

Sm. Rukmini Debi, Petitioner v. Sm. Mihir Bala Sarkar, Opposite Party.

C. R. No. 70 of 1973, D/- 5-1-1977.

Evidence Act (1872), Section 115 — Estoppel — Principles — Representation by a party as to existence of facts or positions in law — Jurisdiction is not conferred upon Court — Determination of jurisdiction is to be made by Court on materials before it — ((i) Civil P. C. (1908), Section 9 — (ii) West Bengal Non-Agricultural Tenancy Act (20 of 1949), Section 24).

(a) Estoppel arises when a party by act and conduct makes a representation to the other party of certain state of facts which is acted upon by such party to his detriment.

(b) Estoppel may even be available when there is a representation by one party in regard to a position in law which is accepted and acted upon by the other to his detriment.

(c) When however the jurisdiction of a Court or tribunal by statute is dependent on the existence of a certain state of facts or position in law a representation by one party to the other about the existence of a certain state of facts or position in law by themselves will not confer jurisdiction on the Court or the tribunal to adjudicate upon the controversy involved.

(d) The Court or the tribunal in such circumstances will have to determine on materials before it whether it has the jurisdiction to determine the controversy and there can be no estoppel on Court or tribunal by conduct or act of parties. In course of such adjudication, the parties will be required to produce evidence relevant to the question of jurisdiction whereon the Court or tribunal will decide if it has the jurisdiction to adjudicate the matters in controversy. AIR 1959 SC 135; AIR 1931 All 490 (FB); AIR 1925 PC 83; AIR 1924 Cal 600; AIR 1930 Cal 32; AIR 1959 Andh Pra 9 and AIR 1968 Andh Pra 336, Ref. (Para 13)

In the case of an application under Section 24 of the West Bengal Non-agricultural Tenancy Act, 1949, a party is not barred by the doctrine of estoppel to produce before the Court, relevant evidence which may have

a bearing on the question of its jurisdiction on the application for pre-emption. The Court can entertain and decide the application under Section 24 of the Act only if the tenancy is a non-agricultural one which as a jurisdictional fact will have to be decided on evidence to be adduced by the parties and no estoppel accordingly arises on such question of jurisdiction which has been created by the statute.

(Para 14)

Cases	Referred:	Chronological	Paras
AIR 1969 SC 864 = (1969) 1 SCR 1169		8	
AIR 1968 Andh Pra 386		9	
AIR 1959 SC 135 = 1959 SCR 1350		11	
AIR 1959 Andh Pra 9 = (1958) 2 An WR 447		9	
AIR 1931 All 490 = 1931 All LJ 715 (FB)		12	
AIR 1930 Cal 32 = ILR 56 Cal 584		9	
AIR 1925 PC 83 = 52 Ind App 123		10	
AIR 1924 Cal 600 = 39 Cal LJ 40		9	

Mr. Manindra Nath Ghosh, Mr. Mrinal Kanti Das, for Petitioner; Mr. Sakti Nath Mukherjee, Mr. Samaresh Banerjee, for Opposite Party.

SALIL KUMAR DATTA, J.— This Rule is directed against the appellate order of the District Judge, Bankura dated November 27, 1972 in Miscellaneous Appeal No. 7 of 1972 affirming the order of the Subordinate Judge, Bankura dated January 15, 1972 in J. Misc. Case No. 14 of 1970, allowing an application for pre-emption under Section 24 of the West Bengal Non-agricultural Tenancy Act, 1949 (hereinafter referred to as the Act).

2. The disputed land measuring 12 acres of land is the northern half of R. S. Dag No. 203/1431 recorded in R. S. Khatian No. 1206 as Bastu. This plot was part of the big plot No. 203 under Khatian No. 533 in Cadastral Survey. This big plot measuring 1.21 acres was held by three brothers—Gopinath, Lakshmi and Ambika under landlord Gobinda Chandra Das whose interest was recorded in C. S. Khatian No. 529 as Madhya Sattadhikari Chirasthayi Mokarari under the Burdwan Raj as Ghatwali tenure. Gobinda was the benamdar of Jogendra whose sons Rash Behari and Bepin Behari sold their interest in Khatian No. 529 and the under Khatians to Nagendra. Ambika and Gopinath's successor-in-interest Karali sold their 2/3rd raiyati interest in C. S. Dag No. 203 to said Nagendra by a kobala of November 5, 1937 Lakshmi out of about .41 decimals or 1 bigha 4 cottahs 5 ch. of land in his 1/3rd share, sold 4 cottahs 13 ch. of land to Nagendra by kobala dated January 17, 1938, giving up about 4 cottahs of land for road. The balance of about 15 cottahs 9 ch. of land was held by him in raiyati interest at the proportionate

rent of Rs. 1-2-4 gd under Nagendra, who, as we have seen, had already purchased the landlord's interest. By a registered pattah dated January 18, 1938, in consideration of a selami of Rs. 90/- Nagendra on receipt of a kabuliyat in similar terms gave permanent raiyati mokarari right to Lakshmi in respect of his raiyati interest aforesaid for agricultural purposes.

3. By a lease dated January 17, 1938 Nagendra out of his khas land of plot 203 settled 7 cottahs 3 ch. 6 gd equivalent to .12 decimals of land to Banewar Pal for the purpose of building structures. The deed recited that after acquisition of landlord's interest and thereafter of 2/3rd of tenant's share, Nagendra on amicable partition with Lakshmi had been in khas possession of his portion of land a portion whereof was leased out as aforesaid. This deed was signed by both Nagendra and Banewar and carried a jama of 15 annas, Banewar in his turn by a kobala dated February 28, 1939 sold to Mihirbala and Bibhabati his leasehold mokarari interest in 12 decimals of land of Dag No. 203 under the said jama with full rights to build and construct buildings, well, privy thereon for residence or letting out. Mihir Bala erected her house on the southern portion of the land under the lease which was incorrectly recorded only in her name as 'korfa' and under Section 48G (1) (2) B. T. Act and Rule 4 E. A. Rules raiyati Dakhalsatta to remain under the State. Bibhabati in Title Suit No. 230 of 1967 obtained a declaration of her moiety share in the said land and thereafter on February 1, 1969 sold to Sm. Rukmini, the petitioner before us, for a consideration of Rs. 10,200/- the northern half of the aforesaid plot which it was recited in the document as being in her exclusive possession by demarcation bounded by a compound wall, after their joint purchase obviously from Banewar, the proportionate rent for the land sold being 47-P payable to J. L. R. O. Bankura. It was not mentioned in the document that Mihirbala was a co-sharer in respect of the land held under the said jama and no notice of the sale was served on her.

4. Mihir Bala filed an application for pre-emption of the land sold under Sec. 8 of the West Bengal Land Reforms Act, 1955 before the Revenue Officer, Bankura registered as Case No. 3 of 1969-70. The application was opposed by the petitioner contending that the land was within Bankura municipality and was not a raiyati holding but non-agricultural land governed by Non-agricultural Tenancy Act and not by Land Reforms Act. By order dated January 21, 1970 Revenue Officer held

on merits that the land in dispute was non-agricultural land and accordingly the petition for pre-emption under the Land Reforms Act was rejected.

5. Mihir Bala thereafter filed on February 16, 1970 an application under Section 24 of the Act for pre-emption of the disputed land on deposit of the consideration money with 5% compensation in court. It was stated that in view of the dismissal of her application under Section 8 of the Land Reforms Act pursuant to the objection taken by the pre-emptee she was entitled to pre-emption of the land as a co-sharer of the non-agricultural tenancy of which the disputed land formed a part. A point was also raised that the price in the kobala was unreal being inflated, the real price being Rs. 7,000/-. This application was registered as J. Mis. Case No. 14/70.

6. The petitioner Rukmini opposed the application by filing a written objection contending, inter alia, that the tenancy of Nagendra and Lakshmi was raiyati sthitiban as recorded and Banerwar acquired no other right than 'korfa' under the Bengal Tenancy Act as recorded in respect of the tenancy. The record-of-right correctly described the tenancy as being raiyati and accordingly Non-agricultural Tenancy Act had no application. The parties were no longer co-sharers after vesting and the disputed land was in the separate tenancy of Bibhabati. It was denied that the consideration was inflated while the amount was in fact paid before the Registrar and improvements for over Rs. 2000/- were made in the disputed land. The petition, it was submitted, was accordingly liable to be rejected.

7. By order dated January 15, 1972 the learned Subordinate Judge held that the jama of Rs. 4.50 was not apportioned at any time and there was a merger of two interests in the hands of Nagendra in so far the demarcated area in his khas possession is concerned. Further as admitted by Lakshmi in Ext. 2 (a), there was a partition between him and Nagendra and the original jama of Rs. 4-8-0 ceased to exist. The lease in favour of Banerwar was for non-agricultural purpose and as such Banerwar was a non-agricultural tenant and the land held by him under his lease from Nagendra was non-agricultural land as defined in Section 2 (4) of the Act. Accordingly the provisions of the Act were applicable to the land under the lease. The allegation that the consideration of the sale was inflated was not pressed. The application for pre-emption was accordingly allowed.

8. On appeal the learned District Judge held that in fact there occurred a mer-

ger of the portion of the tenancy purchased by Nagendra which became a separate holding after upgrading the status of Lakshmi the remaining tenant to superior interest. There was an amicable partition by metes and bounds of the tenants two-third share acquired by Nagendra and the remaining interest of Lakshmi and the jama was apportioned and thereafter Lakshmi's interest was upgraded. This amounted to a surrender of the raiyati interest in the holding and the original occupancy raiyati holding with jama of Rs. 4/8/- ceased to exist. The ruling in *Nirshi Dhobin v. Sudhir Kumar Mukherjee* AIR 1969 SC 864 did not stand in the way in the circumstances. It was also held that the tenancy under the lease to Banerwar was a non-agricultural one for residential purpose which did not vest in the state and did not deprive Mihir Bala of her status as a co-sharer with Bibhabati in respect of the tenancy. The learned Judge further held that the doctrine of estoppel preventing the petitioner from contending that the land was agricultural land had no application as the case was decided on merits in the earlier proceeding. The appeal was accordingly dismissed and this rule, as already stated, is against the decision.

9. Mr. Saktinath Mukherjee learned Advocate for the opposite party stated that the position taken by the petitioner in the earlier proceeding was that the land in question formed a part of the non-agricultural holding and as such the application under Section 8 of the Land Reforms Act was not maintainable in law. The Petitioner cannot be permitted to take a different and inconsistent position in a subsequent proceeding contending that the holding was and continued to be a raiyati holding. He referred to the decision in *Dwijendra Narayan v. Joges Chandra*, AIR 1924 Cal 600 wherein it was observed "that an estoppel is not confined to the judgment but extends to all facts involved in it as necessary steps or ground work: in other words, a judgment operates by way of estoppel as regards all the findings which are essential to sustain the judgment, though not as regards findings which did not form the basis of the decision or were in conflict therewith." In *Hemanta Kumar v. Prasanna Kumar*, AIR 1980 Cal 32 the Court observed that a party cannot be permitted to assume inconsistent positions in Court, to play fast and loose, to blow hot and cold, to approbate and reprobate to the detriment of his opponents and this principle applies when the second suit grows out of the judgment of the first. The principle that when one who without mistake induced by the opposite

party, has taken a particular position deliberately in the course of litigation must act consistently with it was approved in *Amritlal v. Alla Annapurnammer* AIR 1959 Andh Pra 9, as also in *Official Receiver Kurnool v. Vale Pedda* AIR 1968 Andh Pra 336.

10. Mr. Manindra Nath Ghosh learned Advocate appearing for the petitioner submitted on the other hand that in the earlier proceeding, the Revenue Officer found on merits upon materials on record that the application under Section 8 of the Land Reforms Act was not maintainable as the holding involved was a non-agricultural land. Further, though there may be an estoppel against a party there can be no estoppel on Court or Tribunal to determine a controversy particularly when it involves jurisdiction of the Court or tribunal to adjudicate the matter before it, as a Court or Tribunal can have no jurisdiction by consent or on estoppel when the statute confers none. He referred to the decision *Surajmull Nagoremull v. Triton Insurance Co. Ltd.*, 52 Ind App 126 = AIR 1925 PC 83 wherein it was laid down:

"No court can enforce as valid, that which competent enactments have declared shall not be valid, nor is obedience to such enactment a thing from which a Court can be dispensed by the consent of parties, or by a failure to plead or argue the point at the outset."

11. The Supreme Court in *Sales Tax Officer, Benaras v. Kanhaiya Lal* AIR 1959 SC 135 observed—

"Estoppel arises only when the plaintiff by his acts and conduct makes a representation to the defendant of a certain state of facts which is acted upon by the defendant to his detriment; it is only then that the plaintiff is estopped from setting up a different state of facts."

The Court further observed that this position can be availed of where the representation is in regard to a position in law, and even so the Court will refuse to award relief to the plaintiff if it is inequitable for the Court to do so.

12. In *Mahabir Singh v. Narain Tewari* AIR 1931 All 490 (FB) it was observed by Sulaiman, Ag. C. J. that the principle of estoppel cannot be allowed to defeat the provisions of a statutory enactment which affects the jurisdiction of a Court, as a party cannot by its admission or previous conduct confer jurisdiction on a Court where none exists.

13. On a review of the decisions cited above it appears that

(a) Estoppel arises when a party by act and conduct makes a representation to the

other party of certain state of facts which is acted upon by such party to his detriment.

(b) Estoppel may even be available when there is a representation by one party in regard to a position in law which is accepted and acted upon by the other to his detriment.

(c) When however the jurisdiction of a Court or tribunal by statute is dependent on the existence of a certain state of facts or position in law a representation by one party to the other about the existence of a certain state of facts or position in law by themselves will not confer jurisdiction on the Court or the tribunal to adjudicate upon the controversy involved.

(d) The Court or the tribunal in such circumstances will have to determine on materials before it whether it has the jurisdiction to determine the controversy and there can be no estoppel on Court or tribunal by conduct or act of parties. In course of such adjudication the parties will be required to produce evidence relevant to the question of jurisdiction whereon the Court or tribunal will decide if it has the jurisdiction to adjudicate the matters in controversy.

14. In the context of the aforesaid propositions it cannot be said that the petitioner is barred by the doctrine of estoppel to produce before the Court, as in the instant case, relevant evidence which may have a bearing on the question of its jurisdiction on the application for pre-emption. In the instant case, the Court can entertain and decide the application under Section 24 of the Act only if the tenancy is a non-agricultural one which as a jurisdictional fact will have to be decided on evidence to be adduced by the parties and no estoppel accordingly arises on such question of jurisdiction which has been created by the statute.

15. Coming now to the question of merits, it appears that the superior interest which Nagendra held under the Burdwan Raj was a ghatwali tenure which was a service tenure. There is no legal bar to the creation of a non-agricultural tenancy under such service tenure as the definition in Section 2 (k) of the Estates Acquisition Act clearly indicates. Undoubtedly the jama under the landlord's interest, since acquired by Nagendra, was recorded as rayati shritiban and the said jama bore a rent of Rs. 4.50. Nagendra acquired 2/3rd of this interest as also further area out of the remaining 1/3rd share. Even so as he did not acquire the interest in its entirety there could not be merger of the rayati interest with landlord's interest. The pattah by Nagendra to Lakshmi Ext. 3 re-

cited that on acquisition of 2/3rd interest Nagendra was in khas possession of his share in demarcated area while Lakshmi was in possession of his demarcated share. After surrender of about 4 cottahs of land for the road and sale of about 4 cottahs and 13 chattaks of land to Nagendra both out of share, Lakshmi was in possession of the balance area of 15 cottahs at a jama of Rs. 1-3-4 in raiyati right under Nagendra. By the pattah Lakshmi was granted permanent mokarari right in respect of the said jama with full rights to make pucca constructions therein and also compound walls, well privy for residence or otherwise. The schedule of the land therein clearly described the boundary indicating that the said land was in possession of Lakshmi in raiyati jama which was upgraded to mokarari right. Accordingly the original raiyati jama, on sale of about 4 cottahs of land to Nagendra on January 17, 1938 and gift of another 4 cottahs both by Lakshmi ceased to exist and in place thereof Lakshmi was holding his balance 15 cottah of land under separate jama upgraded to mokarari right as aforesaid. Out of the land of the said dag in his khas possession, Nagendra by lease dated January 17, 1938 Ext. 4 settled in permanent right with Banerwar 12 decimals of demarcated land for non-agricultural purpose, namely, for building residential house at a jama of fifteen annas whereby a non-agricultural tenancy in respect thereof was created. This leasehold interest was subsequently sold to Mihirbala and Bibhabati each of them held undivided moiety share. The jama continued to be in existence when the impugned sale of her undivided half share was sold to the petitioner though it was recited in the document of the petitioner that Mihirbala was in possession of the southern half and Bibhabati in possession of the northern half. Such amicable possession without partition and division of the jama did not affect their respective status as cosharers. Accordingly Mihirbala, as cosharer, was entitled to pre-empt the share of her other cosharer under Section 24 of the Act. The courts below were accordingly acted rightly in allowing the application for pre-emption.

16. The Rule in the circumstances fails and is discharged. There will, however, be no order for costs in the circumstances.

H. N. SEN, J.:— I agree.

Rule discharged.

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FULL BENCH

SANKAR PRASAD MITRA, C. J.,
SABYASACHI MUKHARJI AND
SALIL KUMAR DATTA, JJ.

Sen-Raleigh Ltd. Applicant v. Employees' State Insurance Corporation and others, Respondents.

Matter No. 458 of 1973, D/- 9-11-1976.

Employees' State Insurance Act (1948), Section 2 (9) (as amended by Act 44 of 1966) — Employer's special contribution — Liability — Head office at Calcutta — Factory at Assansol — Ch. V-A coming into force in 1951 — Demand for employer's special contribution from 28-1-1968 to 30-6-1968 is justified.

Where the head office and the factory are situate at different places the employees in the head office who are engaged in any type of work specified in Section 2 (9) of the Employees' State Insurance Act, 1948, as it now stands, are "employees" within the meaning of the Act. Even where the head office is at Calcutta where the provisions of the Act are applicable and the factory is at Assansol the employees in head office will be "employees" within the meaning of Section 2 (9) of the Act. Ch. V-A came into operation in the whole of India except Jammu and Kashmir on the 24th November, 1951. It ceased to have effect on the 1st July, 1973. Consequently demand by Employees' State Insurance Corporation from 28-1-1968 to 30-6-1968 is justified inasmuch as it is entitled to demand employer's special contribution till at least upto 30-6-1973. Matter No. 175 of 1973 D/- 9-11-1976 (Cal), Rel. on.

(Paras 1 and 13)

Cases Referred: Chronological Paras (1976) Matter No. 175 of 1973, D/- 9-11-1976 (Cal) 1

P. P. Ginwalla with Arijit Chowdhury and Jatin Ghose, for Applicant; Arun Dutt (Sr.) with Dipak Basu, for Respondents.

SANKAR PRASAD MITRA, C. J.:— In our judgment delivered today in Matter No. 175 of 1973 (Cal) (India Jute Co. Ltd. v. The Regional Director, West Bengal Region Employees' State Insurance Corporation) we have held that where the head office and the factory are situate at different places the employees in the head office who are engaged in any type of work specified in Section 2 (9) of the Employees' State Insurance Act, 1948, as it now stands, are 'employees' within the meaning of the Act. In this case it has been urged before us that the head

office of Sen-Raleigh Ltd., is in Middleton Row in Calcutta but the factory is in Asansol. The Act applies to Calcutta but not to Asansol. In the circumstances, the employees in the head office who are engaged in any type of work mentioned in Section 2 (9) of the Act would not be employees within the meaning of the Act.

2. On behalf of the respondents our attention has been drawn to various notifications issued in the Gazette of India from time to time on the applicability of this Act. On the 1st September, 1948, Chapters I, III and VIII of the Act came into force in all the Provinces in India. The Gazette publication was made on the 31st August, 1948. As we have pointed out in our aforesaid judgment sub-section (3) of Section 1 in Chapter I of the Act provides that the Act shall come into force on such date or dates as the Central Government may, by notification in the Official Gazette, appoint, and different dates may be appointed for different provisions of this Act and 'for different States or different parts thereof' (the words within quotations were substituted by Act 53 of 1951, Section 2, for "for different States").

3. It is pursuant to the above provision that the Gazette Notification of 31 August, 1948, was published. The charging sub-section is sub-section (4) of Section 1 in Chapter I. It prescribes that that the Act shall apply, in the first instance, to all factories (including factories belonging to the Government) other than seasonal factories.

4. This shows that on the 1st September, 1948, Chapters I, II, III and VIII of the Act became applicable to all factories throughout India irrespective of location. The headings of these Chapters respectively are (a) preliminary, (b) corporation, Standing Committee, and Medical Benefit Council (c) Finance and Audit and (d) Miscellaneous. Sections 44 and 45 (Employers to furnish returns etc; Inspectors their functions and duties) were brought into force in all part 'A' states with effect from the 1st April, 1950.

5. On the 24th November, 1955, Chapter VA became applicable to the whole of India except the State of Jammu and Kashmir. This Chapter provides for 'Transitory Provisions'. During the transitory period every principal employer had to pay to the Corporation a special contribution subject to the other provisions in the Chapter.

6. On 14 August, 1955, Chapter IV (except Sections 44 and 45), Chapter V and Chapter VI (except Sections 76 (1), 77, 78, 79 and 81 of the Act came into operation with respect, inter alia, to the Calcutta Municipal

areas. These Chapters deal respectively with (a) contributions, (b) benefits and (c) adjudication of dispute and claims. The marginal notes of Sections 44, 45, 76, 77, 78, 79 and 81 are respectively as follows:—

1. Employers to furnish returns and maintain registers in certain cases.
2. Inspectors, their functions and duties.
3. Institution of proceedings.
4. Commencement of proceedings.
5. Powers of Employees Insurance Court.
6. Appearance by legal practitioners and
7. Reference to High Court.

7. In 1966, Section 2 (9) was amended, as we have seen, by Act 44 of 1966, which came into force on 28 January, 1966. By this amendment an exhaustive definition was prescribed for the word "employee".

8. After the amendment came into force on the 29th May, 1968, the Regional Director, Calcutta, wrote to Messrs. Sen-Raleigh and Co. Ltd., Kannyapur, Post Office Asansol, Burdwan, inter alia, as follows:—

"That as per definition of the term 'employee' laid down in Section 2 (9) of the E. S. I. (Amendment) Act, 1966 the employees of your head office situated at Mercantile Building, Calcutta-1, are also now covered within the meaning of Section 2 (9) of the Act with effect from 28th January 1968 i. e., the date from which the amendment came into force. You are requested to please confirm that necessary action with regard to registration of your head office employees and deduction/payment of contribution in respect of them have been taken up by you." (Vide pages 16 and 17 of the Paper Book).

9. It appears, therefore, that Chapter IV and Chapter V of the Act became applicable to the head office of Sen-Raleigh Ltd. on the 14th August, 1955; but the State Insurance Corporation did not make any demands till the amended definition of 'employee' came into force. In other words, after the definition was amended the provisions relating to 'contributions' and 'benefits' except as hereinbefore stated, became applicable to the employees of Sen-Raleigh Ltd. working in its head office in Calcutta who were covered by the amended definition in Section 2 (9).

10. On the 3rd September, 1968, the Regional Director, Calcutta, again wrote to Sen-Raleigh and Co. Ltd. as follows:—

"It has been reported by this office Insurance Inspector who visited the Head Office of your factory that the following amount has been paid to the Head Office Staff for the period from 28th January 1968 to 30th June 1968 but no Employers' Special Contribution on the same has been paid.

Period.	Total Wages Bill,	ESE due,
28-1-68 to 31-3-68	Rs. 47,323.39	Rs. 355.30
1-4-68 to 30-6-69	Rs. 67,044.10	Rs. 503.00
	TOTAL	Rs. 858.30

Employers' Special Contribution as shown above may please be paid immediately." (vide pages 18 and 19 of the Paper Book.)

11. In this letter the Regional Director has demanded "Employers' Special Contribution" from 28 January, 1968 to 30 June, 1968. "Employers' Special Contribution" has been provided for in Section 73-A in Chapter VA of the Act which deals with "Transitory Provisions". Section 73-A is in these terms:

"73A. (1) For so long as the provisions of this Chapter are in force, every principal employer shall, notwithstanding anything contained in this Act, pay to the Corporation a special contribution (hereinafter referred to as the Employers' Special Contribution) at the rates specified under sub-section (3).

(2) The Employers' Special Contribution shall, in the case of a factory or establishment situate in any area in which the provisions of both Chapters IV and V are in force, be in lieu of the Employers' contribution payable under Chapter IV.

(3) The Employers' Special Contribution shall consist of such percentage, not exceeding 5% of the total wage bill of the employer, as the Central Government may, by notification in the Official Gazette, specify from time to time.

Provided that before fixing or varying any such percentage the Central Government shall give by like notification not less than two months' notice of its intention so to do and shall in such notification specify the percentage which it proposes to fix or, as the case may be, the extent to which the percentage already fixed is to be varied.

Provided further that the Employers' Special Contribution in the case of factories or establishments situate in any area in which the provisions of both Chapters IV and V are in force shall be fixed at a rate higher than that in the case of factories or establishments situate in any area in which the provisions of the said Chapters are not in force.

(4) The Employers' Special Contribution shall fall due as soon as the liability of the employer to pay wages accrues, but may be paid to the Corporation at such intervals within such time and in such manner as the Central Government may, by notification in

the Official Gazette, specify, and any such notification may provide for the grant of a rebate for prompt payment of such contribution.

Explanation.— "Total Wage Bill" in this section means the total wages which have accrued due to employees in a factory or establishment in respect of such wage periods as may be specified for the purposes of this section by the Central Government by notification in the Official Gazette."

12. We have seen that Chapter VA came into operation in the whole of India except Jammu and Kashmir on the 24th November, 1951. It ceased to have effect, we have been told, on the 1st July, 1973.

13. In the instant case, the Employees' State Insurance Corporation by the Regional Director's letter of the 3rd September, 1968, demanded Employers' Special Contribution from 28 January, 1968 to 30 June, 1968. We do not think that this demand is unjustified inasmuch as on the facts stated above the Regional Director is entitled to demand the Employers' Special Contribution upto 30 June, 1973.

14. In the writ petition Sen-Raleigh Ltd., has challenged, the notice dated the 29th May, 1968 at pages 16 to 17 of the Paper Book. We have quoted above the relevant portions of this notice. It seems to us that this is a valid notice in view of the amended definition of Section 2 (9) and the various notifications referred to above which brought into operation different Chapters of the Act in different areas in India.

15. The result is that this application is dismissed. All interim orders, if any, are vacated. There will be no order as to costs.

SABYASACHI MUKHARJI, J.:— I agree.

SALIL KUMAR DATTA, J.:— I agree.
Application dismissed.

AIR 1977 CALCUTTA 167

SALIL KUMAR DATTA AND G. N. RAY, JJ.

Jogesh Chandra Sen, Appellant v. Sm. Kiron Bala Saha, Respondent.

A. F. O. D. No. 700 of 1969, D/- 14-1-1977.

(A) Civil P. C. (1908), Order 6, Rule 17 — Amendment of plaint by introducing case not set up in original plaint — Amendment once allowed by Court cannot be objected to

BU/BU/A329/77/KSB

in subsequent stages of the proceeding.

(Para 5)

(B) West Bengal Premises Tenancy Act (12 of 1956), Section 13 (1) (ff) — Suit for possession on ground of reasonable requirement of landlord for own use and occupation — Plaintiff already living in tenanted premises which he alleged to be insufficient, uninhabitable and inconvenient — Plaintiff if entitled to relief.

Held that the contention of the defendant that it was open to the plaintiff to take steps for effecting proper repairs to the tenanted premises and her inaction cannot be a ground for the defendant's eviction cannot be accepted, as possession of a reasonable accommodation of the landlord must be with reference to the state in which the accommodation of such landlord is at the material time. Simply because that some remedies were available to the plaintiff for remedying the inconveniences it cannot be said that the plaintiff ought to have availed of those remedies before she can approach the Court for appropriate relief.

(Para 9)

Clause (ff) of Section 13 (1) provides for reasonable requirement of the landlord and there is no prohibition in the said sub-section against any further addition or alteration or renovation to the premises after the landlord obtains possession of such premises. There is thus no bar in law for the plaintiff making a case of own use and occupation of the premises with the further case that he on obtaining such possession will make further additions and alterations or even renovation to make it suitable for his own use and occupation. Accordingly, even though the accommodation in the suit premises is less than what the plaintiff had been enjoying in her tenanted premises such fact should not be an impediment on the way of plaintiff's getting a decree for her own use and occupation when she has established the requisite conditions for such relief.

(Para 10)

Cases Referred: Chronological Paras
AIR 1975 SC 1146 = (1975) 2 SCR 774 4
AIR 1959 Cal 181 = 63 Cal WN 29 10

R. N. Mitra, S. P. Sen and P. N. Bhattacharya, for Appellant; C. N. Mukherjee and Gopalchandra Mukherjee, for Respondent.

SALIL KUMAR DATTA, J.:— This appeal is from the judgment and decree of the learned Judge, 8th Bench, City Civil Court, Calcutta dated January 27, 1969 in a suit for recovery of possession of the suit premises. The plaintiff is the owner of premises No. 9-B, Mathura Sen Garden Lane P. S. Jorabagan, Calcutta which she purchased on October 12, 1966. The said premises had

been in occupation of the defendant as a monthly tenant at a rental of Rs. 25/- payable according to the Bengali Calendar month. The plaintiff's case was that she with her family had been residing in a small house at 87-A, B. K. Pal Avenue, Calcutta as a tenant with three rooms in her possession. The said premises were insufficient for the accommodation of herself and her family consisting of her husband, eldest son, his wife, second son, a daughter, husband's sister and two employees of the business of the plaintiff's husband and her son. The plaintiff, it was stated required the said premises for her use and occupation and she intended to raise a second storey and to completely renovate the existing structure and she had means to effect such renovation and construction. It was further stated that the plaintiff and her family were living in extreme inconvenience and discomfort on account of the insufficiency of accommodation in the said premises. Further the landlords were asking the plaintiff to vacate the premises. The tenancy of the defendant was determined by a notice to quit expiring with the month of Falgun, 1373 B. S. The said notice was duly served but as the defendant did not vacate the premises the suit was instituted on May 17, 1967 for recovery of possession thereof by eviction of the defendant therefrom on the ground of her reasonable requirement.

2. The suit was contested by the defendant who filed a written statement denying the material allegations in the plaint. It was further stated that the accommodation the plaintiff had at 87 B. K. Pal Avenue was sufficient and the accommodation in the suit premises was insufficient and there was no scope for erection of second storey on the premises. Further the tenancy was not duly determined in accordance with law.

3. It appears that the defendant did not deposit the admitted arrears of rent within the time allowed under Section 17 (1) of the West Bengal Premises Tenancy Act, 1956 and as a result the plaintiff's application under Section 17 (3) of the Act was allowed and the defence of the defendant against eviction was struck off. The suit was heard thereafter ex parte and by the judgment under appeal the suit was decreed on the finding that the plaintiff required the suit premises for her own use and occupation as also of her family. It was further held that the notice was valid in law and was duly served. The present appeal is against this decision.

4. It may be mentioned here that after the decree was obtained there was an amendment to the West Bengal Premises Tenancy Act. Section 13 (1) (f) was substitut-

ed by clauses (f) and (ff) by West Bengal Premises Tenancy (Second Amendment) Act, 1969. By the said amendment Act, sub-section (3-A) to Section 13 was inserted which provided that no suit for recovery of possession would be maintainable by the landlord on the ground of his own requirement unless three years have passed after his acquisition of the property concerned. By Section 13 of the said Act the provisions of sub-section (3A) of Section 13 of the parent Act were made applicable to pending cases. The Supreme Court in *B. Banerjee v. Amita Pan*, AIR 1975 SC 1146 upheld the vires of sub-section 3-A and further held that the provisions thereof applied to pending proceedings. Opportunity to the plaintiff was however afforded to amend his plaint in terms of the provisions of clause (f) or clause (ff) of Section 13 (1) and for further trial on evidence on such amended pleadings. In view of the aforesaid provisions, the plaintiff filed an application for amendment of her plaint incorporating fresh averments in consonance with the said provisions of the Act and this amendment application was allowed by this Court by order dated 2nd May, 1975. By this order also the Court confirmed the order of the trial court striking out defence of the defendant against eviction in view of his failure to comply with the first part of Section 17 (1) and accordingly the defendant was not allowed to file any additional written statement to the amended plaint. This Court by the said order framed two additional issues which are as follows:—

(1) Does the plaintiff-respondent reasonably require the suit premises for his own use and occupation?

(2) Is the plaintiff already in occupation of any reasonably suitable accommodation? The case was sent back to the trial court for recording evidence if adduced by the plaintiff and thereafter to transmit back to this Court its finding thereon together with the evidence recorded in that Court. In pursuance of this direction the plaintiff adduced evidence in support of her amended pleadings and the court found that in regard to issue No. 2 the plaintiff was not in occupation of a reasonably suitable accommodation. In regard to the first issue, the court found that the plaintiff reasonably required the premises for use and occupation of herself as also of her family and the inconveniences to which the plaintiff and her family were subjected to would be remedied if she could recover possession of the suit premises. Both the issues were decided in favour of the plaintiff. These findings are now before us for our consideration.

5. Mr. Mitra appearing for the appellant submitted that by the amendment of the plaint, the plaintiff improved her case in material particulars in her effort to bring it in conformity with clause (ff) of Section 13 (1). The case of plaintiff as being in occupation of an accommodation not fit for human habitation was made by the amendment of the plaint of which there is no whisper in the original plaint. It may be that the plaintiff by the amendment set up a case which was not made originally in that form in the plaint as it was filed but once an amendment has been allowed by this Court, it is no longer possible for us to take any exception to such amendment. The case will accordingly have to proceed on the basis of the amended plaint.

6. Now by the amendment, it was stated by the plaintiff in support of her case that she was not in possession of a reasonably suitable accommodation, that the wooden stair-case leading from the ground floor to the tenancy of the plaintiff in the first floor of of 87-A, B. K. Pal Avenue was seriously damaged and out of repair and that the plaintiff and the members of her family were using the same with risk as it was in a dilapidated condition. Further the roof could not be reached or used at all and the roof of the tenancy of first floor had become leaky and during the rains the plaintiff and her family members had to live with great difficulty and inconvenience as the accommodation became 'practically' unfit for human habitation.

7. A commissioner was appointed to survey the respective accommodation of the parties and it was found by the Commissioner that the plaintiff was in effect in occupation of four rooms. As the fourth room was a very small room measuring about 7' X 3' 6" it could not obviously be used for habitation. The Commissioner further found that the wooden stair-case was in grave dilapidated condition and the plaintiff and the members of her family suffered great difficulty and risk in using the same. The Commissioner further found that the roof was leaky and there was rain water in at least one room following rains which took place shortly before his inspection of the premises.

8. The son of the plaintiff gave evidence in the trial court after the records were sent back to that court by this Court as aforesaid. It was stated by him that the accommodation was wholly insufficient for his family members. It was stated that the family consisted of, apart from his parents, wife and brother, her married sister who was deserted by her husband. It may be mentioned here that by the amendment the plaintiff

stated that her sister had all along been living with the plaintiff as her husband has deserted her. In view of the size of the plaintiff's family there can be no dispute that the accommodation of three rooms was wholly insufficient for their purpose. Out of three rooms one room was necessary for the plaintiff's husband's business and only two rooms were thus left for their accommodation. It was obvious that the plaintiff and her husband require one room, her married son with his wife require another and her daughter as also the sister's husband require another room while the son also is to be accommodated. We are, therefore, in agreement with the finding of the learned Judge that the plaintiff reasonably required the premises for occupation of herself and her family.

9. Apart from the question of requirements it will appear on evidence that the premises where the plaintiff and her family had been residing so long were uninhabitable for the risk involved as the access to such premises was highly inconvenient and risky while the roof was leaky causing additional inconvenience. Mr. Mitra has submitted that it was open to the plaintiff to take steps for effecting proper repairs to the premises and her inaction cannot be a ground for the defendant's eviction. We are unable to accept this contention as possession of a reasonable accommodation of the landlord must be with reference to the state in which the accommodation of such landlord is at the material time. Simply because that some remedies were available to the plaintiff for remedying the inconveniences it cannot be said that the plaintiff ought to have availed of those remedies before she can approach the Court for appropriate relief. We therefore, find that the plaintiff is not in possession of reasonably suitable accommodation at the tenanted premises where she has been living at the material time.

10. Mr. Mitra has next drawn our attention to the fact that the accommodation which is sought to be recovered is less in area than the plaintiff's tenanted premises. As the learned Judge has found, the defendant is in occupation of two rooms and two verandahs. The witness for the plaintiff has stated in evidence that after they obtain possession of the accommodation, the plaintiff will renovate the ground floor and construct a new storey over it for her accommodation as also of her members of the family. It was further stated that the plan had been submitted for sanction by the Corporation. It was however not sanctioned presumably on the ground, as pointed out by Mr. Mitra, that

inspection of the premises was not given to the Corporation authorities. Mr. Mitra submitted that in considering a case under clause (ff) of Section 13 (1) the court has to take into consideration only the existing accommodation which would be available if a decree was passed and not to additional accommodation available after construction as it is covered by cl. (f) Mr. Mukherjee appearing for the respondent on the other hand drew our attention to the decision in *Krishna Das Nandi v. Bidhan Chandra Roy* 63 Cal WN 29 at p. 44 = (AIR 1959 Cal 181 at pp. 188, 189) in which the Court observed that it could not be believed that the Legislature intended to leave the landlord without a remedy and without a residence for himself and his family even though he had a premises and a reasonable requirement of it for his own occupation or residence and also the means of making it fit for his habitation. Under Clause (f) it is provided that when premises are required by the landlord for building or rebuilding then such requirement would be subject to the provisions of Sections 3-A and 18-A. In such a case under the clause (f) as amended the landlord does not require the premises for his own use and occupation but for the purpose of building and rebuilding or making thereto substantial alterations therein. Clause (ff) provides for reasonable requirement of the landlord and there is no prohibition in the said sub-section against any further addition or alteration or renovation to the premises after the landlord obtains possession of such premises. There is thus no bar in law for the plaintiff making a case of own use and occupation of the premises with the further case that he on obtaining such possession will make further additions and alterations or even renovation to make it suitable for his own use and occupation. Accordingly even though the accommodation in the suit premises is less than what the plaintiff had been enjoying in her tenanted premises we do not think that such fact should be an impediment on the way of plaintiff's getting a decree for her own use and occupation when she has established the requisite conditions for such relief. It may be further noted as observed by the trial Judge that the covered two verandahs on the two sides would also be available in the suit premises in which the plaintiff will accommodate herself and her family.

11. For all these reasons we accept the findings of the trial court on the both issues and hold that the plaintiff is not in occupation of any reasonably suitable accommodation, and that she requires the suit premises for her accommodation and also of her family. The appeal in the circumstances,

fails and is dismissed. There will be no order for costs in the circumstances.

12. Mr. Mitra prays for one year's time to vacate the premises as, it is stated, he has been residing there for over 20 years. Mr. Mukherjee has submitted that if any time is given it should be before the rainy season. We think that in the circumstances of the case the defendant should be granted time till Sravan 1384 B. S. to vacate the suit premises. Accordingly the decree hereby confirmed by us will not be executable till the expiry of Sravan 1384 B. S. on the terms and conditions set out below. It is stated that the defendant is not in arrears of rent or damages. The defendant will go on paying to the landlord or deposit in the trial court to the credit of the plaintiff damages at the rate of rent month by month according to Bengali Calendar month by the 15th of the succeeding month. The first of such deposit or payment will be made of the month of Pous 1383 B. S. by the 15th of Magh 1383 B. S. Damages for the last month of Sravan 1384 B. S. shall be paid or deposited as aforesaid by the end of Sravan 1384 B. S. In default of any of the deposits aforesaid, the decree will be executable at once and in any event the decree will be executable on the expiry of Sravan 1384 B. S. The plaintiff however will be at liberty to receive from the defendant all damages or withdraw from the court all the rent or damages deposited by the defendant in respect of the suit premises without prejudice to her rights under the decree.

G. N. RAY, J.:— I agree.

Appeal dismissed.

AIR 1977 CALCUTTA 171

R. BHATTACHARYA AND
A. K. JANA, JJ.

Pradip Kumar Saha, Petitioner v.
Laksmi Narayan Dutta, Opposite Party.

Civil Revn. Case No. 209 of 1976, D/-
7-9-1976.

Civil P. C. (1908), O. 32, R. 3, S. 115
— Suit against X as major — X really a
minor — Application by father of minor
to represent X as his guardian — Order
refusing, is illegal and is a failure to ex-
ercise the jurisdiction vested in the Court
by law — Duty of Court.

It is the duty of the Court to see
that a party to the suit who is minor
should be properly represented and if

there is any question as to whether the
defendant is a minor or not, the Court
should certainly make an enquiry in that
behalf and be satisfied about the status of
the party.

The duty of the Court is paramount
to see that a minor party is properly re-
presented. The order of the Court refus-
ing the application without any enquiry
as to the alleged minority is a failure to
exercise the jurisdiction vested in the
Court by law and the High Court will
interfere in revision, AIR 1953 Cal 196,
Dist. (Para 5)

Cases Referred: Chronological Paras
AIR 1953 Cal 196 = 56 Cal WN 757 4
AIR 1948 Cal 149 5

Haridas Ghosh, for Petitioner; Ban-
kim Dutt and Bhaskar Ghose, for Oppo-
site Party.

R. BHATTACHARYA, J.:— This re-
visional application under Section 115 of
the Code of Civil Procedure has been
filed by the petitioner, Pradip Kumar
Saha, alleged to be a minor represented
by his natural guardian father, against
an order passed by the learned Judge,
City Civil Court, Calcutta in Ejectment
Suit No. 281 of 1975 refusing to allow
the petitioner to be represented by his
father.

2. The relevant facts in this case
are simple. The plaintiff Lakshmi Nara-
yan Dutt, a lunatic represented by his
next friend and wife Parul Dutta filed
the ejectment suit against the defendant
on the allegation that he was the tenant
in respect of the suit premises. The de-
fendant was described as major. On se-
veral occasions processes were issued,
but it appears that on one occasion the
service return was to the effect that Pra-
dip Kumar Saha was a minor. However,
Maheswar Prasad Saha appeared in the
suit representing Pradip Kumar Saha on
the allegation that the said Pradip Ku-
mar was a minor and that the said minor
requires to be represented by him, his
natural guardian, the father. It was ob-
jected to by the plaintiff. Certain docu-
ments were filed, but without taking any
evidence the learned Judge held that the
defendant was described as a major and
had no locus standi to be represented by
his natural guardian on the allegation
that he was a minor. Moreover, it was
stated that the plaintiff filed the suit at
his own risk. The application filed by
Maheswar Prasad for representation of
the minor was rejected. Against that
order the present application has been

filed by the defendant represented by Maheswar Prasad Saha.

3. We have heard Mr. Ghosh, the learned Advocate appearing on behalf of the petitioner and Mr. Dutt on behalf of the opposite party. The contention of Mr. Ghosh is that when there was a petition filed on behalf of the defendant on the allegation that he was a minor and that when according to law his representation through guardian was essential, the Court ought to have made an enquiry into the matter and ascertained whether in fact the defendant was a minor or not.

4. Mr. Dutt, however, contended that Pradip Kumar who was described as major had no locus standi to appear as minor and in this connexion a reference was made to the case of Prabhat Kumar Chatterjee v. Latika Debi reported in 56 Cal WN 757 = (A.I.R. 1953 Cal 196).

5. Mr. Ghosh has, however, referred us to the decision in the case of Bhubaneswar Baidya v. Rabi Charan Baidya, reported in A.I.R. 1948 Cal 149, in support of his own contention. We have gone through both the cases. The case referred to by Mr. Dutt is a decision of the Division Bench of this Court. But the facts are quite different. In that case an ex parte decree was passed against the defendant described as major and subsequently an application was filed under Order 9, Rule 13 of the Code of Civil Procedure on behalf of the defendant for setting aside that ex parte decree describing himself as a minor represented by a guardian. It was held that that application was not maintainable. In that case it is clear that already a decree had been passed wherein the defendant was described as a major. In the present case, however, the defendant has been described as major, no doubt, but during the pendency of the suit he appeared describing himself as minor and wanted to be represented by his father, the natural guardian. It should be remembered that it is the duty of the court to see that a party to the suit who is minor should be properly represented and if there is any question as to whether the defendant is a minor or not, the court will certainly make an enquiry in that behalf and be satisfied about the status of the party. In the present case an application was filed alleging that the defendant was a minor and not a major, and that is why, the defendant wanted to be represented by

his father, the natural guardian. The duty of the court is there and remains paramount to see that a minor is properly represented. In the present case, the learned Judge relied upon the decision of the Division Bench, we have already mentioned, but he failed to appreciate the real import of the decision and the facts stated therein. He misapplied the principles enunciated therein. On the other hand, we have gone through the decision relied on by Mr. Ghosh, a decision of Harries, C. J. of this Court, and the facts of that case are similar to those before us. The provisions of Order 32, Rule 3 were considered and it has been held that where there has been an allegation that defendant is a minor though sued as major, that question should be decided by the court and then the suit should be proceeded with. We agree with the decision in that case and we cannot say that the other case relied upon by Mr. Dutt is applicable here. We find that in the instant case there has been no proper enquiry by the learned Judge to ascertain whether or not the defendant was a minor, as alleged. The learned Judge ought to have made an enquiry after giving the parties an opportunity to adduce evidence in this respect. We are of the view that the order passed by the learned Judge complained against is quite illegal and with material irregularity, causing injustice to the parties and he refused to act in exercise of the jurisdiction vested in him by law. The order is liable to be set aside. We also find that subsequent to that order another order has been passed on the same day rejecting applications under Section 17 (2A) (b) and Section 17 (1) of the West Bengal Premises Tenancy Act. Without being satisfied as to the status of the defendant the learned Court below ought not to have passed this order. This order is also liable to be set aside.

6. In the result, the application succeeds and the Rule is hereby made absolute. The orders indicated above are hereby set aside and the matter is sent back to the court below with a direction to the learned Judge to make an enquiry to ascertain as to whether or not the defendant was a minor at the date of institution of the suit after giving opportunity to the parties to adduce evidence according to law and after that decision he will deal with the applications under Section 17 (2A) (b) and under Section 17 (1) of the Act according to law.

7. We pass no order as to costs in this application.

Let the records be sent down as soon as possible so that the matter may be disposed of quickly.

JANAH, J.:— I agree.

Rule made absolute.

AIR 1977 CALCUTTA 173

PRADYOT KUMAR BANERJEE AND
RAMKRISHNA SHARMA, JJ.

Kanailal Dutta, Appellant v. Sadhan Chandra Santra, Respondent.

A. F. O. D. No. 431 of 1974. D/- 27-8-1976.*

West Bengal Premises Tenancy Act (12 of 1956), S. 13 (1) (b) — Accommodation being sufficient a landlord cannot, by bringing in others, claim additional accommodation by evicting the tenant — Members of the family, who are.

Where the landlord sought eviction of a tenant so that he might accommodate his son-in-law and the facts showed that the son-in-law had an house and establishment in his village home and that he had parents to be looked after, the landlord's plea that the son-in-law being a member of his family required accommodation was rejected. Held that in the circumstances of the case the son-in-law could not be treated as a member of the landlord's family. A nephew whose parents died when he was quite young and was brought up by the landlord in his own house and was married was held to be a member of the family. Countering the landlord's further argument that the son-in-law was already occupying a room in the house, it was held that the accommodation for the landlord being sufficient, he could not by bringing persons who were not members of the family seek eviction of the tenant. (1966) 70 Cal WN 867 and AIR 1968 Cal 49, Dist. (Paras 3 & 4)

Cases Referred: Chronological Paras
AIR 1968 Cal 49 5
(1966) 70 Cal WN 967 = ILR (1967) 1
Cal 112 5

Chandidas Roy Choudhury and Rejendra Nath Sarkar, for Appellant; Barun Kumar Roy Chowdhury, for Respondent.

* (Against decree of N. C. Dutta, Judge, First Bench, City Civil Court, Calcutta in E. S. No. 828 of 1971, D/- 27-7-1974.)

BANERJEE, J.:— This appeal at the instance of the defendant-tenant arises out of a suit for eviction by the respondent-landlord on the ground of reasonable requirement of the premises by the landlord. The admitted case of the parties is that the plaintiff has resided himself, his two wives, two sons, the plaintiff's nephew and 4 children, two of whom live in the disputed premises. Second daughter and her husband Kali Krishna Santra (Ghar Jamai) also live in the said premises. There are altogether 10 rooms, 6 in the first floor and 4 in the ground floor. Out of the 6 rooms of the first floor, 3 are bedrooms, one kitchen, one thakurghar and one kitchen-cum-store room. Out of the 4 rooms of the ground floor, 2 are bedrooms, 1 kitchen and one dining room besides a space underneath the staircase used for storing coal and fuel etc. The appellant defendant is in occupation of 1 room and 1 kitchen of the first floor of the house. The only point for consideration in this appeal is whether the decree passed by the Judge, City Civil Court, holding that the landlord requires the premises in question reasonably on the ground that the son-in-law and the daughter and the nephew are the members of the family of the plaintiff landlord is tenable.

2. Mr. Chandidas Roy Chowdhury on behalf of the appellant contended that neither the son-in-law nor the nephew can be treated as a member of the family of the plaintiff and therefore the plaintiff is not entitled to the decree. It is argued further by Mr. Roy Chowdhury that the ejectment suit being Title Suit No. 828 of 1971 was also against the brother of the appellant and the decree was passed against him. The appeal was preferred by the brother Subol Chandra Datta but the appeal has not been pressed at the hearing. Therefore it is argued that the plaintiff has already got a decree for 1 room which will be sufficient for the plaintiff's accommodation. The plaintiff, after the decree has been passed, is now in occupation of 3 rooms including kitchen and therefore his requirement should be satisfied with those 3 rooms.

3. Mr. Barun Roy Chowdhury appearing for the respondent contended that these 3 rooms will not be sufficient, inasmuch as, the son-in-law, who is Ghar Jamai, is in possession of 1 room in the ground floor and therefore it is argued that the learned Judge, City

Civil Court, is right in decreeing the suit. In our opinion, the son-in-law, in the facts and circumstances of the case, cannot be treated as a member of the family of the father-in-law. It appears that the son-in-law who was married 3 years before is now working in Calcutta. Before the marriage, he was staying in the mess. It is stated that his village home is about 70 miles from Calcutta and therefore it is inconvenient for his son-in-law to come to Calcutta in order to perform the duties here. It is further stated that the plaintiff is an illiterate person and it is necessary for the son-in-law to stay with him in the same mess to help the old father-in-law. This argument has no leg to stand upon on the facts of this case. At the present moment it appears to us that the landlord has 2 sons and a nephew who admittedly stays with the uncle from his very childhood. The son of the landlord is also educated and at the present moment is studying Bachelor of Commerce Degree. The son-in-law has a house and establishment in his village home. He has father and mother who live in village home and the son-in-law of the plaintiff looks after the father and mother. In our opinion, therefore, in the facts of the present case, the son-in-law, cannot be treated as a member of the family and therefore his accommodation cannot be treated as a reasonable requirement for his own use and occupation of the plaintiff landlord.

4. We agree with Mr. Barun Roy Chowdhury that the nephew and his wife are members of the family of the landlord. It appears that the parent of the nephew died leaving the nephew under the care of the landlord uncle and since then he was brought up by him in his own house and was married. In our opinion, the nephew is a member of the family in the facts and circumstances of the case.

5. Mr. Barun Roy Chowdhury however contended that admittedly the son-in-law is in possession of 1 room, if he is not a member of the family. But the facts remain that the prayer cannot be taken into consideration when considering the availability of accommodation of the landlord and therefore the landlord is entitled to a decree. In our opinion, this argument is fallacious. If it is found that the landlord's accommodation is sufficient but he has himself brought in persons who are not members of the

family that cannot be taken to be a ground for ejection of the tenant. Mr. Roy Chowdhury referred to some decisions of the different High Courts including our High Court, namely, (1966) 70 Cal WN 967 (Mrs. E. Davidson v. A. Khatun); AIR 1968 Cal 49 (Sukumar v. Naresh Chandra) and contended that the son-in-law is a member of the family. All these decisions make it clear that on the facts of the case appearing before the Hon'ble Court it was held that a particular person is a member of the family. It has been held in paragraph 30 that the boundaries of the family depend on particular facts of each case and the structure and outlook of each family. In our opinion, in the facts and circumstances of this case, the son-in-law, cannot be treated as a member of the family of the landlord.

6. In the result, the appeal must, therefore, be allowed and the suit must stand dismissed. There will be no order as to costs.

R. K. SHARMA, J.:— I agree.

Appeal allowed.

AIR 1977 CALCUTTA 174:

N. C. MUKHERJI AND
B. C. RAY, JJ.

Lalit Mohan Mitra and others, Appellants v. Samirendra Kumar Ghosh and others, Respondents.

S. A. No. 1582 of 1968, D/- 13-1-1977.

(A) Calcutta Municipal Act (33 of 1951), Section 388, Sch. 16, Rr. 23, 30 — Premises divided and renumbered as different premises belonging to different owner — Applicability of Act and Rules.

In the Municipal Act and the Building Rules contained therein there is no such thing as a "mother premises". The unit of computation under the said Act and the rules is a holding numbered as premises. When a plan is submitted for the sanction of the construction or reconstruction of a building, in a particular premises, the building rules must be applied to the plan in connection with the said premises. There is no scope for deeming the said premises to be a part of a larger premises, which it formed in the past, but which now has been divided and renumbered as different premises and belongs to a different owner. When accordingly the back space of certain

original premises cannot be said to exist after the original premises is divided into two separate parts between two brothers after partition between them and is treated as a separate premises, the ordinary rules relating to the back space of a premises will not apply to such a case. (1964) 68 Cal WN 1049, Followed.

(Para 5)

(B) Calcutta Municipal Act (33 of 1951), Section 388, Sch. 16, Rr. 23, 30 — Building plan not sanctioned strictly in accordance with the rules — Commissioner can make relaxation in a particular case. AIR 1972 Cal 459, Foll.

(Para 7)

(C) Specific Relief Act (1963), Sections 38, 39 — Construction by owner (defendant) on his own land — Suit by adjoining owners (plaintiff) on ground that construction was in breach of Municipal Rules — Absence of contractual obligation between plaintiff and defendant — Construction duly sanctioned by Corporation — No violation of statutory rules — Defendant's act not amounting to actionable nuisance — Plaintiff cannot start any action against defendant and pray for injunction. AIR 1952 Cal 74, AIR 1952 Cal 364 and AIR 1965 Cal 148, Followed.

(Paras 6, 8, 9, 10)

Cases Referred: Chronological Paras
AIR 1972 Cal 459 = 76 Cal WN 983 (FB)

AIR 1965 Cal 148 = 68 Cal WN 757

(1964) 68 Cal WN 1049

AIR 1961 Cal 359

AIR 1952 Cal 74

AIR 1952 Cal 364 = ILR (1950) 1 Cal 355

AIR 1931 Cal 129 (2) = 34 Cal WN 951

AIR 1927 Cal 1 = 31 Cal WN 32

AIR 1914 PC 45 = 41 Ind App 180

Gopal Chandra Mukherjee, for Appellants; Manindra Nath Ghosh, for Respondents.

N. C. MUKHERJI, J.:— This is an appeal by the defendants against the judgment and decree passed by Sri. M. Roy, Additional District Judge, 13th Court at Alipore in Title Appeal No. 1854 of 1966 dated 29th September 1967 affirming the judgment and decree dated 30th September 1964 passed by Sri N. C. Mahanty, 2nd Court Munsif, Sealdah in Title Suit No. 16 of 1963.

2. The facts of the case may briefly be stated as follows:— Premises No. 4/1, Jadu Mitra Lane, Calcutta, belonged to two brothers Lalit (defendant No. 1) and Pramatha. The above pre-

mises comprised an area of about 5 cottas and odd. To the adjacent of the above premises is the residential premises of the plaintiffs. Formerly there was a back space of 10 feet in respect of the joint premises of the two brothers at 4/1, Jadu Nath Mitra Lane. The joint premises was constructed in terms of the sanctioned plan of the Calcutta Corporation in 1932. Sometime in 1933 the defendant No. 1 tried to make an unauthorised pucca construction in the above back space without a sanctioned plan. This was immediately objected to by the plaintiffs and it was found by the Corporation that the defendant No. 1 constructed in accordance with the sanctioned plan. According to the plaintiffs they noticed once again attempts by the defendant No. 1 at laying a foundation of third storied building in the above back space. On enquiry the plaintiffs came to know that the defendant No. 1 in collusion with the officers of the Corporation managed to obtain previously a separate premises being No. 14/1-A, Radhakanta Jew Street out of the former premises at 4/1, Jadu Nath Mitra Lane. Premises No. 14/1, Radhakanta Jew Street was shown as a separate unit in respect of which it was alleged by the plaintiffs that the defendant No. 1 managed to obtain a sanctioned plan for the proposed third storied building in the back space of 4/1, Jadu Nath Mitra Lane. It is the case of the plaintiffs that the proposed plan was in violation of the statutory rules of the Calcutta Municipal Act, 1951. In such circumstances, the plaintiffs brought the suit praying for a perpetual injunction against the defendant No. 1 from constructing any structure on the basis of the said plan. The Corporation of Calcutta and the Commissioner of Calcutta Corporation were made parties. It was prayed that they be directed to cancel the said plan sanctioned by them. The plaintiffs also prayed for a mandatory injunction to demolish the structure already raised.

3. The defence was that by a partition deed of 1949 between the two brothers Lalit and Pramatha the premises at 4/1, Jadu Nath Mitra Lane was divided into two parts. The northern portion of the said premises was allotted to Lalit, the defendant No. 1, which was adjacent to the plaintiffs' premises at 16, Radha Kanta Jew Street. The southern portion was allotted to Pramatha who was not made a party in the present suit. After the partition deed was effected, the de-

defendant No. 1 Lalit enjoyed the southern half of the above premises as a separate unit and mutated his name in the Calcutta Corporation. The said premises was numbered as 14/1-A, Radha Kanta Jew Street. In 1960 the defendant No. 1 obtained a sanctioned plan of a three storied building. The defendant relied upon the Corporation tax bills which showed that the other brother Pramatha enjoyed the separate premises at 4/1-A, Jadu Nath Mitra Lane. On behalf of the Corporation of Calcutta it was asserted that the plan was legally sanctioned by them and there was no violation of the rules of the Calcutta Municipal Act. The learned Munsif held that the building plan was in violation of the statutory building rules and the defendant No. 1 was not entitled to construct in terms of such plan. In that view of his finding the learned Munsif decreed the suit. Being aggrieved, the defendant No. 1 preferred an appeal. The learned appellate Court below agreed with all the findings of the trial Court and dismissed the appeal. Being aggrieved, this present appeal has been filed by the defendants.

4. On a previous occasion this appeal was heard by M. M. Dutt, J. and his Lordship after hearing the matter for sometime was of the opinion that important points of law are involved in this appeal and in that view of his finding his Lordship referred the case to the Division Bench.

5. Mr. Gopal Chandra Mukherjee, learned Advocate appearing on behalf of the appellant, challenges the judgment passed by the Courts below on several grounds. In the first place he submits that ordinary rules relating to the back space of a premises will not apply to the facts of the present case inasmuch as the back space of the original premises is no longer in existence as the original premises was divided into two parts—each forming a separate unit. There is nothing known in the Calcutta Municipal Act as “mother premises” and as such the back space of the original premises cannot be said to exist even after the original premises is divided into two separate parts and each is treated as a separate premises. In support of his contention Mr. Mukherjee refers to a decision reported in (1964) 68 Cal WN 1049, (Kanai Lal Paul v. Corporation of Calcutta). This case was cited by Mr. Mukherjee to show that in the Municipal Act and the Building Rules contained therein there is no such thing as a “mother premises”. In that

case prior to the partition decree, the disputed premises formed a part of the larger premises Nos. 67 and 69, Simla Street, which belonged to common owners. His Lordship observed:

“If we take the whole premises as it then stood, it would form a corner premises, situated at the intersection of Simla Street and Vivekananda Road. In other words, notwithstanding partition which took place by decree passed on 4-2-1918, and notwithstanding the division of the original premises into different units by allotting different premises Nos. and notwithstanding the fact that the respondent No. 13 is the owner only of premises No. 57/3/A, Simla Street which does not abut either on Simla Street or on Vivekananda Road, it should be considered as a corner premises at the intersection of Simla Street and Vivekananda Road, because many many years ago it formed part of a larger premises which was a corner premises, facing the intersection. In my opinion, this is an absurd argument. In the Municipal Act and the Building Rules contained therein there is no such thing as a “mother premises.” The unit of computation under the said Act and the rules is a holding numbered as premises. When a plan is submitted for the sanction of the construction or reconstruction of a building, in a particular premises, the building rules must be applied to the plan in connection with the said premises. There is no scope for deeming the said premises to be a part of a larger premises, which it formed in the past, but which now has been divided and renumbered as different premises and belongs to a different owner”.

In the present case the fact that the original premises was divided into two parts and belonged to two different owners is admitted. It is also the admitted position that the plan was sanctioned in respect of the new portion which belonged to the defendant No. 1. That being so, the principles laid down in the case referred to above apply with full force to the facts of the present case.

6. In the next place Mr. Mukherjee contends that the defendant has obligation only to the Corporation and not to the plaintiffs. If the defendant makes construction in violation of the sanctioned plan then it is for the Corporation to start action against the defendant. The plaintiff cannot come to Court only for the simple reason

that the plan has not been sanctioned properly by the Corporation and the defendant is making construction in violation of the plan. In support of the contention Mr. Mukherjee refers to a decision reported in AIR 1952 Cal 74, (Nandalal Ladia v. Provudayal Tikriwalla). In this case on the facts it was held that "Where the plaintiffs and the defendants are adjoining owners, the plaintiffs have no right to pray either for a mandatory injunction or a perpetual injunction merely on the ground that certain proposed construction on the defendants' land may be in breach of Municipal Rules and bye-laws. There is no obligation contractual or otherwise, on the part of the plaintiffs towards the defendants which requires that the defendant should construct on his own land in accordance with the Municipal Rules and Regulations." Mr. Mukherjee submits that in the present case also there is no contractual obligation between the plaintiffs and the defendant and as such even assuming that there was violation on the part of the defendant, the plaintiffs cannot only for that bring an action against the defendant and pray for injunction. Mr. Mukherjee also refers to another decision reported in AIR 1952 Cal 364, (Sm. Parul Bala Roy v. Srinibash Chowmal). In this case it was held "In order to entitle the plaintiff to obtain an injunction, there must be an invasion or threatened invasion of the plaintiff's right to or enjoyment of property. Simply because the enjoyment of the plaintiff is rendered less beneficial that would not entitle him to obtain an injunction unless he can show that there is a legal duty on the part of the defendant towards him and that by non-performance of that legal duty the enjoyment of his property is materially affected". Mr. Mukherjee contends that in this case it cannot be said that there was any legal duty on the part of the defendant towards the plaintiff and that as there was a breach of that duty the plaintiff can start an action praying for injunction.

7. Mr. Mukherjee puts forward another argument to the effect that even assuming that the plan was not sanctioned strictly in accordance with the Rules even then the Commissioner can under the provisions of the Act make relaxation in any particular case. It is further contended that even in respect of matters which involve violation of unrelaxable building rules, the Commissioner has discretion not to order demolition if the violation is not of serious nature. That

discretion must be used bona fide stating reasons therefor. In support of this argument Mr. Mukherjee refers to a decision reported in AIR 1972 Cal 459, (Purusottam Lalji v. Ratan Lal Agarwalla) which is a Full Bench decision.

8. Mr. Mukherjee's last point is that even assuming that by proposed construction there will be some diminution of light and air as enjoyed by the plaintiff even then the plaintiff is not entitled to get an order of injunction unless the defendant's action amounts to actionable nuisance. In support of this contention Mr. Mukherjee refers to a decision reported in 41 IA 180 = (AIR 1914 PC 45), (Paul v. Robson). In this case it was laid down "The owner or occupier of a tenement in respect of which an easement of light has been acquired by prescription is entitled to a quantity of light the measure of which is what is required for the ordinary purposes of inhabitancy or business of the tenement, according to the ordinary notions of mankind. The actual user will neither increase nor diminish the right. The question, in an action for obstruction, is whether the obstruction amounts to a nuisance". It is not the case of the plaintiff that the proposed obstruction will amount to nuisance. No issue was framed in this respect in the Court below and though the number of witnesses have been examined by the plaintiff no evidence has been laid to this effect.

9. Mr. Manindra Nath Ghosh, learned Advocate appearing on behalf of the respondents relies on a decision reported in 68 Cal WN 757 = (AIR 1965 Cal 148), (Krishna Kali Mallik v. Babulal Shaw). In this case it was held "Under the Calcutta Municipal Act there is a duty to construct buildings in accordance with the terms of the statute and a duty not to construct buildings in violation of the statute. The purpose of the statute as also the terms thereof will show that building rules have been designed for the protection of rights and interests of persons who are the adjoining owners. It is indisputable that infraction of light and air or any other kind of actionable nuisance will give rise to a right of action against infringing landowner or owner of the building. We have gone through the judgment carefully and we do not find how the principle laid down in this case helps the plaintiffs rather it supports the contention advanced by Mr. Mukherjee that unless the defendant's act amounts

to actionable nuisance the plaintiffs cannot start an action.

10. Mr. Ghosh refers to a decision reported in 31 Cal WN 32 = (AIR 1927 Cal 1), (Brojendra Kishore Roy Chaudhuri v. Mohim Chandra Bhattacharji) to show that if there is evidence on record the High Court in a second appeal can determine not only any issue of fact which has not been determined by the lower appellate Court but also such issue which has been wrongly determined by such Court by reason of any illegality, omission, error or defect such as referred to in sub-sec. (1) of Section 100. In this connection Mr. Ghosh also refers to decisions reported in 34 Cal WN 951 = (AIR 1931 Cal 129 (2)), (Sm. Kshirodamoyi Dasi v. Kashi Lal Seal) and AIR 1961 Cal 359, (A. E. G. Carapiet v. Derderian). We have gone through the evidence on record carefully and we do not find that the evidence is such from which a conclusion can be drawn that by the proposed construction the defendant made and the further construction which defendant may make it has amounted to or will amount to actionable nuisance so as to entitle the plaintiff to start an action and pray for injunction. For all the reasons stated above we are of the opinion that there has been no violation of the statutory rules and that the plaintiff has no cause of action.

11. In the result, the appeal succeeds. The judgment and decree passed by the Court below are set aside. The plaintiff's suit is dismissed. There will be however no order as to costs in this appeal.

B. C. RAY, J.:— I agree.

Appeal allowed.

AIR 1977 CALCUTTA 178

PRADYOT KUMAR BANERJEE AND
RAMKRISHNA SHARMA, JJ.

Gobinda Lal Shaw and another, Appellants v. Tarak Nath Paul and others, Respondents.

Appeal from the Original Decree No. 173 of 1974, D/- 9-7-1976.*

*(Against decree of N. G. Choudhury, Judge, Ninth Bench of City Civil Court, Calcutta in T. S. No. 1151 of 1970, D/- 14-12-1973).

AU/BU/A275/77/SBB/WNG

(A) Transfer of Property Act (1882), Section 114 — Forfeiture — Right of sub-lessee.

If the provision of the lease itself gives right to the lessee to sub-let, the sub-lessee has right to avoid the forfeiture by payment of rent within the terms of Section 114. A lease for 21 years contained a provision of re-entry for non-payment of rent for 3 consecutive months. The head-lessee had a power to sub-let. Therefore for the purpose of the lease, the sub-lessee would have same powers during the continuance of the lease as head-lessee had. The sub-lessee thus has a power to avoid forfeiture on the ground of non-payment of rent under Section 114 and unless he is disentitled on the exercise of discretion in his favour. AIR 1914 All 411, Foll.; AIR 1953 Bom 129, Dist.

(Paras 8 and 9)

(B) Transfer of Property Act (1882), Section 114 — Relief against forfeiture — Appellate Court has discretion to grant relief at appellate stage. (AIR 1946 All 328 Held no longer good law in view of AIR 1969 SC 1349).

Where sub-lessees defending eviction and claiming protection under Section 114 showed their willingness to pay the arrears of rent against lessee if any, unless the trial Court finds that the lessee is in arrears for payment of rent or there is dispute about the arrears of rent the question of tendering or paying arrears by sub-lessee does not arise. In such a case when an appeal against order of eviction against sub-lessees is filed the appellate Court can relieve the sub-lessees against forfeiture by requiring them to pay the arrears as the order of ejectment by the trial Court does not take away the jurisdiction of the appellate Court to grant equitable relief. The appellate Court can exercise its discretion to grant such equitable relief. AIR 1946 All 328 held no longer good law in view of AIR 1969 SC 1349; (1904) 31 Cal 1057; ILR (1970) 1 Cal 117, Dist.

(Paras 7 & 9)

Cases Referred: Chronological Paras

ILR (1970) 1 Cal 117	9
AIR 1969 SC 1349 = (1969) 3 SCR 950	9
AIR 1953 SC 228 = 1953 SCR 1009	9
AIR 1953 Bom 129 = 54 Bom LR 833	9
AIR 1946 All 328 = 1946 All LJ 121	9
AIR 1914 All 411 = (1914) 12 All LJ 1085	8
(1907) 2 KB 8 = 76 LJ KB 658	8
(1904) 31 Cal 1057	9

S. C. Das Gupta and Anath Nath Mondal, for Appellants; P. K. Das and Bidyut Banerjee, for Respondents.

BANERJEE, J.:— This appeal is at the instance of the defendants Nos. 9 and 10 arising out of a suit for eviction of the lessee and sub-lessee in respect of a portion of the suit premises being No. 122, Surendra Nath Banerjee Road, Calcutta, P. S. Taltolla, Calcutta, which was leased out for a term of 21 years commencing from 1st day of February, 1957 to last day of January, 1978 at a monthly rental of Rs. 80/- payable by the 15th day of the following month for which the rent became due. The plaintiff became the owner of the premises by purchase on 7th March, 1962 and the lessee tenant Probodh Chandra Dey on receiving letter of attornment paid rent to the plaintiff as per terms of lease of 21 years commencing from 1st day of February, 1957 to last day of January, 1978. Probodh Chandra Dey died intestate in or about the month of June 1969 leaving the defendants Nos. 1 to 8 as his heirs and legal representatives and they became the tenants under the plaintiff on the terms of the lease and paid rent to the plaintiff at the rate of Rs. 80/- per month till the month of February, 1970. The said defendants failed and neglected to pay rent to the plaintiff in respect of the said premises from the month of March 1970 and thereafter the plaintiff determined the lease by way of forfeiture in view of the clause in the Deed of Lease that if the rent hereby reserved or any part thereof shall remain unpaid for three consecutive months it will be lawful for the lessor to enter in the premises on determination of the lease. The plaintiff filed the suit for eviction therefrom. In the suit they made defendants Nos. 9 and 10 who are under-lessees of the other defendants whose lease has been forfeited, parties and the defendants Nos. 9 and 10 are in the occupation of a part of the premises and rent payable by them are mentioned in Schedules "B" and "C".

2. The defendants Nos. 1 to 8 did not contest the suit. Defendants Nos. 9 and 10 however filed the written statements, inter alia, stating that they are under-lessees of the other defendants and they are not bound to vacate the portion of the premises occupied by them. Defendants Nos. 9 and 10 stated that they were inducted as tenants in respect of a room only on the 3rd floor at premises No. 122, S. N. Banerjee Road, Calcutta, at

a monthly rental of Rs. 55/- payable according to English Calendar month. It is further stated that on 28th February, 1970 at the time of the commencing of the tenancy, he paid a sum of Rs. 500/- in advance to the defendant No. 1 against a receipt with a term that a sum of Rupees 27-50 out of the said sum of Rs. 500/- shall be adjusted towards the rents from the month of February, 1970 and onwards. Similarly, the defendant No. 10 also paid a similar amount on the same date with a similar stipulation that a sum of Rs. 20/- shall be adjusted towards his monthly rents from the month of February, 1970 and onwards. According to the said arrangement and mode of payment of the monthly rent of the respective tenancy of the defendants Nos. 9 and 10, they went on paying and there is no arrear and if any arrear is found these defendants are ready to pay the same (Vide — Paragraph 14 of the written statements). The tenancy of these defendants is well protected under the provisions of law and even in case a decree for eviction is passed against defendants Nos. 1 to 8 the said decree is not binding and enforceable against these defendants and as such they prayed for a dismissal of the suit. On these pleadings, number of issues were framed and for the purpose of consideration of the argument at the Bar, Issue No. 4 is relevant. Issue No. 4 is as follows:— "Are the defendants Nos. 9 and 10 under-lessees under defendants Nos. 1 to 8? If so, has the lease been forfeited?" The learned Judge, City Civil Court having held against the defendants Nos. 9 and 10, appellants herein, they preferred the present appeal.

3. Mr. Das Gupta on behalf of the appellants contended, inter alia, that under Section 114 of the Transfer of Property Act, the defendants are entitled to protection and the appellants are agreeable to pay any amount which may be found due by the plaintiff to the defendant No. 1. It is argued by Mr. Das Gupta that under the registered indenture of lease dated 29th January, 1957 the lessee has the right to sub-let any portion of the demised premises and on the basis thereof the lessees defendants Nos. 1 to 8 had sublet the portion of the demised premises to defendants Nos. 9 and 10. It may be stated herein that the right to sub-let is to be found in the proviso to the clause which gave the right of re-entry to the lessor of the premises in case the lessee fails to pay, during the continuance of the lease, the rent reserved

by the indenture for three consecutive months. It is contended by Mr. Das Gupta that the lessee has let out to the appellant a portion of the premises under the lessee's right to sub-let any portion and it is open to the defendants Nos. 9 and 10 to pay the same or tender the same in terms of Section 114 of the Transfer of Property Act and thereby avoid the forfeiture in so far as the portions of the premises let out by the lessee are concerned.

4. Mr. Das on behalf of the respondent however contended, *inter alia*, that the case is covered by Section 115 and as soon as the right of lessee goes, all the subsequent rights created under the lease comes to an end with the determination of the original lease. The lessee cannot give more right to his sub-tenant. Mr. Das next contended that in the facts of the present case, Section 114 has no application as the essential conditions were not fulfilled. The provision, according to Mr. Das, under Section 114 is discretionary as they did not ask for relief against forfeiture before the trial Court, the appellant's contention cannot be upheld. In order to get relief under Section 114 under-lessee must pay or tender all the rents with interest and costs as stated in Section 114 of the Transfer of Property Act. In the present case this was not done. In that view of the matter, it is argued by Mr. Das that the under-lessee, appellant herein, has no right to avoid the forfeiture.

5. The point for consideration is whether in the facts and circumstances of the case, the appellant has a right to avoid the forfeiture of the lease on the ground of admitted non-payment of three consecutive months' rent by the lessee.

6. Mr. Das Gupta contended that the lessee has the right under the terms of the lease to sub-let a part of the premises and in fact it was sub-let by the lessee. If the lessee has made a default in payment of rent, the sub-lessee is within his right to offer the rent in default and get the relief against forfeiture under Section 114 of Transfer of Property Act.

7. Mr. Das however contended that, that is not so. If the lease is determined, the sub-lessee cannot have any right to continue. Mr. Das further contended that under Section 114 of the Transfer of Property Act, the first condition is that the lessee must pay or tender the rent together with interest and costs which according to Mr. Das, the lessee

did not tender at all. Mr. Das is not correct in his contention. From the judgment appealed against it is found that the appellant all along argued that under Section 114 of the Transfer of Property Act they are entitled to protection. Unless the Court finds that the lessee is in arrears for payment of rent or there is dispute about the arrears of rent, the Court comes to a proper finding, the question of tendering or paying does not arise in case the under-lessee who is in possession in terms of the indenture of lease can seek protection against the forfeiture under Section 114 of the T. P. Act. In view of the said offer to pay it cannot be said that at the time the defendant failed to make the offer to tender the payment. On the other hand in the judgment appealed against the plea of forfeiture was the only plea which was taken by the appellants and defendants Nos. 1 to 8 did not contest the suit and defendants Nos. 9 and 10 alone contested. The learned Judge was pleased to hold that under the law if there is a lessee and he has created an under-lease or any other legal interest then after the lease is forfeited, the under-lessee, or the person who claims under the lessee, loses his estate as well as the lessee himself. This plea however will not be available to the lessor if under the lease the lessee had the right to transfer or sublet a part or whole of the tenancy and as such if a lessee has transferred his interest in the lease it is binding on the same terms and condition on the lessee for the period of 21 years.

8. Mr. Das further contended that the case reported in (1914) 12 All LJ 1085 = 25 Ind Cas 186 = (AIR 1914 All 411), (Ahmad Hussain v. Riaz Ahmad) is not correctly decided. In our opinion, Mr. Das is not correct in his submission. We respectfully follow the reasons of the Hon'ble single Judge of the Allahabad High Court which held in 25 IC 186 = (AIR 1914 All 411), (Ahmad Hussain v. Riaz Ahmad) as follows:—

"Under the English Law, an under-lessee is entitled to claim relief from forfeiture, on the same way as the tenant (see page 545 of the same work) under the Common Law Procedure, 1852 (15 and 16 Vic., Section 76). There is no similar statutory enactment in India. Relief against forfeiture for non-payment of rent used to be granted in India long before the enactment of the Transfer of Property Act. It is still granted on equitable grounds in the case of agricultural

leases to which the provision of the Transfer of Property Act do not apply. I have not been able to lay my finger on any case decided in India in which an under-lessee has been given the privilege that Section 114 of Transfer of Property Act confers upon the lessee, nor am I aware of any decided case to the contrary. In England a liberal interpretation has been placed upon the term "tenant" as used in Section 4, George II, C. 28, which has been held to include an under-lessee (*Moore v. Smee*), (1907) 2 KB 8). In my opinion where a lessee is permitted by law to transfer mortgage, or sub-lease his rights, as in this case, the transferee of the rights must be deemed to stand in the shoes of the transferor for the purpose of making payment of the rent in arrears and costs of the suit under Section 114 of the Act. I am inclined to think that he is as much entitled to be relieved of the forfeiture as the original tenant. This is more especially so where the original tenant has transferred his entire rights to the defendant. The heirs of the original lessee are certainly entitled to pray for the relief which the lessee is entitled to and ask for relief against forfeiture under Section 114. Act IV of 1882. I see no reason for holding that the assignee of the rights of the tenant should be in a worse position. I dismiss the appeal but without costs, as the respondents have not appeared".

In our opinion, in view of the provision of the lease itself giving right to the lessee to sub-let, the sub-lessee has right to avoid the forfeiture by payment of rent within the terms of Section 114 of the Transfer of Property Act.

9. Next contention of Mr. Das is that in the appellate stage, the appellant cannot apply for avoiding the forfeiture by making a payment. This contention, however, is not tenable in view of the Supreme Court Judgment reported in AIR 1969 SC 1349, (*Praduman Kumar v. Virendra Goyal*). In paragraph 7 of the said judgment it has been stated that "in terms Section 114 makes payment of rent at the hearing of the suit in ejectment a condition of the exercise of the Courts' jurisdiction but an appeal being a rehearing of the suit in appropriate cases it is open to the appellate Court at the hearing of the appeal to relieve the tenant in default against forfeiture. Passing of a decree in ejectment against the tenant by the Court of First Instance does not take away the jurisdiction of the appellate Court to grant equitable relief".

Mr. Das Gupta's contention is that the appellate Court has power to grant equitable relief in appropriate cases even in the appellate stage. Mr. Das however referred to a case reported in (1904) 31 Cal. 1057 as also I. L. R. (1970) 1 Cal. 117 which is equally distinguishable in the facts of the present case. It appears to us that Mr. Das is not right in his contention that the defendants Nos. 9 and 10 did not apply for relief under Section 114 of the Act. Mr. Das's contention is that even if the appellate Court has the power to grant a relief under S. 114, this power should not be exercised unless the tenant has prayed for such relief at the earliest stage of the suit. Once a decree is passed without any prayer for relief, no such relief can be granted by the Appellate Court. Mr. Das contended that the power of the appellate Court to grant relief is to be exercised if such relief is prayed for in the trial Court. Moreover this is the question of direction of the Court and in the facts of the present case Mr. Das contended that the discretion should not be exercised in favour of the appellant. In our opinion, the discretion should be exercised in favour of the sub-lessee in the facts and circumstances of the present case. In the present case it must be held that the lessor was granted a lease for 21 years. In the said lease there is a provision of re-entry for non-payment of rent for 3 consecutive months. The head-lessee has a power to sublet. Therefore for the purpose of the lease, the sub-lessee has same powers during the continuance of the lease as head-lessee had. Admittedly in this case the head-lessee has a power to avoid forfeiture on the ground of non-payment of rent under Section 114 of the Act and unless he is disentitled on the exercise of discretion in his favour. Even at the stage of the trial the defendants Nos. 9 and 10 wanted to pay as will appear from the judgment itself but they contended that they never knew that the head-lessee made a default and they paid all rents to their head-lessee. In the facts and circumstances of the present case, we are not inclined to accept Mr. Das's contention that the discretion should not be exercised in favour of the sub-lessee. Therefore the sub-lessee has power to avoid the forfeiture by making payment under Section 114 of the Transfer of Property Act. Mr. Das however referred to the case reported in AIR 1953 Bom 129, (*Bhagwant v. Ramchandra*), AIR 1946 All 328, AIR 1953 SC 228 and AIR 1969 SC 1349,

(Praduman Kumar v. Virendra Goyal). In our opinion, however, in the facts of the present case, the defendants Nos. 9 and 10 are entitled to relief. In AIR 1953 Bom 129, (Bhagwant v. Ramchandra) what the Bombay High Court held is clearly distinguishable in the facts of the present case. It has been held by the Bombay High Court in paragraph 11 as follows:—

"The word 'forfeiture' used in Section 114 has a technical meaning which must be ascertained by reference to Section 111 (g) of the said Act. Forfeiture in this technical sense is incurred in case the lessee breaks an express condition which provides that on breach thereof the lessor may re-enter, and even in such a case the lessor has to give notice in writing to the lessee of his intention to determine the lease. The lease between the parties in the present case is not on the record and it is impossible to say that the requirements of Section 111 (g) of the Transfer of Property Act have been satisfied. No plea under Section 114 was made in the Courts below and it is obviously difficult to entertain this plea for the first time in second appeal. The plea clearly raises a mixed question of fact and law which we cannot decide in the absence of adequate material on the record".

In the said case it will appear that no plea of Section 114 was taken in the Court below and the matter was dealt with in the second appeal and moreover the lease between the parties was not in the record. In the present case however the lease is exhibited and sub-lessee is a party in the proceeding and the lease provides that the lessee shall be entitled to sub-let any portion of the demised premises. In AIR 1946 All 328, (Habib Ahmad v. Keoti Kuer) it has been held that the payment or tender cannot be made in the appellate Court under Section 114 of the Transfer of Property Act and in view of the judgment of the Supreme Court reported in AIR 1969 SC 1349, (Praduman Kumar v. Virendra Goyal) we do not think that the Allahabad High Court's decision reported in AIR 1946 All 328, (Habib Ahmed v. Keoti Kuer) can be stated to be correctly decided.

10. The appeal is therefore allowed. The judgment and decree passed by the Court below is set aside.

11. We direct that the appellants (defendants Nos. 9 and 10) will remain in

occupation of the premises till the expiry of the terms of the lease on payment of stipulated rent.

12. It is further directed that the plaintiff will be entitled to all the arrears of rents from the defendants Nos. 9 and 10 including the rents for the premises in occupation by the defendants from the date of the suit up-to-date and he will be entitled to withdraw the money already deposited during the pendency of the suit and appropriate the same towards his dues. The plaintiff will also be entitled to the interest as provided in Section 114 of the Transfer of Property Act.

13. There will be no order as to cost in this appeal.

14. In view of disposal of the appeal no order is passed on the application.

R. K. SHARMA, J.:— I agree.

Appeal allowed.

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SALIL KUMAR DATTA AND

G. N. RAY, JJ.

Gobinda Lal Daga and another, Petitioners v. State of West Bengal and another, Opposite Parties.

C. R. No. 4249 of 1975, D/- 7-1-1977.

(A) Requisitioning and Acquisition of Immovable Property Act (30 of 1952), Sections 8 (1) (g) and 25 — Applicability — Provisions of Section 8 apply only to requisition by Central Government under Defence of India Act, 1962 — Section 25 does not apply — Provision of Arbitration Act apply. (Defence of India Act (1962), Section 29).

Provisions of Section 8 of the Requisitioning and Acquisition of Immovable Property Act apply to a requisition of any immovable property by the Central Government or by any officer or authority to whom powers in this behalf have been delegated under Defence of India Act, 1962 and the Rules framed thereunder. Where the requisition is made by the State Government under powers conferred under Section 29 of the Defence of India Act, 1962, the provisions of Section 25 do not apply. The Arbitration Act, therefore, applies to the proceedings. (Faras 4 and 5)

(B) Defence of India Act (1962), Sections 29 and 30 — Requisition of Property — Compensation — Determination —

BU/BU/A331/77/GGM

Provisions of Arbitration Act apply to statutory arbitration. (Defence of India (Requisitioning and Acquisition of Immovable Property) Rules, 1962, Rules 12 and 13).

Considering the provisions of Sections 29 and 30 of the Defence of India Act, 1962 and Defence of India (Requisitioning and Acquisition of Immovable Property) Rules, provisions of the Arbitration Act are applicable to the statutory arbitrations contemplated under the Defence of India Act, 1962 except in respect possibly of the reasons forming the basis of the award. Accordingly an application filed by the party under Section 14 (2) of the Arbitration Act appears to be otherwise maintainable in law. AIR 1964 All 185; AIR 1969 Cal 286 and C. R. No. 2568 of 1972, D/- 6-3-1975 (Cal) and AIR 1970 Tripura 94, Ref. (Para 12)

Cases Referred: Chronological Paras

C. R. No. 2568 of 1972, D/- 6-3-1975 (Cal) 12

AIR 1970 Tripura 94 12

AIR 1969 Cal 286 12

AIR 1964 All 185 = 1963 All LJ 581 12

(1890) ILR 17 Cal 155 13

A. C. Bhabra, J. Pugalka, for Petitioners; S. N. Bakshi, for Opposite Parties.

S. K. DATTA, J.:— The petitioners are the owners of premises No. 902 Barackpore Trunk Road, 24-Parganas. A part of the said premises was requisitioned under Section 29 (2) of the Defence of India Act, 1962 (Act 51 of 1962) on 30th September, 1965 for setting up a fire station at Kamarhati for Civil Defence purpose. The possession of the premises requisitioned, it appears, was taken on October 6, 1965. The petitioners submitted their claim for rent compensation at the rate of Rs. 2,500/- per month and electric charges at the rate of Rs. 175/- per month. The Additional Collector (North) Barasat, 24-Paraganas on June 10, 1968 fixed rent compensation at the rate of Rs. 227/- per month for the period from 1st of March 1968 to 28th February, 1969. The premises was derequisitioned on July 10, 1968 on the expiry of the Defence of India Act and, it is said, it was requisitioned again under the West Bengal Premises Requisition and Control (Temporary Provisions) Act, 1947 according to the petitioners. The petitioners were not satisfied with the determination of the rent compensation made by the Additional Collector as aforesaid and they prayed for a reference to arbitration

under the provision of the Defence of India Act. The State of West Bengal accordingly by order dated 27th August, 1973 appointed Mr. S. Ahmed, Additional District and Sessions Judge, 24-Parganas as an Arbitrator for determination of compensation payable for such requisition of the property, that is, the requisition for the period from 6th October, 1965 to 9th July, 1968. As Mr. Ahmed was transferred, the State Government by subsequent order dated June 27, 1974 appointed in his place Mr. L. K. Pal, Additional District and Sessions Judge, 24-Parganas as an Arbitrator for such determination. The award was, it appears, made by the Arbitrator on 13th September, 1974 and same rate of compensation was awarded as rent compensation for the aforesaid period. According to the petitioners, no notice of appointment of Mr. Pal as an Arbitrator was served on the petitioners nor they were given any notice of the proceeding before him. On enquiry through their advocate the petitioners came to know on March 14, 1975 about the award that was passed ex parte as stated above. On April 2, 1975 the petitioners requested the Arbitrator to file his award in Court under the provision of S. 14 (2) of the Arbitration Act, 1940. On his failure to do so, the petitioners on April 16, 1975 filed an application before the District Judge at Alipore giving rise to Misc. Case No 75 of 1975 for a direction on the Arbitrator to file the award in Court. This application came up for hearing before the District Judge and by his order dated August 16, 1975 the application was dismissed as not maintainable. The learned Judge held that in view of the provisions of Section 25 of the Requisitioning and Acquisition of Immovable Property Act, 1952 (Act XXX of 1952) which was inserted by an amendment Act 31 of 1968, the provisions of the Arbitration Act did not apply to proceeding before the Arbitrator. Accordingly, the Court had no jurisdiction to entertain, consider or dispose of such application. The petitioner have obtained this Rule against the aforesaid order.

2. Mr. Bhabra, learned advocate appearing for the petitioners, submitted that the learned Judge committed an error in the exercise of jurisdiction in thinking, in any event, that the provisions of Act 30 of 1952, as amended, were applicable to the facts of the case. Section 25 provides as follows:—

"25. Special provision as to certain requisitions under Act 51 of 1962— (1)

Notwithstanding anything contained in this Act, any immovable property requisitioned by the Central Government or by any officer or authority to whom powers in this behalf have been delegated by that Government under the Defence of India Act, 1962, and the rules made thereunder (including any immovable property deemed to have been requisitioned under the said Act) which has not been released from such requisition before the 10th January, 1968, shall, as from the date, be deemed to have been requisitioned by the competent authority under the provisions of this Act for the purpose for which such property was held immediately before the said date and all the provisions of this Act shall apply accordingly...."

3. If Act XXX of 1952 as amended applied to the arbitration in the instant case at least for a part of the period of requisition, in view of the provisions of Section 8 (1) (g) thereof, nothing in the Arbitration Act, 1940 would apply to arbitration under challenge before us. The learned Judge held that the application before him was not maintainable as the Act XXX of 1952 applied to the requisition in question.

4. The provisions of this section it is to be noted, apply to a requisition of any immovable property by the Central Government or by any officer or authority to whom powers in this behalf have been delegated by the Government under the Defence of India Act, 1962 and the Rules framed thereunder. In the instant case, the requisition was made by the State Government under powers conferred by Section 29 of the Defence of India Act, 1962. That the requisition was made by the State Government will be evident from the preamble of the orders dated August 27, 1973 and June 27, 1974 which we have referred to above. The preambles are as follows:

"(i) Government of West Bengal Land Utilisation and Reforms and Land and Land Revenue Department Requisition (L. I.) Branch.

ORDER.

No. 16348-Reqn. (D. I)/2A-12/72, dated the 27th August, 1973.

Whereas the property specified in the Schedule below as requisitioned by the State Government under Section 29 of the Defence of India Act, 1962 (Act 51 of 1962).

(ii) ORDER.

No. 11304-Reqn. (D. I)/2A-12/72, dated Calcutta the 27th June, 1974.

Whereas the property specified in the schedule below was requisitioned by the State Government under Section 29 of the Defence of India Act, 1962 (Act 51 of 1962)."

5. In view of this requisition, the provision of Section 25 of Act 30 of 1952 have no application and this aspect of the controversy escaped the attention of the learned Judge.

6. We shall now consider the other contention raised on behalf of the petitioners about the applicability of the provisions of the Arbitration Act to the instant arbitration. It will appear from Section 45 of the Arbitration Act that the provisions of the said Act shall be binding on the Government which obviously include both the Central Government and the State Government as provided in Section 3 (23) of the General Clauses Act, 1897. Section 46 of the Arbitration Act is to the following effect:

"46. The provisions of this Act except sub-section (1) of Section 6 and Sections 7, 12 and 37, shall apply to every arbitration under any other enactment for the time being in force, as if the arbitration were pursuant to an arbitration agreement and as if that other enactment were an arbitration agreement, except in so far as this Act is inconsistent with that other enactment or with any rules made thereunder."

7. It is therefore, obvious that when there is no prohibition in other statutes wherein there is a provision for arbitration as regards applicability of the provisions of the Arbitration Act, such provision would be applicable to arbitrations under the other statutes unless they are inconsistent with the other enactments or with any rules made thereunder. Section 19, clause (g) of the Defence of India Act, 1939 provides that nothing in any law for the time being in force shall apply to arbitrations under this section. Clause (g) is worded in the following manner.

"Save as provided in this section and in any rules made thereunder, nothing in any law for the time being in force shall apply to arbitrations under this section."

8. Again, in the Requisitioning and Acquisition of Immovable Property Act, 1952 (Act 30 of 1952), it is provided in Section 8 (1), Clause (g) as follows:—

"Nothing in the Arbitration Act, 1940 (Act X of 1940) shall apply to arbitrations under this section."

9. It will further be found that under the provision of Section 19 (1) (f)

of the Defence of India Act, 1939, there is a provision for an appeal to the High Court against an award of an arbitrator except in cases where the amount thereof does not exceed an amount prescribed in this behalf by rule made by the Central Government. Section 11 of Act 30 of 1952 provides for an appeal from the award of an arbitrator to the High Court within whose jurisdiction the requisitioned or acquired property is situate.

10. It will thus be seen that the application of the provision of the Arbitration Act was expressly excluded by the provisions cited above and, accordingly, in cases of an award passed under those Acts, it is not possible for any aggrieved party to avail himself of the provision of the Arbitration Act.

11. We do not find any similar provision or prohibition in the Defence of India Act, 1962. The relevant sections are Sections 29 and 30. Section 29 provides for requisitioning of immovable property by the Central Government or the State Government. Section 30 provides for payment of rent compensation in respect of the requisition of any immovable property and such amount shall be determined by taking into consideration the factors mentioned in that section. It is further provided that if anybody is aggrieved by the amount of compensation so determined, he may apply to the appropriate Government for referring the matter to an Arbitrator for determining the amount of compensation in respect of such requisition. There is no other provision providing for any appeal against the award as may be passed by the Arbitrator appointed in that behalf. There is also no provision excluding operation of the provision of the Arbitration Act in respect of such arbitration proceeding.

12. Mr. Bakshi, learned advocate appearing on behalf of the State, submitted that the Defence of India Act, 1962 and the Rules framed thereunder constitute a complete Code and, accordingly, there is no scope for application of any provision of the Arbitration Act to such proceeding. He drew our attention to the Rules framed under Section 38 of the Defence of India Act which lays down that the Central Government or the State Government may make rules for carrying out the purposes of this chapter, the chapter being Chapter VI — requisitioning and acquisition of immovable property and it further provides that in parti-

cular, and without prejudice to the generality of the foregoing powers, such rules may prescribe the procedure to be followed in arbitration proceedings under this Chapter. In pursuance thereof, the Central Government has framed rules called the Defence of India (Requisitioning and Acquisition of Immovable Property) Rules, 1962. Under these Rules, an Arbitrator has been given certain powers of Civil Court by Rule 12, Rule 13 provides for making of the award by the Arbitrator in writing. It further provides that the award shall thereafter be signed setting forth the grounds for his decision of the amount of compensation which in his opinion should be allowed for the property and for the apportionment thereof between the persons interested in the property. It is further provided that a copy of the award should be sent by post to all parties to the reference and to the competent authority together with the ground on which the award is based. Rule 15 provides for payment of compensation determined in accordance with Section 30, Clause (i) of the Act which shall be payable on the expiry of every three months in respect of a building on an urban land and on the expiry of every six months in respect of rural land. These are the provisions under the Rules in respect of the arbitration under the said Act. In these Rules as in the Act, as we have seen, there is no provision for any appeal from the award of the arbitrator as in other like two statutes we have considered above. It will also be seen that there is also no provision excluding the application of the Arbitration Act to such proceeding. The Rules, as we have seen, provide for the procedure of the arbitration till the making of the award and the payment thereof but there is no procedure laid down as to what will happen if any party feels aggrieved by the award for any reason whatsoever. Mr. Bakshi has drawn our attention to the applications made in similar circumstances by the aggrieved party in this Court under Article 227 of the Constitution. He has referred us to a decision in *Smt. Narayani Debi Sureka v. Union of India*, reported in AIR 1969 Cal 286 where this Court on an application under Article 227 of the Constitution interfered with the award setting aside the same and sent back the matter before the tribunal below for assessment of the compensation in accordance with law in the light of the observation made in the judgment. He also referred us to an unreported decision in

C. R. No. 2568 of 1972, (Srimati Roy v. Union of India) dated March 6, 1975 (Cal) where another Division Bench of this Court interfered with an award made in respect of a requisition of a property under Section 29 of the Defence of India Act. It may be that an application under Article 227 of the Constitution may be a convenient mode of challenging the award on grounds permissible in law under that Article and we also note that it has been practically the uniform and consistent practice in this Court to interfere with the award on proper grounds. Even so, Article 227 is no part of the Defence of India Act and interference in that Article is also circumscribed by limitation imposed by judicial decisions. As a substantive right has been conferred on a party under the relevant provision of the statute under Section 46 of the Arbitration Act, in absence of any prohibition, we do not think that the provision of Article 227 can in any way limit such right. Further, the Rules to which our attention has been drawn and with the making of the award and sending a copy of the award to the competent authority and other interested parties. It may also be of interest to note that in the relevant provisions unlike those in Arbitration Act, the arbitrator has to give his reasons as the basis of the award and to that extent the provision of the Arbitration Act may be said to be superseded but it cannot be extended beyond. After considering the relevant provisions, we are of opinion that in the context of the statutory provision it must be held that the provisions of the Arbitration Act are applicable to the statutory arbitrations contemplated under the Defence of India Act, 1962 except in respect possibly of the reasons forming the basis of the award which we have just referred to. Accordingly, the application filed by the petitioners under Section 14 (2) of the Arbitration Act appears to be otherwise maintainable in law. In Nawabzada S. M. Ali Dabir v. Nawabzada S. M. Ali Kabir Khan, AIR 1964 All 185 it was held that in respect of award under Section 58 of U. P. Court of Wards Act, provisions of the Arbitration Act were applicable for enforcement of the award in absence of any provision to the contrary. In Sachindra v. Chief Commissioner Tripura, AIR 1970 Tripura 94, it was held that determination of compensation for requisition by Arbitrator is subject to Sections 45 and 46 of the Arbitration Act, 1940.

13. The next point for consideration is whether the District Judge had any jurisdiction to entertain such application in his original jurisdiction. Under Section 2 (c) of the Arbitration Act, an application under Section 14 (2) has to be filed in Court which would otherwise have jurisdiction to try a suit in respect of the subject-matter of reference. Mr. Bakshi submitted that the District Judge has been conferred with original jurisdiction only in respect of specific matters like matrimonial cause or guardianship award matters and not suits as contemplated in Section 2 (c). Mr. Bhabra referred to Section 18 of the Bengal, Agra and Assam Civil Courts Act, 1887 and submitted that competency used in that section is a rule of procedure and not of jurisdiction and does not therefore oust the jurisdiction of the Courts of higher grade who had concurrent jurisdiction in the matter. Mr. Bhabra relied on a decision in Matra Mondal v. Hari Mohun Mullick alias Mothura Mohun Mullick, reported in (1890) ILR 17 Cal 155 wherein it was held that the words "not affecting the jurisdiction of the Court" in Sec. 578 of the same Code mean "not affecting the competency of the Court to try". It was further held that the error in instituting a suit in a Subordinate Judge's Court instead of in that of the Munsiff is not an error which affects the jurisdiction of the former Court within the meaning of Section 578 of the Code of Civil Procedure of 1882. Accordingly, the District Judge, Mr. Bhabra submitted, has ample jurisdiction to entertain an application according to law and pass appropriate directions. As we propose to remit the case to the learned Judge, we do not feel inclined to consider the points raised before us for the first time when this aspect of the question was not considered by the learned Judge.

14. In the view we have taken, this Rule is made absolute and the impugned order is set aside. The learned Judge will now consider the application in accordance with law keeping in mind the above contentions raised on behalf of the respective parties if they are raised before him in regard to his jurisdiction to entertain and dispose of the application. We also make it clear that we are expressing no opinion about the merits of the contentions of the parties made before us on the point of jurisdiction.

15. Mr. Bakshi prays for stay of operation of this order. Let the opera-

tion of this order be stayed for two months from date.

G. N. RAY, J.:— I agree.

Rule made absolute.

AIR 1977 CALCUTTA 187

N. C. MUKHERJI AND B. C. RAY, JJ.

Mrs. Namita Dhar, Petitioner v Dr. Amalendu Sen, Respondent.

Civil Revn. Case No. 1708 of 1973, D/-9-12-1976.

(A) Civil P. C. (1908), O. 11, R. 21 — No power in Court to strike out the defence of the defendant or dismiss the plaintiff's suit suo motu under Order 11, Rule 21.

Though Order 11, Rule 21 is in two parts and the first part provides for a liability of the plaintiff to have his suit dismissed and the liability of the defendant to have his defence struck out on refusing to reply interrogatories and the second part provides that the party asking for the interrogatory may apply to the Court and obtain the order to that effect, the Court by itself has no power to dismiss the suit or strike off the defence as the case may be without any such application by the other party. (Para 4)

(B) Civil P. C. (1908), Section 115 — Revision — Jurisdiction — Application under Section 151 to the same Court against an appealable order — No appeal filed — Application rejected — No revision lies. AIR 1944 Cal 309, Dist.

(Para 5)

Cases Referred: Chronological Paras

AIR 1970 SC 997 = 1970 SCD 774 4

ILR (1963) 2 Cal 309 3

AIR 1947 All 343 = ILR (1947) All 389 4

AIR 1944 Cal 309 = 48 Cal WN 501 5

AIR 1927 Cal 158 = 98 Ind Cas 70 4

Narendra Nath Biswas, for Petitioner; Asoke Kumar Sen Gupta, for Respondent.

N. C. MUKHERJI, J.:— This Rule arises on an application under Section 115 of the Code of Civil Procedure and is directed against an order striking out defence on defendant's failure to comply with an order for making further discovery and an order refusing to vacate the said order by re-consideration of the matter under Section 151 of the Code of Civil Procedure.

2. The facts of the case may briefly be stated as follows:—

The opposite party filed a Money Suit against the petitioner. After the petitioner filed written statement the opposite party filed an application for direction to make discovery of documents that might be relied on by the petitioner. The petitioner through her husband made discovery of documents in her possession or power on 21st of April, 1972 stating therein that the most important document had already been filed in Court. Thereafter on the application of the opposite party for further discovery of documents, an order was passed on June 29, 1972 directing the petitioner to make further discovery on oath by way of supplying further particulars regarding the discovery made on behalf of the petitioner. As the petitioner being a lady and not being familiar with Court affairs and the petitioner's husband having left Calcutta in August 1972 and then was attacked with Jaundice and could not return to Calcutta in due time no steps could be taken on behalf of the petitioner. On 25th of August 1972 the learned Subordinate Judge rejected the written statement and fixed the suit for ex parte hearing on September 13, 1972 although there was no application on behalf of the opposite party for rejecting the written statement. On September 13, 1972 an application was filed by the petitioner praying for vacating the order dated 25th of August 1972. The said application was rejected. Being aggrieved, the petitioner has come up before this Court.

3. Mr. Narendra Nath Biswas, learned Advocate appearing on behalf of the petitioner, in the first place submits that the learned Court below was wrong in rejecting the written statement as no application was filed on behalf of the opposite party, and that being so, the Court cannot pass an order rejecting the written statement suo motu under Order 11, Rule 21 of the Code. In support of his contention Mr. Biswas places before us a Bench decision of this Court reported in ILR (1963) 2 Cal 309, (Braja Behari Sen v. Arun Coomar Bose). At page 313 it has been held that "to dismiss a suit for failure of the plaintiff to comply with an order for inspection is not automatic in its operation. Under Order 11, Rule 21 the Court can act on the application of a party and not suo motu". It was also held that "the Court does not impose the penalty under Order 11, Rule 21 except in clear cases and where the party re-

fusing inspection is contumacious or has deliberately disobeyed the order of the Court with full knowledge thereof". Mr. Biswas submits that in this case no application was filed and, moreover, circumstances were not such that the extreme penalty should have been imposed by the Court.

4. Mr. Ashoke Kumar Sen Gupta, learned Advocate appearing on behalf of the opposite party, submits that in this revisional application the petitioner cannot challenge the order which was passed under Order 11, Rule 21. Assuming that the said order was passed illegally the petitioner ought to have preferred an appeal against the said order, instead he filed an application under Section 151 of the Code and the learned Court below rightly held that as the order challenged was appealable the application under Section 151 was not maintainable. The learned Court below relied on the decision reported in 98 Ind Cas 70 = (AIR 1927 Cal 158), (*Asutosh Ghose v. Indu Bhusan Ghose*). It is a Bench decision of our Court and it has been laid down

"An order under Order 11, Rule 21. Civil P. C. dismissing a suit for failure to answer interrogatories being appealable, a Court has no power to review such an order in the exercise of its inherent power under Section 151, Civil P. C. A Court cannot invoke an inherent jurisdiction where there is a provision in the Code which, if applied, will meet the justice of the case, however desirable it may deem that an order should be passed under Section 151, Civil P. C."

In this connection Mr. Sen Gupta also relies on a decision reported in AIR 1947 All 343, (*Chander Bhan Singh v. Lallu Singh*). It was held in this case that "An order under Section 151 cannot be made where there is a specific remedy provided by the Code applicable to the circumstances of the case. Order 43, Rule 1 gives a party a right to appeal from an order passed under Order 11, Rule 21 and if he fails to avail himself of that remedy the order under Order 11, Rule 21 cannot be set aside under Section 151". Mr. Sen Gupta in support of his contention relies on the Supreme Court decision reported in AIR 1970 SC 997, (*Nainsingh v. Koonwarjee*). In this case it has been held that "If no appeal is preferred against an appealable order, its correctness is no more open to examination". It was further laid down that "Under the inherent power of Courts recognised by Section 151,

Civil P. C., a Court has no power to do that which is prohibited by the Code. Inherent jurisdiction of the Court must be exercised subject to the rule that if the Code does contain specific provisions which would meet the necessities of the case, such provisions should be followed and inherent jurisdiction should not be invoked. In other words the Court cannot make use of the special provisions of Section 151 of the Code where a party had his remedy provided elsewhere in the Code and he neglected to avail himself of the same". In short, Mr. Sen Gupta contends that assuming that the order rejecting the written statement was not a proper order even then the same cannot be challenged in an application under Section 151 of the Code as the order was an appealable one. It may be noted that Mr. Sen Gupta, however, submits that the Court may pass an order under Order 11, Rule 21 suo motu. He submits that R. 21 has two parts. The first part says about the liability of the plaintiff to have his suit dismissed and the liability of the defendant to have his defence struck out, and the second part provides that the party interrogating or seeking discovery or inspection may apply to the Court for an order to that effect, and an order may be made accordingly. Mr. Sen Gupta wants to say that when a liability has been provided in the first part of R. 21 it means that the Court can pass an order suo motu. The second part only provides that a party interrogating or seeking discovery or inspection may file an application for getting an order from the Court. On reading R. 21 carefully we do not accept this submission of Mr. Sen Gupta and we hold that a Court cannot pass an order suo motu under Order 11, Rule 21. We therefore find that the order passed by the learned Court below in striking out the defence was not a proper order. But in this case the only point that requires to be decided is whether the said order can be challenged in this revisional application when without preferring an appeal an application was filed under Section 151 of the Code.

5. Mr. Biswas contends that it is true that the order rejecting the written statement was an appealable order, but that appeal lay to the District Judge and not to this Court and that being so, the petitioner can very well challenge the said order in this Court under Section 115 of the Code. In support of his contention he refers to a decision reported in AIR 1944 Cal 309, (*Maharani Nilimaprova v.*

Kadambini Dasi). Mr. Biswas refers to Section 115 of the Code which provides "The High Court may call for the record of any case which has been decided by any Court subordinate to such High Court and in which no appeal lies thereto". In the case referred to above it has been held "The precise meaning of the word 'thereto' has given rise to some controversy, but it seems to us that it can only refer to the High Court and not to a Court subordinate to the High Court", and their Lordships held that in such a case where an appeal lies not to the High Court but to the lower Court and the petitioner instead of preferring an appeal to the lower Court files an application under Sec. 115 of the Code, that application can be entertained by the High Court. But the facts of the present case are completely different. In this case the petitioner did not come up to this Court against the order striking out the written statement. But he filed an application under Section 151 of the Code which was completely misconceived. That being so, this decision does not help the petitioner. For the facts and circumstances of the case stated above and relying on the decisions referred to above we are of the opinion that the learned Court below was correct to hold that an application under Section 151 was not maintainable. In the circumstances we find nothing to interfere.

6. In the result, the application fails and the Rule is discharged. There will be no order as to costs.

B. C. RAY, J.:— I agree.

Rule discharged.

AIR 1977 CALCUTTA 189

SALIL KUMAR DATTA AND

G. N. RAY, JJ.

Kanailal Das and another, Petitioners
v. Jiban Kanai Das and another, Opposite
Parties.

C. R. No. 218 of 1976, D/- 15-2-1977.

**(A) Civil P. C. (1908), O. 6, R. 17 —
Amendment of plaint — Principles.**

All amendments will be generally permissible when they are necessary for determination of the real controversy in the suit.

All the same, substitution of one cause of action or the nature of the claim for another in the original plaint or

change of the subject-matter of or controversy in the suit is not permissible.

Introduction by amendment of inconsistent or contradictory allegations in negation of the admitted position on facts, or mutually destructive allegations of facts are also impermissible though inconsistent pleas on the admitted position can be introduced by way of amendment.

In general, the amendments should not cause prejudice to the other side which cannot be compensated in costs.

Amendment of a claim or relief which is barred by limitation when the amendment is sought to be made should not be allowed to defeat a legal right accrued except when such consideration is outweighed by the special circumstances of the case. Case law referred.

(Para 5)

Held, on facts, that there was no substitution of new case in place of original one and there was no change in respect of the real nature of controversy or the subject-matter of the suit.

(Para 6)

(B) Limitation Act (1963), Article 58 — Limitation under — Starting point — Knowledge — Relevancy.

"The right to sue" in Article 58 which is the residuary article on suits relating to declarations is not there until an accrual of the right asserted and its infringement or at least a clear and unequivocal threat to infringe that right by the defendant against whom the suit is instituted.

(Para 9)

Though there is no reference in the Article to the knowledge of the plaintiff, there may be cases where the nature of the right imports knowledge of certain facts and in such case the right to sue cannot be said to arise until the plaintiff have the necessary knowledge. Case law referred.

(Paras 9 and 10)

(C) Civil P. C. (1908), Order 1, Rule 3 — Suit for partition on declaration of plaintiff's title to suit property — Allegation that ostensible owner was merely name lender — Person who would be otherwise interested in the property in case such owner be found to have a share, held, was a necessary party — Similar was the case when a stranger also claimed to be interested in the property in suit on basis of documents impugned by the plaintiff was not binding on him.

(Para 12)

**Cases Referred: Chronological Paras
AIR 1963 Cal 46 = 66 Cal WN 828 (FB)**

AIR 1961 SC 808 = (1962) 1 SCR 67 9
 AIR 1960 Pat 66 = 1959 BLJR 631 9
 AIR 1959 Andh Pra 280 = 1958 Andh LT 938 8
 AIR 1959 Andh Pra 448 = (1959) 1 Andh WR 239 4
 AIR 1957 SC 357 = 1957 SCR 438 8
 AIR 1953 Mad 958 = 66 Mad LW 734 4
 AIR 1953 Cal 15 = 89 Cal LJ 140 4
 AIR 1950 PC 68 = (1950) 1 Mad LJ 417 4
 AIR 1934 Lah 574 = 148 Ind Cas 776 8
 AIR 1930 PC 270 = 57 Ind App 325 9
 AIR 1923 Pat 475 = ILR 2 Pat 391 7
 AIR 1922 PC 249 = 48 Ind App 214 4
 AIR 1921 PC 50 = 47 Ind App 255 8
 AIR 1914 Mad 708 = ILR 38 Mad 1064 7
 (1910) ILR 33 Mad 31 = 5 Ind Cas 698 7
 (1888) 15 Ind App 81 = ILR 15 Cal 684 (PC) 4

Sakti Nath Mukherjee and Bhaskar Ghosh, for Petitioners; S. P. Roy Choudhury and Phani Bhusan Das, for Opposite Party No. 1.

SALIL KUMAR DATTA, J.:— This Rule is directed against order No. 112 dated 30-9-1975 allowing the amendment of the plaint in a suit filed on 19-8-1970. The plaintiff opposite party instituted the suit for declaration on his share in 'ka' and 'kha' schedule properties of the plaint and for partition of his share by metes and bounds on allegations stated in brief as follows:—

One Behari Lal Das acquired 'ka' schedule property in the benami of his daughter-in-law Siddeswari; 'kha' schedule property was acquired by mortgaging 'ka' schedule property as also out of its usufructs in the name of Siddeswari aforesaid who had no income or fund by herself. The defendant No. 1 who is full brother of the plaintiff obtained the deed of gift of the said property in his favour on 7-10-1967 from Siddeswari by exercising of fraud and undue influence on revocation of the earlier deed made in favour of defendant No. 2 their full sister, in respect of 'ka' schedule property. The said deed of 1967 was not binding on the plaintiff and as Siddeswari acquired 1/4th interest by inheritance, by the aforesaid deed she could convey only her 1/4th share to the defendant by the said deed executed by her. The plaintiff accordingly prayed for declaration that her mother Siddeswari was merely a name lender in respect of suit properties and the deed of 7-10-1967 was not binding

on him. He claimed as 1/4th share in the property and 1/12th share as heir to his mother Siddeswari in all his 1/4th share and for partition of his share by metes and bounds.

2. In their joint written statement the defendants 1 and 2 denied the allegations and the claims made in the plaint and further stated that Siddeswari acquired the properties herself. By deed of 1967 and further three deeds executed by her free will dated 31-7-1968 she transferred respectively 'ka' schedule property to the defendant No. 1 and different portions of 'kha' schedule property to the defendant No. 1, to his son and also to the defendant No. 2 and the plaintiff had thus no title or interest in the suit property. The plaintiff thereafter by an application for amendment dated 13-3-1974 wanted to amend the plaint alleging that through misconception of law his share in the said property was not correctly stated and further because of his absence of knowledge of the deeds of 31-7-1968 which he came to know for the first time from the written statement he could not make specific allegations in respect thereof in the plaint. For these reasons he wanted to amend the plaint stating in addition that the deed of 31-7-1968 were obtained by taking advantage of the senility and mental weakness of Siddeswari due to old age and they were not binding on the plaintiff; further on the death of Behari Lal Das according to the Hindu Law of succession the plaintiff as also the defendant No. 1 inherited the suit properties in equal share. It was also stated that the son of the defendant No. 1 was also to be impleaded in the suit as defendant No. 3 in the aforesaid circumstances. There was further prayer for insertion of specific particulars relating to description of the suit property.

3. This application was opposed by the defendants 1 and 2 and by the impugned order the learned Judge allowed the amendment subject to payment of costs of Rs. 100/-. It was held that the proposed amendment should be allowed for determining the real question in controversy between the parties and there was no question of any prejudice to the defendants as they would be given opportunity to meet the case made out by the amendment and would be compensated with costs. Further there was no question of limitation as these three years had not elapsed from the filing of the written statement.

4. Mr. Sakti Nath Mukherjee, learned advocate appearing for the petitioner referred to various decisions and submitted that the proposed amendments brought in new facts inconsistent with the original case. The amendments proposed formed no part of the original controversy and amounted to a negation of the admitted position previously taken by the plaintiff in his plaint. In such case the amendment was impermissible according to the judicial decisions. He referred to the decision in *Ma Shwe Mya v. Maung Mo Hnaung*, AIR 1922 PC 249 in which it was noted that the real question in controversy between the parties was the existence and character of the agreement made in 1912. When the existence of that contract had been negated, to permit the plaintiff to set up and establish another and an independent contract would be altogether outside the provisions of the Code. The Court observed as follows:—

"All rules of Court are nothing but provisions intended to secure the proper administration of justice and it is, therefore, essential that they should be made to serve and be subordinate to that purpose so that full power of amendment must be enjoyed and should always be liberally exercised, but nonetheless no power has yet been given to enable one distinct cause of action to be substituted for another, nor to change, by means of amendment, the subject-matter of the suit."

He also referred to the earlier decision in *Md. Baksh Khan v. Hussein Bibi*, (1888) 15 Ind App 81 at p. 86 (PC) for the proposition that though inconsistent pleas are permissible, inconsistent or mutually destructive facts are not permissible in pleading and accordingly the contradictory allegations to the admitted position is also not permissible in law. He referred to the decision in *Kanda v. Waghu*, AIR 1950 PC 68 in which the Privy Council held that the amendment which involves the setting up of a new case and alters the real matter in controversy between the parties cannot be allowed. He referred to the decision in *Nir Singh Prosad v. Steel Products Ltd.*, AIR 1953 Cal 15 for the proposition that the plaintiff cannot be allowed to amend his plaint so as to alter materially or substitute his cause of action or nature of the claim made earlier. Reference was made to *Sk. Masthan v. Palayani Balarami Reddi*, AIR 1953 Mad 958 for the proposition that proposed amendment of written statement in direct negation of admission contained

in the written statement is not permissible in law and this rigour applies in greater force in respect of amendment to plaint. In *Jaldu Anantha v. Jaldu Bapanna*, AIR 1959 Andh Pra 448 the Court disallowed the proposed amendment to written statement which displaced the original one and destroyed all that was stated and claimed therein. According to Mr. Mukherjee on all these authorities, in the facts of the present case, the proposed amendment substituting the new case in alteration of the admitted position should not have been permitted by the trial Court.

5. The principles established by judicial decisions in respect of amendment of plaint are as follows:—

(i) All amendments will be generally permissible when they are necessary for determination of the real controversy in the suit.

(ii) All the same, substitution of one cause of action or the nature of the claim for another in the original plaint or change of the subject-matter of or controversy in the suit is not permissible.

(iii) Introduction by amendment of inconsistent or contradictory allegations in negation of the admitted position on facts, or mutually destructive allegations of facts are also impermissible though inconsistent pleas on the admitted position can be introduced by way of amendment.

(iv) In general, the amendments should not cause prejudice to the other side which cannot be compensated in costs.

(v) Amendment of a claim or relief which is barred by limitation when the amendment is sought to be made should not be allowed to defeat a legal right accrued except when such consideration is outweighed by the special circumstances of the case.

6. The contention of Mr. Mukherjee in our opinion appears to be unsubstantial as contended by Mr. S. P. Roy Chowdhury learned advocate appearing for the plaintiff opposite party. The case before us is a suit for partition on declaration of plaintiff's title to the suit property. In the original plaint it was stated that the ostensible holder of the property was merely the name lender and the 'ka' schedule property was in fact acquired by Lal Behari in benami of Sidheswari while 'kha' schedule property was acquired against and out of 'ka' schedule property and its usufructs. Thereafter it is stated in the original plaint that Sidheswari ac-

quired 1/4th interest by inheritance. This was according to the plaintiff a mis-statement made on the misconception of law of Hindu Succession and by the amendment it was merely stated that Sidheswari never acquired any share under the law of Hindu succession, while the plaintiff and the defendant No. 1 together inherited 8 annas share in the suit property. This is not substitution of a new case in place of the original one and nor a change in respect of the real nature of controversy or the subject-matter of the suit. Accordingly we do not find that the authorities cited by Mr. Mukherjee are of any assistance to him on the contrary they support the case for the amendment as sought for by the plaintiff.

7. The next point is urged by Mr. Mukherjee that in any event amendment should not be allowed as the claim sought to be made by the amendment is otherwise barred by limitation. He submitted that by the proposed amendment the subsequent deeds are being sought to be set aside. The deeds were exempted in 1968 as already stated and on the day the amendment application was filed in 1974, clearly three years passed away therefrom and accordingly on the date the amendment was sought for the claim in respect of the deeds aforesaid was barred by limitation under Article 113 of the Limitation Act, 1963. Reference was made in support to the decision in *Md. Fahimal v. Jagat Ballav*, AIR 1923 Pat 475 in which it was held that the suit to contest alienation by Mutwali and for possession must be brought within six years from date of alienation under the old Limitation Act. Reference also made in the decisions in *Ottappurakkal Thazhate Soopi v. Cherichil Pallikkal Uppathumma*, (1910) ILR 33 Mad 31 and *C. Parasanna Venkatachella Reddiar v. The Collector of Trichinopoly*, ILR 38 Mad 1064 = (AIR 1914 Mad 708), in support of the above proposition. He accordingly submitted that the Court had no jurisdiction to allow the amendment after the period of limitation in respect of the claim has already expired.

8. Mr. Roy Chowdhury contended on the other hand that the starting point of limitation is not the date of alienation but the date on which the aggrieved party comes to know of the alienations or an invasion of his right to the property in dispute. He submitted that the case is governed by Article 58 of the Limitation Act which provided for three years

limitation from the date of accrual of the cause of action as aforesaid. In the instant case according to Mr. Roy Chowdhury the cause of action arose on the date of knowledge of the plaintiff from the written statement that there has been such alienations and invasion of his right therein against which he prayed for declaration that such documents are not binding on him. He referred to the decision in *Ahmed Ali v. Banguluru*, AIR 1959 Andh Pra 280 in which it has been held that suit for declaration that alienation is not binding on the creditor under Section 53 of the Transfer of Property Act is governed of Article 120 of the old Limitation Act. It was held that the cause of action does not arise on the date of alienation but on the date when the creditor who seeks to set aside the alienation knows that he has been defrauded, defeated or delayed. He also referred to an earlier decision in *Bhagatram v. Param*, AIR 1934 Lah 574 where it was held that the cause of action arose from the date of knowledge of fraud though governed by Article 120. In any event in *L. J. Leach and Co. Ltd. v. Jardine Skinner and Co. Ltd.*, AIR 1957 SC 357 following *Charan Das v. Amirkhan*, AIR 1921 PC 50 the Court allowed the amendment even when the effect was to take away the legal right which had accrued to the defendant by lapse of time as even so there might be cases where such considerations are outweighed by the special circumstances of the case. Mr. Bhaskar Ghose's rejoinder appearing for the opposite parties was that Article 58 applied when the claim on documents was the substantive claim in the suit and not an ancillary claim as here.

9. It has been held that "the right to sue" in Article 58 which is the residuary Article on suits relating to declarations is not there until an accrual of the right asserted and its infringement or at least a clear and unequivocal threat to infringe that right by the defendant against whom the suit is instituted as was held in *Mt. Bolo v. Mt. Koklan*, AIR 1930 PC 270 as also in *Md. Yunus v. Syed Unnissa*, AIR 1961 SC 808. Though there is no reference in the Article to the knowledge of the plaintiff, there may be cases where the nature of the right imports knowledge of certain facts and in such case the right to sue cannot be said to arise until the plaintiff have the necessary knowledge, as was held in *Sheonandan v. Ugrah Sao*, AIR 1960 Pat 66. It was further held that there can be no ap-

prehension of threat to right where due to mistake or fraud things are done in secrecy or at the back of the plaintiffs.

10. According to the plaintiff he was not aware of the purported transfers of 1968 prior to the filing of the written statement by the defendant and that was the date of his first knowledge in respect thereto when there was the invasion of his right in the suit properties. On the fact of these allegations we are prima facie satisfied that the claim that the said deeds are not binding on him was within the period of limitation being within three years from the date of filing of the written statement which is to be deemed to be the accrual of the cause of action subject however to the determination of the controversy in the suit during the trial.

11. The last contention raised is that the defendants Nos. 2 and 3 were the unnecessary parties even according to the amended plaint as proposed and as such their names should be struck out from the suit. Mr. Roy Chowdhury has referred to the decision of the Full Bench in *Sebarani v. Ramandra Nath*, 66 Cal WN 828 = (AIR 1963 Cal 46) (FB) in which the Court was considering that whether the suit should come out of Clause V-A of Article 17, Schedule II of the Court-fees Act, 1870 where a stranger was a party in a partition suit. In this case the plaintiff joined as a defendant a stranger that is the person who was not the co-sharer or co-owner, for enforcing in his presence the right of the plaintiff to a share in the suit property claimed by him. This involved construction of documents of suit properties in which the stranger was or claimed to be interested. It was observed by P. N. Mookerjee, J. in the concurring judgment as follows:—

"If the determination of the question whether the suit property is a joint property or joint family property of the persons between or amongst whom partition or joint possession is claimed that is of the plaintiff and the persons against whom the said relief is claimed, depends only on the construction or avoidance of any document, not necessitating its setting aside or cancellation, it is in substance and may well be in form too, a suit for partition and separate possession or enforcement of a right to a share of the alleged joint property or joint family property even though a stranger may be interested in or affected by the result or decision of the suit."

12. In such case the party who would be otherwise interested in the pro-

perty in case *Sidheswari* be found to have a share in such property is a necessary party in the partition suit on declaration. Similar is the case when a stranger also claims to be interested in the property in suit on the basis of document impugned by the plaintiff is not binding on him. Accordingly the defendants Nos. 2 and 3 are also necessary parties in the suit and the suit should be decided in their presence.

13. For all these reasons the impugned order suffers from no infirmity and has to be sustained. The rule accordingly is discharged. There will be no order as to costs. We are making it clear that we are not expressing any opinion on the merits of the case or otherwise of the parties before us in the suit.

14. Let the order be communicated to the trial Court at once, as prayed for.

G. N. RAY, J.:— I agree.

Rule discharged.

AIR 1977 CALCUTTA 193

A. K. JANAH AND A. N. BANERJEE, JJ.

Sm. Sundari Dasi, Petitioner v. Basudeo Lal Guraliar, Opposite Party.

F. A. No. 227 of 1970, D/- 10-2-1977.

Marriage Laws (Amendment) Act (1976), Section 39 — Scope — Amended provisions of Act are intended by Section 39 (1) to apply to all pending proceedings whether pending in Court of first instance or in appeal — Thus petition for judicial separation under Section 10 of Hindu Marriage Act can be amended by taking grounds under Section 13 (1) as amended even in appeal by virtue of Section 39 (2). (Hindu Marriage Act (1955), Sections 10 and 13) — (Interpretation of Statutes — Duty of Court to apply law as it stands and not to question its wisdom).

It may be that if the amended provisions are made applicable at the appellate stage, it would result in denying the right of appeal to a party to the litigation. That is a situation which cannot be helped. If the Parliament has enacted a provision which is meant to apply to all pending proceedings, the Court has to apply the law as it stands. It is not for the Court to go into legislative wisdom of the Parliament. (Paras 2, 3)

Milan Ch. Bhattacharjee, for Petitioner; Nirendra Krishna Mitra and Partha Pratim Mukherjee, for Opposite Party.

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ORDER:— This is an application for leave to amend the plaint under Section 39 (1) (i) and (2) of the Marriage Laws (Amendment) Act, 1976 (Act LXVIII of 1976) filed on behalf of the respondent. The respondent filed a petition against the appellant for judicial separation under Hindu Marriage Act, 1955 on the ground of cruelty and desertion. The suit was decreed by the trial Court. Against that decree the present appeal has been filed by the appellant. During the pendency of the appeal the Marriage Laws (Amendment) Act, 1976 came into force on the 27th May, 1976. Several changes have been introduced in the Hindu Marriage Act, 1955 and the Special Marriage Act, 1954 by the said Marriage Laws (Amendment) Act, 1976. Section 10 of the Hindu Marriage Act enumerates the grounds on which a decree for judicial separation could be passed. By Section 4 of the amending Act, Section 10 of the Hindu Marriage Act as it originally stood, has been changed entirely by a new sub-section (1). The amended sub-section (1) of Section 10 provides that a petition may be presented for a decree for judicial separation on any of the grounds specified in sub-section (1) of Section 13. Section 7 of the amending Act has replaced Cl. (i) of sub-section (1) of Section 13 of the Hindu Marriage Act. Section 13 (1) (i) as it stood prior to the amendment was as follows:

"13 (1). Any marriage solemnized, whether before or after the commencement of this Act, may, on a petition presented by either the husband or the wife, be dissolved by a decree of divorce on the ground that the other party

(i) is living in adultery; or"

The amended clause (i) of sub-section (1) of Section 13 is as follows:

"(i) has, after the solemnization of the marriage, had voluntary sexual intercourse with any person other than his or her spouse; or

(ia) has, after the solemnization of the marriage, treated the petitioner with cruelty; or

(ib) has deserted the petitioner for a continuous period of not less than two years immediately preceding the presentation of the petition; or"

The effect of these two amendments has been that a petition for judicial separation may be presented on the ground mentioned in Section 13 (1) (i) as amended. Similarly, the ground for granting a decree for divorce has also been changed.

The respondent-petitioner wants to take advantage of the provisions of the Hindu Marriage Act as amended by the amending Act in view of Section 39 of the amending Act. Section 39 of the amending Act makes special provision as to pending cases. The relevant portion of the said section is as follows:

"39 (1). All petitions and proceedings in causes and matters matrimonial which are pending in any Court at the commencement of the Marriage Laws (Amendment) Act, 1976 shall be dealt with and decided by such Court.

(i) if it is a petition or proceeding under the Hindu Marriage Act, then so far as may be, as if it had been originally instituted therein under the Hindu Marriage Act, as amended by this Act;

(ii)

(2) in every petition or proceeding to which sub-section (1) applies, the Court in which the petition or proceeding is pending shall give an opportunity to the parties to amend the pleadings, in so far as such amendment is necessary to give effect to the provisions of sub-section (1), within such time as it may allow in this behalf and any such amendment may include an amendment for conversion of a petition or proceeding for judicial separation into a petition or proceeding, as the case may be, for divorce."

In view of this provision contained in Section 39, the learned Advocate for the respondent-petitioner contends that he is entitled to amend the original petition which was filed by him for judicial separation.

2. The learned Advocate for the appellant opposite party has contended that the provisions of the amending Act cannot have any application to proceedings under the Hindu Marriage Act or the Special Marriage Act which have been disposed of by the Court of first instance. In other words, he wants to restrict the amended provisions only to proceedings pending in the trial Court. He has contended that if the amended provisions are made applicable to any proceeding other than proceedings pending before the Court of first instance, it will have the effect of depriving the party of a right of appeal which he has under the law. In considering whether the special provisions contained in Section 39 are applicable only to proceedings pending before the Court of first instance or proceedings pending in appeal, the language used in Section 39 should be carefully looked into. The section opens with the words

"all petitions and proceedings in causes and matters matrimonial which are pending in any Court". If it was intended that the amended provisions would be applicable only to proceedings pending in the trial Court, there was no necessity of using the words "petitions" and "proceedings". Then again sub-section (1) says, "causes and matters matrimonial which are pending in any Court." The obvious intention therefore is to make the amended provisions applicable to all proceedings whether pending in the trial Court or in appeal. This would be clear from the statement of objects and reasons of the Bill which was introduced in the Parliament. It would appear from the bill that the objects of the legislation were mainly (1) to liberalise the provisions relating to divorce, (2) to enable expeditious disposal of proceedings under the Act and (3) to remove certain anomalies and handicaps that have come to light after the passing of the Act. In the statement of objects and reasons it is stated as follows:

"To avoid multiplicity of litigation and consequent delay, it is also proposed to apply the amended law in relation to all pending proceedings under the relevant Acts."

It is clear therefore that the amended provisions are intended to apply to all pending proceedings whether pending in the Court of first instance or in appeal.

3. The learned Advocate for the appellant opposite party contended that if the amended provisions are made applicable at the appellate stage, it would result in denying the right of appeal to a party to the litigation. That is a situation which cannot be helped. If the Parliament has enacted a provision which is meant to apply to all pending proceedings, the Court has to apply the law as it stands. It is not for the Court to go into legislative wisdom of the Parliament. In the above view of the matter we allow this application and grant leave to the respondent-petitioner to amend the petition under Section 10 of the Hindu Marriage Act in terms of the prayer made in paragraph 7 of the petition. The appellant-opposite party will be entitled to file an additional written statement within four weeks from this date. The application is allowed. There will be no order as to costs.

Petition allowed.

AIR 1977 CALCUTTA 195

SALIL KUMAR DATTA AND

G. N. RAY, JJ.

Mukunda Ram Bhattacharjee and another, Shebait, Petitioners v. State, Opposite Party.

C. R. No. 1360 of 1976, D/- 2-2-1977.

Land Acquisition Act (1894), Section 32 (1) (a) — Applicability — Applies to construction of buildings on land acquired by person incompetent to alienate land — Prior application for funds for purchase of land dismissed — Subsequent application for funds for erection of building, if barred — (Civil P. C. (1908), S. 11).

Where property belonging to deities was acquired by Government and compensation money which had been lying in Court on investment was fetching an income annually and the petitioners as shebait moved an application praying for funds for purchase of land for erection of temple thereon but the prayer was rejected and subsequently they filed another petition praying for funds for construction of a temple on the land which had been purchased by them as shebait.

Held that (i) the prayer made in the subsequent application was in terms of S. 32 (1) (a) if other requisite conditions were satisfied, AIR 1921 Cal 536, Followed; and (ii), the order on previous application did not stand as a bar to the grant of the prayer in the subsequent application as in the earlier order the prayer for funds for acquisition of land was rejected. (Paras 4, 5)

Cases Referred: Chronological Paras

AIR 1921 Cal 536 = 25 Cal WN 597 3

Ramesh Banerjee, Manohar Saha, Rabindra Nath Datta, for Petitioners; C. D. Roy Choudhury, A. K. Basu Choudhury, for Opposite Party.

SALIL KUMAR DATTA, J.:— A property belonging to deities was acquired by the Government and the compensation money had been lying in Court invested fetching an income of Rs. 235/- annually. The petitioners claiming to be shebait of the deities moved an application for purchase of land for erection of a temple thereon for the deities for a consideration of Rs. 4,355/-. This prayer was rejected by the Additional Special Land Acquisition Judge, 4th Court, Alipore by order No. 145 dated 27-11-1973. As no steps appear to have been taken

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against that order the learned Judge was of opinion that the said order acquired finality. Thereafter it appears these petitioners filed another application before the Judge stating that they as shebaita had purchased a piece of land and wanted to build a temple thereon in fulfilment of the wishes of the settlor in the deed of settlement executed by him in respect of acquired property. This application was rejected by order No. 158 dated 3-4-1976 by the learned Judge holding that in view of the earlier order it was not permissible to pass any order in favour of the petitioners on their present petition. The petitioners have challenged the propriety of this order by the instant Rule.

2. Sections 31 and 32 of the Land Acquisition Act 1894 provide as follows:—

31. Payment of compensation or deposit of same in Court.

(1) On making an award under Section 11, the Collector shall tender payment of the compensation awarded by him to the persons interested entitled thereto according to the award and shall pay it to them unless prevented by some one or more of the contingencies mentioned in the next sub-section.

(2) If they shall not consent to receive it, or if there be no person competent to alienate the land, or if there be any dispute as to the title to receive the compensation or as to the apportionment of it, the Collector shall deposit the amount of the compensation in the Court in which a reference petition would be submitted....

32. Investment of money deposited in respect of lands belonging to persons incompetent to alienate.

(1) If any money shall be deposited in Court under sub-section (2) of the last preceding section and it appears that the land in respect whereof the same was awarded belonged to any person who had no power to alienate the same, the Court shall

(a) order the money to be invested in the purchase of other lands to be held under the like title and conditions of ownership as the land in respect of which such money shall have been deposited or held, or

(b) if such purchase cannot be effected forthwith then in such Government or other approved securities as the Court shall think fit....

It was submitted on behalf of the State that in view of the provisions of Section 32 as quoted above, the Court was

not in a position to entertain such application as it did not relate to purchase of the land but to construction of a temple on the land alleged to have been purchased by the shebaita. Accordingly, the impugned order does not suffer from any infirmity.

3. In Re: Ganendra Mullick, reported in 25 Cal WN 597 = (AIR 1921 Cal 536) a Division Bench was considering the provisions of Section 32 of the Land Acquisition Act as amended by the Calcutta Improvement Act and it was held— ...

"Section 32 of the Land Acquisition Act, as amended by the Calcutta Improvement Trust Act provided that the Tribunal shall order the money to be invested in the purchase of other lands to be held under like title and conditions of ownership as the land in respect of which such money shall have been deposited was held. Here there can be no question as to the land being under like title and conditions of ownership because the proposal is to erect buildings on the land belonging to the trust estate. The only question for consideration, therefore, was whether the erection of buildings would come within the words "invested in the purchase of other lands" in Section 32 of the Act. Having regard to the definition of the expression "land" we think that the words of Section 32 quoted above would include the erection of buildings upon the land and if the President is satisfied that the money would be invested in the erection of buildings as proposed by the petitioners, we are of opinion that he is bound to pay the money over to the petitioners... We think under these circumstances that the case should go back to the learned President of the Improvement Tribunal in order that he may satisfy as to whether the petitioners are the sole trustees of the trust estate and if so, whether money would be invested in erection of building on the land and whether there is an agreement between them and their lessees for the erection of the buildings on the portion of the land not acquired as mentioned in their petition and if he is satisfied upon those points, we think that he should pay out the money to the petitioners."

4. It is thus obvious that provisions of Section 32 (1) (a) of the Land Acquisition Act apply to construction of buildings on the land acquired by a person incompetent to alienate such land, apart from application of the section to the acquisition of such land by him.

5. In the present petition before the Judge the petitioners have prayed that they have already acquired the land as such shebait and the funds are now needed for construction of the temple on such land. Accordingly following the above decision we are of opinion that the prayer made is in terms of the provisions of Section 32 (1) (a) if other requisite conditions are satisfied. The previous order of the learned Judge does not stand as a bar to the grant of the prayer on this application as in the earlier order the prayer for funds for acquisition of land was rejected. The learned Judge accordingly is in error in thinking that the previous order stood as a bar to a consideration of the present application made by the petitioners. We accordingly make the Rule absolute and set aside the impugned order and direct the learned Judge to consider the application of the petitioners in accordance with law keeping in view the decision we have cited above in extenso. There will be no order as to costs.

6. Let the records be sent down at once.

G. N. RAY, J.:— I agree.

Rule made absolute.

AIR 1977 CALCUTTA 197
SALIL KUMAR DATTA AND
G. N. RAY, JJ.

Kamal Kumar Bose, Applicant v. Sm. Ashalata Dey and others, Respondents.

L. P. A. No. 186 of 1974, D/- 31-1-1977.

Civil P. C. (1908), Section 151 — Appeal by tenant — Direction to deposit arrears of rent and damages — Whether can be given in exercise of inherent powers — W. B. Premises Tenancy Act (1956).

The powers under Section 151 of the Code cannot be extended to defeat any provision of law or a substantive right conferred by law. The Code has provided for an appeal to higher Courts and it is nowhere the condition under the West Bengal Premises Tenancy Act, 1956 or under the Code that unless arrears of rent and damages are deposited the appeal filed by the tenant would be liable to be dismissed. This substantive right of appeal conferred under the law cannot be defeated or frustrated by exercise of in-

herent powers which would thus be contrary to provisions of law. Any condition in regard to deposit, if imposed on the tenant-appellant, would amount to a clog on the appeal which is not warranted by the provision of the relevant statute. Case law referred. (Para 4)

Cases Referred: Chronological Paras
AIR 1975 Cal 80 = 78 Cal WN 1045 (FB)

2
(1964) 68 Cal WN 1064

2
AIR 1962 SC 527 = 1962 Supp (1) SCR 450

2
S. P. Roy Chowdhury and Phani Bhusan Das, for Applicant; Saktinath Mukherjee and Nihar Ranjan Chatterjee, for Respondents.

S. K. DATTA, J.:— This is an application by the plaintiffs landlords respondents for a direction on the tenant appellant to deposit all arrears of damages in respect of the suit premises. The plaintiffs respondents, the petitioners in this application obtained on May 20, 1967 a decree before the trial Court for recovery of possession of the suit premises on eviction of the defendant therefrom. The said decree was modified on appeal in this Court by the learned Judge on June 26, 1973 by a decree for partial eviction. The learned Judge, it is alleged, on concession by the tenant appellant decreed the suit in respect of the ground-floor and first-floor of the premises leaving the defendant to remain in possession of the other portion of the premises and the monthly rent was apportioned from Rs. 85/- to Rs. 40/- in respect of the premises allowed to be retained by the tenant. The tenant defendant however was dissatisfied with the judgment and preferred the instant appeal. It has also been stated before us that the landlord has also filed an appeal thereafter against the decree for partial eviction and both the appeals are pending.

2. Mr. Roy Chowdhury, learned advocate appearing for the respondents in this appeal, submitted that the tenant filed his appeal mala fide in spite of his concession before the learned Judge in this Court. He further stated that taking advantage of the appeal filed by the landlord the tenant has stopped paying or depositing any rent or damages in respect of the suit premises of which he is to be deemed to be in occupation and thus liable to pay rent or damages in respect thereof. He accordingly submitted that the appellant should be directed to deposit all arrears of rent or damages in Court during the pendency of the appeal.

Mr. Roy Chowdhury submitted that such order could be passed by the Court in exercise of powers under Section 151 of the Civil Procedure Code in the interest of justice. He referred to the decision in *Manohar Lal Chopra v. Rai Bahadur Rao Raja Seth Hiralal* reported in AIR 1962 SC 527 in which in paragraph 23, the Court has noted that Section 151 of the Code itself says that nothing in the Code shall be deemed to limit or otherwise affect the inherent power of the Court to make orders necessary for the ends of justice. The Court further observed that the inherent power had not been conferred upon the Court but it is a power inherent in the Court by virtue of its duty to do justice between the parties before it. Mr. Roy Chowdhury also referred to the decision in *Sibani Rani Dutta v. Balai Chandra Dutta*, reported in (1964) 68 Cal WN 1064 in which the Court observed that there may be extraordinary cases when the application of Section 151 of the Code may be justified even though there may be alternative remedy. Reliance was also placed on the decision of this Court in *Smt. Bimla Devi v. Aghore Chandra Mallick* reported in AIR 1975 Cal 80 (FB) in which it was observed that there is no reason why, specially when the legislature has in this country taken special care to provide for the exercise of special powers to prevent injustice in special circumstances in the form of Section 151 the Court should hesitate to exercise these powers because of their fondness for a formula. It was further observed that the Court ought not to take an attitude which would deny to litigants the assistance of the beneficial provisions of Section 151 of the Civil Procedure Code unless it was compelled to do so by a binding authority or principle. Strongly relying on these decisions, Mr. Roy Chowdhury submitted that this was a fit case where the Court should exercise this inherent power under Section 151 of the Code and direct the opposite party to deposit or pay all damages payable by him in respect of the suit premises.

3. In this appeal by the tenant defendant, there is no application for stay of proceedings in execution. Mr. Roy Chowdhury's contention is that even if there is no such application in view of the fact that the tenant has been or is deemed to be in possession of the suit premises he is liable to pay rent or damages in respect thereof during the period of his occupation. He accordingly

cannot be allowed to proceed with his appeal unless he deposited or paid the rent in respect of the suit premises.

4. We are afraid we are unable to accept this contention of Mr. Roy Chowdhury. The powers under Sec 151 of the Code cannot be extended to defeat any provision of law or a substantive right conferred by law. The Code has provided for an appeal to higher Courts and it is nowhere the condition under the West Bengal Premises Tenancy Act, 1956 or under the Code that unless such amounts are deposited the appeal would be liable to be dismissed. This substantive right of appeal conferred under the law cannot be defeated or frustrated by exercise of inherent powers which would thus be contrary to provisions of law. We may profitably refer to the provisions of Section 14 (4) of the West Bengal Premises Rent Control (Temporary Provisions) Act, 1950 which provide that in a case for recovery of possession where the suit is contested by a tenant, the tenant on the application of the landlord may be directed to deposit all arrears of rent as also current rent within a specified date and in default the Court shall order defence to be struck out and the tenant to be placed in the same position as if he had not defended the claim for ejectment. In sub-section (5) of Section 14 it is provided that the power given under sub-section (4) may be exercised by Courts of appeal with necessary adaptation. It could therefore be contended that in a case governed by this Act the Court could order under sub-section (5) that an appeal by the tenant would be liable to be dismissed if there was non-compliance with the provision of sub-section (4). We however do not find any similar provision in the Act of 1956. Any condition in regard to deposit, if imposed on the tenant appellant, would, in our view, amount to a clog on the appeal which is not warranted by the provision of the relevant statute.

5. It would further appear that problem in this case had arisen because of the fact that the landlords had preferred an appeal against the decree for partial ejectment which may not thus be put into execution. But for the filing of the appeal, there was no difficulty in executing the decree and in such case if the decree was to be put into execution, the Court could impose terms on the tenant in granting a stay of execution of such a decree. There is in this case no

necessity for tenant's applying for stay of execution of the decree as by reason of their appeal the landlords have not to put the decree into execution. Accordingly we cannot saddle the defendant appellant with the obligation to deposit the arrears of rent or damages on penalty of dismissal of his appeal. It is not a case where the Court would be justified in exercising its power under S. 151 of the Code and we are not prepared to pass an innocuous order. We therefore reject the application but feel that in the circumstances the appeal should be heard out with utmost expedition. We accordingly direct the tenant-defendant to file the requisite number of typewritten paper-books within a fortnight from date; in default, the appeal will be placed for orders before us.

6. We also make it clear that we are making no observation in respect of the landlords petitioners' right to move this Hon'ble Court against certain alleged orders passed in S. C. C. Suit No. 555 of 1974 staying deposits of rents or damages in respect of the suit premises in a suit for recovery of the same instituted by the landlord.

7. Mr. Roy Chowdhury states that he will also file paper-books in his appeal against the said judgment. If such paper-books are filed, liberty is given to Mr. Roy Chowdhury to pray for analogous and expeditious hearing of the appeals.

8. Liberty is given to mention for early hearing of the appeals after the paper-books have been filed.

G. N. RAY, J.:— I agree.

Orders accordingly.

AIR 1977 CALCUTTA 199

M. N. ROY, J.

Benoy Bhusan Dasgupta, Appellant
v. Sm. Sabitri Banerjee, Respondent.

Second Appeal No. 728 of 1971, D/-
17-1-1977.

(A) Civil P. C. (1908), Order 2, Rule 2 — Requirement of — Subsequent suit when barred because of an earlier suit — Test for determination. (T. P. Act (1882), Section 108).

The object of Rules 1 and 2 of Order 2 is to prevent multiplicity of suits. The Rule in Order 2, Rule 2 is founded on the principle that a person shall not be vexed twice for one and the same cause. The

terms of Order 2, Rule 2 require only that every suit shall include the whole of the claim arising from one and the same cause of action and not that every suit shall include every claim or every cause of action which the plaintiff may have against the defendant and if the cause of action in the subsequent suit is not barred.

The test for finding out whether the subsequent suit would be barred because of an earlier one, is whether the claim in the subsequent suit, is, in fact, founded on a cause of action distinct from that which was the foundation of the former suit. Case law referred.

The plaintiff-respondent, as owner of suit premises brought suit against defendant-appellant for ejectment and mesne profits and for compensation for damages caused to the same on allegations that defendant-tenant broke open a portion of wall in between two bed-rooms, made a hole in privy and thereby contravened clauses (m) and (o) of Section 108, T. P. Act and as such became liable for eviction. The plaintiff previously filed suit for mandatory order of injunction directing defendant to restore rooms to their former position and the suit was decreed. Damages which were caused were duly repaired by the defendant subsequent to the decree.

Held: Since such damages were admittedly repaired duly, the same could not be a ground for ejectment in the subsequent suit because at that time damages as alleged were not subsisting. A suit for ejectment can only be brought on subsisting cause of action viz., damage to the premises in the instant case. The instant suit, being founded or based upon the same damages which were in issue in the earlier one, would not be maintainable and that too when the claim in question was made on a cause of action not quite distinct or practically and in effect the same as in the earlier suit and all the more so when the breach alleged or complained of is the same. (Paras 10, 15)

(B) Words and Phrases — "Damage" — "Damages" — Meaning.

The words "damage" and "damages" form more than one meaning. It may mean injury; the words may mean sums paid under the order of the Court for compensation for a breach of contract. Damage means any loss whether actionable as an injury or not. It may be defined as the pecuniary compensation which the law awards to a person for the in-

jury he has sustained by reason of the act or default of another where that act or default is a breach of contract or a tort. Damages are the recompense given by process of law to a person for the wrong that another has done to him. "Damage" connotes a genus while "deterioration" and "destruction" connote two species. (1912) 3 KB 493, AIR 1962 Madh Pra 301, Followed. (Para 14)

(C) West Bengal Premises Tenancy Act (12 of 1956), Section 13 — Provisions do not create any new cause of action for landlord — Grounds of ejectment remain as they are under Transfer of Property Act — (T. P. Act (1882), Section 108, Cls. (m) and (o)). (Para 15)
Cases Referred: Chronological Paras
AIR 1965 SC 1574 = (1965) 2 SCR 705

AIR 1962 Madh Pra 301 = 1962 MPLJ 575 11'
14
(1955) 59 Cal WN 974 14
AIR 1949 PC 78 = 52 Cal WN 812 10
(1948) 1 All ER 227 = 92 SJ 95 10
(1939) 1 KB 748 = (1939) 1 All ER 809 14
14
(1936) 1 KB 669 = 105 LJ KB 419 14
AIR 1922 PC 23 = 26 Cal WN 297 10
(1912) 3 KB 493 = 81 LJ KB 1103 14
(1888) 15 Ind App 156 = ILR 16 Cal 98
(PC) 10
(1867) 11 Moo Ind App 551 (PC) 10

Jnanendra Nath Bakshi, for Appellant; A. K. Dutt and M. M. Saha, for Respondent.

JUDGMENT:— This appeal from appellate decree is directed against the judgment and decree dated August 30, 1970, made in Title Appeal No. 337 of 1970 by Shri S. K. Dutta Additional District Judge, 1st Court, Alipore, affirming thereby the judgment and decree dated January 30, 1970, made in Title Suit No. 234 of 1968, by Shri D. K. Panda, Munsif, 2nd Court, Alipore.

2. The plaintiff-respondent, being the owner of the premises in suit brought the Title Suit in question against the defendant appellant for recovery of khas possession by eviction and for mesne profits and also for compensation for damages caused to the same. It was alleged that the defendant appellant was a tenant in respect of two bed rooms, one privy and one verandah at a monthly rent of Rupees 35/-, payable according to English calendar month. It was contended that the tenant defendant broke open a portion of the wall in between the bed rooms of his tenancy, made a hole in the wall of the privy and broke other portion of the

rooms of the tenancy and thereby contravened the provisions of clauses (m) and (o) of Section 108 of the Transfer of Property Act and as such became liable for eviction. The tenancy was alleged to have been duly determined by necessary service of notice to quit.

3. The tenant-defendant, apart from denying the material allegations, contended that he was a tenant in the premises in question from the predecessor-in-interest of the plaintiff respondent at a rent of Rs. 24/- per month, payable according to English calendar month and at first his tenancy consisted of 2 rooms and a privy which was used by him jointly with other tenants. He alleged that after her purchase there was some rearrangement of the tenancy at the request of the plaintiff respondent and the tenant defendant left possession of one of his rooms in exchange of another room of similar size. He has further alleged that the room so surrendered by him was converted into two privies and he was given exclusive possession of one of the said two privies. Thus the tenant defendant has contended that the extent of his tenancy was thus changed to two rooms, one privy and a verandah and the rent of the same was correspondingly increased to Rs. 35/- from Rs. 24/- per month. The tenant defendant has stated that since there was neither any intercommunicating door between the two rooms of the tenancy as subsequently created nor there was any ventilator in the newly constructed privy, for which he was facing great trouble and difficulties, he with the knowledge and consent of the plaintiff respondent's husband and/or with intimation to him got an opening in the common wall of the two rooms and so also a ventilator in the privy. On such happening, the plaintiff respondent filed Title Suit No. 122 of 1968 for permanent injunction restraining him from breaking or demolishing any portion of the structure within his tenancy. A prayer for mandatory order of injunction directing him to restore the walls of the rooms to their former position was also made. On admissions made by him in the written statement, the said Title Suit was decreed on contest and thereafter the tenant defendant has filled up the portions he broke open for the purposes as aforesaid. Since the damages which were caused were duly repaired the tenant defendant contended that the subsequent suit for ejectment on the ground of causing damages was not maintainable. In that view of the matter

it was also contended by him that the plaintiff respondent was not entitled to any damages at all, apart from contending further that the present suit in view of the earlier determination was barred.

4. On the pleadings as aforesaid the parties went in trial on the following issues:—

1. Has the plaintiff any cause of action?

2. Has the defendant illegally demolished the portion of the suit premises as mentioned in the plaint without the knowledge and consent of the plaintiff, causing material deterioration of the suit premises?

3. Is the notice to quit legal, valid and sufficient to determine the tenancy?

4. Is the plaintiff entitled to a decree for ejectment and damages against defendant?

5. To what relief, the plaintiff is entitled?

5. The contentions of the defendant appellant were negatived by the learned Munsif excepting the plaintiff respondent's claim for damage and he held that the defendant appellant was guilty of causing damages to the tenancy and as such decreed the suit holding further that the notice to quit was due, valid and proper.

6. From such determination the defendant appellant preferred the connected appeal which was contested by the plaintiff respondent by filing a cross-objection on the question of damages to be paid to her. The learned appellate Court formulated the following points for consideration:—

1. Whether the present suit is maintainable?

2. Whether the notice to quit was valid and sufficient?

3. Whether the plaintiff is entitled to recover khas possession of the premises in suit by evicting the defendant from there?

4. Whether the plaintiff is entitled to compensation for the damages said to have been committed by the defendant to the rooms in the premises in suit? And, if so, to what extent? And whether the plaintiff is entitled to the cost of the suit?

5. To what relief, if any, is the plaintiff entitled in the suit?

and held that since the instant suit does not come within the purview of Order 2, Rule 2 of the Code of Civil Procedure so the same was not barred, the tenancy was

according to English calendar month and there was no defect in the notice to quit and furthermore the same was duly served and there were obvious damages caused to the tenancy by the openings as mentioned hereinbefore and for that the defendant appellant was liable to be evicted. It has of course been held that the plaintiff respondent's claim for damage was unfounded and she was not entitled to the same. In view of the above both the appeal and the cross-objection was rejected.

7. The present appeal has been preferred by the tenant defendant and there has been no cross objection by the plaintiff respondent.

8. Mr. Bakshi appearing in support of the appeal, apart from reiterating the arguments as advanced before the learned appellate Court, submitted further that because of the repairs of the damages which were admittedly done, the subsequent suit for ejectment on the grounds of damage was not maintainable and in any event such opening of a door and ventilator as alleged would not be a case of damage but they should be considered as improvements.

9. Mr. Dutt, appearing for the plaintiff respondent submitted that since the damages in question were repaired after the decree and there were admitted damages caused to the premises, the subsequent suit would be maintainable. He also submitted that the subsequent suit would also be maintainable because the scopes of the two suits were different and such difference would be apparent from a reference to the prayers in the respective plaints. It was also submitted that since there were admitted breaches of clauses (m), (o) and (p) of Sec. 108 of the Transfer of Property Act, the suit as instituted on due and proper service of notice, would also be maintainable and the more so when protections under the West Bengal Premises Tenancy Act would not be available for subsequent repairs.

10. Mr. Bakshi submitted that the connected suit was barred under Order 2, Rule 2 of the Civil Procedure Code in view of the previous Title Suit No. 122 of 1968, which as stated hereinbefore was instituted by the plaintiff respondent in respect of the premises in suit and she could have asked for the reliefs as in this suit in the said earlier suit. In fact, it was submitted by him that the cause of action in the two suits was identical. In support of his contentions and to

establish his case on cause of action and the bar of the connected suit for the earlier one, Mr. Bakshi first relied on the case of Moonshu Buzloor Ruheem v. Shumsoonnissa Begum, (1867) 11 Moo Ind App 551 (PC). In that case the test which has been held to be correct and applicable in the matter of finding out whether a subsequent suit would be barred because of an earlier one, is whether the claim in the new suit is, in fact, founded on a cause of action distinct from that which was the foundation of the former suit. Thereafter, reliance was placed on the case of Mussummat Chand Kour v. Pratab Singh, (1888) 15 Ind App 156 (PC). In that case it has been observed that the subsequent suit would not be barred if the same was founded upon a different and subsequent cause of action. The next case on which reliance was placed by Mr. Bakshi is the case of Muhammad Hafiz v. Mirza Muhammad Zakariya, 26 Cal WN 297 = (AIR 1922 PC 23). In that case a hypothecation bond contained a clause stipulating that if interest was not paid for six months the creditor might sue either for interest alone or for both principal and interest without waiting for the expiration of the period fixed for repayment (which was three years) and the debtor was "to have no objection whatever." More than three years after, no interest having been paid, the creditor brought a suit for interest alone and obtained a decree for sale of the mortgaged property. The decretal amount was deposited in Court and satisfaction entered. On a subsequent suit by the creditor for the principal sum and arrears of interest, it was held that:

"the provisions of Order 2, Rule 2 of the Civil Procedure Code were applicable and the subsequent suit was not maintainable and the cause of action which gives occasion for and forms the foundation of the suit, and if that cause enables a man to seek for larger and wider relief than that to which he limits his claim, he cannot afterwards seek to recover the balance by independent proceedings." Thereafter, reliance was placed on the case of Mohammad Khalil Khan v. Mahub Ali Mian, 52 Cal WN 812 = (AIR 1949 PC 78) wherein it has been laid down that the correct test in cases falling under Order 2, Rule 2 of the Civil Procedure Code is whether the claim in the new suit is in fact founded upon a cause of action distinct from that which was the foundation of the former suit, and it has been further held that the cause of action

means every fact which will be necessary for the plaintiff to prove if traversed in order to support his right to the judgment. It has also been observed in that case that the cause of action in two suits may be considered to be the same if in substance they are identical. The same has no relation whatever to the defence that may be set up by the defendant, nor does it depend upon the character of the relief prayed for by the plaintiff but refers to the media upon which the plaintiff asks the Court to arrive at a conclusion in his favour. These apart, Mr. Bakshi relied on the case of Wright v. Bonnet, (1948) 1 All ER 227.

"In that case the plaintiff failed in an action in which he claimed damages for fraudulent misrepresentation against two defendants and damages for negligence against one of them. He then began a second action against the same defendants, covering substantially the same ground as the first, but based on an allegation of fraudulent conspiracy. It was held on an application by the defendants to have the statements of claim struck out on the ground that the action was frivolous and vexatious, that the proceedings were an abuse of the process of the Court, which should exercise its inherent jurisdiction to prevent the defendants being called on to meet what in substance and reality was the same charge as that in the earlier action."

11. On the admitted facts that the damages, which are the basis of the cause of action having been duly repaired and rectified although after the decree in the previous suit, Mr. Bakshi submitted that the subsequent suit would not also be maintainable and in support of such contentions relied on the case of Brij Kishore v. Kishwa Mitter Kapur, AIR 1965 SC 1574. Two appeals were heard analogously by the Supreme Court wherein a common question with respect to the application of the first proviso to Section 57 (2) of the Delhi Rent Control Act, 1958, came up for consideration and the said provision is in the following terms:

Section 57 (2): Notwithstanding such repeal, all suits and other proceedings under the said Act pending, at the commencement of this Act, before any Court or other authority shall be continued and disposed of in accordance with the provisions of the said Act, as if the said Act had continued in force and this Act had not been passed:

"Provided that in any such suit or proceeding for the fixation of standard

rent or for the eviction of a tenant from any premises to which Section 54 does not apply, the Court or other authority shall have regard to the provisions of this Act."

In Appeal No. 879 of 1962 the landlord brought the suit for ejectment on the ground that the tenant had removed some structures in the shape of closing and opening verandah and removed a portion therein. On account of this, notices were sent to the landlord as well as to the tenant by the authorities concerned to remove those unauthorised structures. Since the tenant did not do so, the suit was filed by the landlord under Section 13 (1) (k) of the Delhi and Ajmer Rent Control Act, 1952.

12. In the other Appeal, being Appeal No. 121 of 1963, also the facts were similar and the suit was filed on the basis of the provisions as mentioned hereinbefore. In that case also the tenant had closed the verandah without the permission of the authorities concerned and notice was given to the landlord on that count by the authorities concerned and he in his turn asked the tenant to remove the unauthorised structures. On the tenant's failure and neglect to do so, the landlord filed a suit. It appeared that during the trial of the suit, the tenant made certain changes in the structure and removed the glazing and instead he closed the verandah with wire gauze net.

13. In the circumstances, as aforesaid, the question that arose for determination in both the cases was whether the tenant could still be ejected after he had removed the unauthorised structure and there was no further danger to the landlord's lease being forfeited and in that connection the application of the first proviso to Section 57 (2) of the Act as mentioned hereinbefore arises and it has been held that the first proviso of the said section must be read harmoniously with the substantive provision contained in sub-section (2) and the only way of harmonising the two was to read the expression "shall have regard to the provision of the Act" as merely to mean that whether the new Act has slightly modified or clarified the provisions, these modifications and clarifications should be applied. Those words did not take away what was provided by sub-section (2) and ordinarily the old Act would apply to pending proceedings. It has further been observed that Section 114-A of the Transfer of Property Act gives power to Court

to give relief to tenant against forfeiture where it held that the landlord did not give reasonable time to the tenant to remedy the breach. In such case it can dismiss the suit as not maintainable. It has also been observed that it is true that the said Section 114-A would not in specific terms apply to cases of ejectment on the ground specified in Section 13 (1) (k) of the 1952 Act but it was somewhat analogous to forfeiture on breach of an express condition of a lease for it also requires previous notice to the tenant before the suit is filed. The Supreme Court has also held that it cannot be said that 1952 Act forbid the Court from granting the relief where the offending structures were removed by the tenant even during the pendency of the suit for ejectment. It has also been observed that what is reasonable time within which the breach should be remedied it is always a question of fact and it would have been possible for the Court in a suit based on Section 13 (1) (k) of the 1952 Act to give relief against forfeiture in a proper case where the tenant had removed the offending structure before the suit was filed or even during the pendency of the suit, if reasonable time was not allowed in the notice in question.

14. Mr. Bakshi, as stated hereinbefore contended thereafter that the opening of a door or verandah would not constitute damages caused to the premises but the same would be an improvement. He submitted that on the analogy of the determination of this Court in the case of Sunil Baran Roy Chowdhury v. Purna Chandra, (1955) 59 Cal WN 974, it must be held that when admittedly the damages were repaired in the manner and circumstances as stated hereinbefore, there was no damage subsisting on the date of the subsequent suit and as such the said determination as referred to and relied on both by the Courts below and by Mr. Dutt has got no application to this case. In that case it has been observed that the act of a tenant in putting down a door contrary to the provisions of Sec. 108 (o) of the Transfer of Property Act would attract the proviso to Section 12 (d) of the Rent Control Act, 1950. That apart, Mr. Bakshi relied on the dictionary meaning of the word "damage" in support of the contentions as referred to hereinbefore. "Damages" according to Byrnes Law Dictionary occurs where one person has done a wrongful act for which the person injured may obtain compensation in an action. According to Stroud the

word damage, neither in any common parlance, nor any legal phraseology, is used as applicable to injuries done to persons; but solely as applicable to mischief done to property. It has also been observed that "damage" occasioned by the erection of a urinal etc., means only direct damage caused by the structure itself; not consequential damage by reason of its being so erected as to cause a nuisance. It has also been laid down that the word "you damage" would mean a circumstances or a thing if "you" render it imperfect or inoperative. "Damage" in contrast with injury, means loss or harm occurring in fact, whether actionable as an injury or not. Where a lessee authorised the lessor to enter and execute repairs making good of damages thereby occasioned it has been held in the case of *Greg v. Planone*, (1936) 1 KB 669 that "damage" was not confined to structural damage but included damage done to the lessee's stock in trade by soot brought down on the cleaning of a flue. Such word damage to an English lawyer, as has been held in the case of *Hall Brothers S. S. Company Limited v. Young*, (1939) 1 KB 748 to imply the sums payable by reason of some breach of duty or obligation, whether the duty or obligation is by contract, by general law or by relation. Damages would fall under two heads (1) general damage i. e. such damages as the law will presume to flow from that which forms the subject-matter of the action and (2) special damage i. e. other damages as can be recovered only if it is specially alleged and specially proved. There may be another case of actual damage which would mean real, substantial and just damages, or amount awarded to a complainant in compensation for his actual or and real loss or injury as opposed on the one hand to "nominal damage" and on the other to "exemplary", or "punitive damages". Damage would also mean loss or harm resulting from injury to person, property or reputation, compensation in money realisable by law for loss or injury. The words "damage" and "damages" form more than one meaning. It may mean injury; the words may mean sums paid as has been held in the case of *Swansea Corporation v. Harpur*, (1912) 3 KB 493 under the order of the Court for compensation for a breach of contract. Damage means any loss whether actionable as an injury or not. It may be defined as the pecuniary compensation which the law awards to a person for the injury he has

sustained by reason of the act or default of another where that act or default is a breach of contract or a Tort; or can more shortly, damages are the recompense given by process of law to a person for the wrong that another has done to him. "Damage" as has been held in the case of *Central India Chemicals (P.) Ltd. v. Union of India*, AIR 1962 Madh Pra 301 to connote a genus while "deterioration" and "destruction" connote two species. According to Chambers's Dictionary damage means hurt, injury, loss, the value of what is lost, the pecuniary reparation due for loss or injury sustained by one person through the fault or negligence of another and according to Oxford Dictionary such word would mean loss of value or efficiency inflicted harm, some claim adjudged as compensation. It is meant by the word "damages", pecuniary satisfaction awarded by a judge, a jury in a Civil action for the wrong suffered by the plaintiff.

15. The admitted facts in the instant case are that some damages were caused to the premises in suit by the defendant appellant for which on the definition of the word "damage" as mentioned hereinbefore, the plaintiff respondent was entitled to be recompensated and in fact for such recompense she brought the earlier suit and the said suit being decreed on the findings of damage, damages as caused were repaired and rectified after the decree and thereafter for the self same damage to the premises in suit, the later suit was filed. What then should be the effect of such repairs and whether after such repairs, the damage would be still continuing or subsisting, for which the later suit could be filed? The answer to the question would in fact decide the question of maintainability of the appeal and thereby the appeal itself, because if the subsequent suit itself is not maintainable then the present appeal will have to be allowed after setting aside the judgments and decrees of the learned Courts below and otherwise they will have to be affirmed and thus to dismiss this appeal, as there is no other point involved in the appeal, which can be gone into or considered in second appeal because of the restricted nature and power of interference by this Court in this jurisdiction and the more so when such findings are concluded by findings of fact arrived at on due consideration of the evidence on record. There is no denying the fact that on the repairs as done, although after the decree in the earlier suit, the nature and

character of the damages as claimed or mentioned in the later suit could not be existing in respect of the premises in suit and as such the basis of the suit in the subsequent suit could not in any event be claimed to be subsisting and in fact it cannot in any way be claimed or considered that there were damages in terms of the definition of the word 'damage' as mentioned hereinbefore. The object of Rules 1 and 2 of Order 2 is to prevent multiplicity of suits. The Rule in Order 2, Rule 2 is founded on the principle that a person shall not be vexed twice for one and the same cause. The term of Order 2, Rule 2 requires only that every suit shall include the whole of the claim arising from one and the same cause of action and not that every suit shall include every claim or every cause of action which the plaintiff may have against the defendant and if the cause of action in the subsequent suit is not barred. The provisions of the West Bengal Premises Tenancy Act do not create, as found by the learned appellate Court, any new cause of action for the landlord and grounds of ejectment remain as they are under the provisions of the Transfer of Property Act. Thus causing damages to the suit property was certainly a good ground for ejectment under the provisions of the Premises Tenancy Act but since such damages were admittedly repaired duly, the same could not be a ground for ejectment in the subsequent suit because at that time damages as alleged were not subsisting. A suit for ejectment can only be brought on subsisting cause of action viz., damage to the premises in the instant case. The instant suit, being founded or based upon the same damages which were in issue in the earlier one, would not be maintainable and that too when the claim in question was made on a cause of action not quite distinct or practically and in effect the same in the earlier suit and all the more so when the breach alleged or complained of is the same. The findings of the learned Courts below on the question of the notice require no interference and they are proper and as such affirmed.

16. In view of the above and applying the tests as laid down in the cases as cited, this appeal should succeed and the same is thus allowed. The judgments and decrees of the Courts below are set aside. There will however be no order for costs.

Appeal allowed.

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SALIL KUMAR DATTA AND
H. N. SEN, JJ.

Nirmala Bala Sen, Petitioner v. Jatindra Nath Sen, Opposite Party.

C. R. No. 2848 of 1973, D/- 22-12-1976.

(A) Land Acquisition Act (1894), Section 12 (2) — Notice of award — Persons not present 'personally or by their representatives'.

Steps were taken on behalf of the petitioner to produce the relevant documents before the Collector prior to making of the Award in support of her claim.

Held such appearance cannot be accepted as appearance at the time the Collector made his award, for an award is in the nature of an offer for acceptance by persons interested and their personal presence or presence through representative at the time of making the award is essential for acceptance or otherwise of the offer contained in the award. The petitioner was therefore entitled to notice under Section 12 (2). (Para 3)

(B) Land Acquisition Act (1894), Section 45 (2) and (3) — Service of notice — When can be made on person other than one mentioned in notice.

Under sub-section (2) of Section 45 it is always desirable whenever practicable that the service of the notice shall be made on the person named therein. Sub-section (3) provides that if such person cannot be found service may be made on any adult member residing with him. This provision, does not imply that in the event of a casual absence of the person interested, the notice is to be served on any other adult member of the family. The use of the word 'cannot' in sub-section (3) is of significance and it amounts to habitual absence of the person interested at the recorded address and not to a casual absence of such person.

(Para 4)

H. N. Ghosh, Sourendra Prasad Ghosh, for Petitioner; S. N. Mukherjee, D. P. Mukherjee, for Opposite Party; P. N. Palit, for the State.

SALIL KUMAR DATTA, J.:— This Rule is directed against an order of the Additional Land Acquisition Officer dated 28/30-7-1973 whereby the application for reference filed by the petitioner under Section 18 of the Land Acquisition Act in L. A. Case No. 3 of 1972-73 was held to be time barred. It appears that in the

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above land acquisition case an Award was passed in respect of acquisition of various plots of land. The Award, as it appears from the record, contained provisions for payment to more than 900 persons interested and specific amounts were mentioned as payable to such persons. In the application for reference which was filed on 6-12-1972 it was stated that there has been joint Award in favour of the petitioner with other persons in respect of certain plots even though the said persons were not entitled to any amount as they had no right, title or interest in the lands acquired. Schedule of the lands was given in respect of which the Award in the above case was challenged. The petitioner moved against these orders rejecting her application for reference and obtained the instant Rule with a blanket injunction restraining the Land Acquisition Officer from making payment of money to the opposite parties till the disposal of the Rule.

2. The point for consideration is whether the impugned order holding that the application for reference was barred by limitation, is sustainable in law. Section 12 (2) of the Land Acquisition Act is as follows:—

The Collector shall give immediate notice of his award to such of the persons interested as are not present personally or by their representatives when the award is made.

Section 18 (1) provides that any person who has not accepted the award may, by written application to the Collector require that the matter be referred by the Collector for the determination of the Court and the objection which can be raised is inter alia about the person to whom the amount is payable or the apportionment of the compensation amongst the persons interested.

Sub-section (2) is as follows:—

"The application shall state the grounds on which the objection to the award is taken:

Provided that every such application shall be made,—

(a) if the person making the application was represented before the Collector at the time when he made his award within six weeks from the date of the Collector's award;

(b) in other cases, within six weeks from the receipt of the notice from the Collector under Section 12, sub-sec. (2), or within six months from the date of the Collector's Award, whichever period shall first expire."

Section 45 provides the mode of service in the following manner:

(1) Service of any notice under this Act shall be made by delivering or tendering a copy thereof signed, in the case of a notice under Section 4, by the officer therein mentioned, and, in the case of any other notice by or by order of the Collector or the Judge.

(2) Whenever it may be practicable, the service of the notice shall be made on the person therein named.

(3) When such person cannot be found the service may be made on any adult male member of his family residing with him; and if no such adult male member can be found, the notice may be served by fixing the copy on the outer door of the house in which the person therein named ordinarily dwells or carries on business, or by fixing a copy thereof in some conspicuous place in the office of the officer aforesaid or of the Collector or in the Court house and also some conspicuous part of the land to be acquired.

It may be noted that the last portion of the sub-section (3) is analogous to the provisions of Order 5, Rule 20 (1) of the Civil Procedure Code.

3. In this case, there is no dispute that the petitioner was not present at the time when the Award was made. Of course, it appears from the record that steps were taken on her behalf to produce the relevant documents before the Collector prior to making of the Award in support of her claim. But such appearance cannot be accepted as appearance at the time the Collector made his award, for an award is in the nature of an offer for acceptance by persons interested and their personal presence or presence through representative at the time of making the award is essential for acceptance or otherwise of the offer contained in the award. There is accordingly no dispute that the petitioner was entitled to a notice under Section 12 (2) of the Act and in fact such notice was sought to be served on the petitioner.

4. The petitioner states that she did not receive any notice under Section 12 (2) though it appears, it was served on her son. It will be seen under sub-section (2) of Section 45 that it is always desirable whenever practicable that the service of the notice shall be made on the person named therein. Sub-section (3) provides that if such person cannot be found service may be made on

any adult member residing with him. This provision, it appears to us, does not imply that in the event of a casual absence of the person interested, the notice is to be served on any other adult member of the family. The use of the word 'cannot' in sub-section (3) is of significance and it amounts in our opinion to habitual absence of the person interested at the recorded address and not to a casual absence of such person. In the facts and circumstances of the case it would appear that the notice was served on the very first attempt on the son of the petitioner and this service cannot be considered to be a proper service of the notice under Section 12 (2) of the Act in the context of the discussion indicated above. We accordingly hold that in this circumstance, the question of limitation of the application under Section 18 does not arise and accordingly the Additional Land Acquisition Officer committed error in exercise of jurisdiction in holding that the application for reference was time barred. We therefore set aside the impugned order and hold that the application under Section 18 was not time barred. We further direct that this application will not be entertained and considered in accordance with law. It however appears that the application under Section 18 suffers from lack of material particulars. The petitioner will furnish the number of items in the award in respect of which reference is sought to be made together with the names of the persons concerned against whom the relief is claimed. Such supplementary statement will be filed by the petitioner within a month from the date of arrival of the records at the office of the L. A. Collector and in default, the application as originally filed will be dealt with and disposed of by the authority concerned in accordance with law.

5. The Rule is accordingly made absolute. There will be no order as to costs.

Re: Application dated 9-9-1975.

6. Some of the opposite parties have filed an application on 9-9-1975 asking for release and payment of the amount of compensation to them which was restrained by the interim order issued on 14-8-1973. It is stated by the petitioners to this petition that in respect of the award made in their favour, the petitioner in the Rule was not in any way connected nor there was any joint award with her. In this state of affairs there is no reason why the interim order in res-

pect of the petitioners of this petition should be allowed to stand. We accordingly modify the interim order confining it to the persons with whom the petitioner was given a joint award in L. A. Case No. 3 of 1972-73. In respect of others the interim order will stand vacated. The application is thus disposed of. There will be no order as to costs.

H. N. SEN, J.:— I agree.

Rule made absolute.

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SALIL KUMAR DATTA AND

H. N. SEN, JJ.

Sm. Safura Bibi, Petitioner v. Ram Prasad Saw and others, Respondents.

C. R. No. 2984 of 1975, D/- 1-12-1976.

Partition Act (1893), Section 4 — Right of pre-emption — Who can claim — One share-holder making application under Section 4 to purchase share of stranger transferee but losing status as share-holder before passing of order of sale — He loses benefit of his application — The benefit is not available even after such status is re-acquired by him.

When a stranger purchaser sues for partition, an application under Section 4 can be made by any member of the family being a co-sharer undertaking to buy the share of the transferee. On such application, a valuation of such share is to be made in such manner as the Court thinks fit and, thereafter, the sale of such share to "such shareholder" is to be directed by the Court and the Court may give all other necessary and proper directions. Thus the share-holder who applies for pre-emption under Section 4 of the Partition Act must continue and retain his status as such shareholder when the order for sale to him is directed by the Court and the sale is completed accordingly. Therefore, if there is any change in the status of such shareholder by any intervening act whereby the interest of such shareholder in the property is lost, subsequent acquisition of such interest by him again will not make the same shareholder reacquire his status as was his at the time when he made the application under Section 4. And if there is such cessation of the interest of the shareholder in the property within the said period leading to a change of the status of the shareholder by reason of any intervening

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factor, such shareholder will not retain the same capacity he had by reason of such transfer and, as such, will not be entitled to the benefit under Section 4 (1) of the Act. AIR 1950 Cal 111, Dist.

(Para 4)

Provisions of Section 4 are clear and it could not be contended that the provisions should be construed liberally so as not to destroy the integrity of the family dwelling house.

(Para 5)

Cases Referred: Chronological Paras
AIR 1950 Cal 111 = 54 Cal WN 660. 3

Shyma Prasanna Roy Choudhury, for Petitioner; Sushil Kumar Biswas, for Respondents.

SALIL KUMAR DATTA, J.:— This Rule was obtained against Order No. 170 dated 9th July, 1975 in a Partition Suit whereby the application of the plaintiff was allowed. The effect of the order is that the defendant No. 2's application under Section 4 of the Partition Act which was earlier allowed stood disallowed in view of some subsequent events. The facts, in short, are as follows:—

On 5th March, 1953 the Partition Suit was filed by the plaintiff who, admittedly, acquired a share of the dwelling house of the defendants. In course of the proceedings, the defendant No. 2 filed an application on 30-4-1957 under Section 4 of the Partition Act, 1893 for purchase of the share of the plaintiff who was, admittedly, a stranger purchaser. This application was allowed on 17-5-1957 when the preliminary decree was also passed. The preliminary decree contained direction on the Commissioner to make a valuation of the plaintiff's share which was determined at two annas six gondas two karas and two krantis and the Court also recorded further directions to the effect that if the amount be paid within 30 days by the defendant No. 2, the plaintiff's interests would vest in her and the plaintiff would execute a kobala in respect of the said share in her favour and the plaintiff's suit for partition would stand dismissed. It appears that on 18-11-1960 the defendant No. 2 transferred her share in favour of her nephew Sheikh Sajahan by a registered Heba-bil-ewaj and, subsequently, Sheikh Sajahan again transferred the said share to the defendant No. 2 by a registered Haba-bil-Ewaj on 22-4-1965. The plaintiff, in the context of the aforesaid facts, made an application for effecting a final decree for partition by metes and bounds and also for a direction that no further steps

should be taken for determination of the value of the plaintiff's share as directed earlier by the Court on the defendant No. 2's application under Section 4. This application was allowed. The learned Judge held that there was no necessity for proceeding further regarding the determination of the valuation of the plaintiff's share as the defendant No. 2 had lost her right of pre-emption by virtue of the transfer dated 18-11-1960. The present Rule is against this order.

2. Mr. S. P. Roychowdhury, learned Advocate appearing for defendant No. 2 who is the petitioner before us, contended that it was not necessary for the Court to look into the intervening facts because the defendant No. 2 subsequently acquired the interests transferred by her earlier in full. It was further contended by Mr. Roychowdhury that as soon as the defendant No. 2 re-acquired her share, her right of pre-emption revived and the Court should proceed, as directed already, on basis of her application under Section 4. Mr. Roychowdhury also contended that provisions of the Partition Act should be construed liberally so as not to destroy the integrity of the family dwelling house, as was held by several decisions cited by him. In any event, Mr. Roychowdhury contended that his client still has the right to file an application under Section 4 of the Partition Act and to prevent multiplicity of the Court proceedings, the Court should not relegate the defendant No. 2 to further proceedings under Section 4 of the Act. These contentions are disputed by Mr. Biswas, learned Advocate appearing for the substituted plaintiffs.

3. Strong reliance has been placed on the decision in the case of Boto Krishna Ghosh v. Akshoy Kumar Ghosh, reported in 54 Cal WN 660 = (AIR 1950 Cal 111) where it was held that there is nothing in Section 4 of the Partition Act which disqualifies a member who, having previously alienated its share, has re-acquired it and is owning it at the time he makes his claim under Section 4. The qualification of the applicant, it was held, is to be judged with reference to his position at the date of the application. In the case before us, it would appear that the transfer which has resulted in the impugned order was made after the application under Section 4 of the Partition Act was filed. Section 4 of the Partition Act is on the following terms:

"Partition suit by transferee of share in dwelling-house.— (1) Where a share of

a dwelling-house belonging to an undivided family has been transferred to a person who is not a member of such family and such transferee sues for partition the Court shall, if any member of the family being a shareholder shall undertake to buy the share of such transferee, make a valuation of such share in such manner as it thinks fit and direct the sale of such share to such shareholder and may give all necessary and proper directions in that behalf."

4. On a plain reading of this section, it appears to us that when a stranger purchaser sues for partition, an application under Section 4 can be made by any member of the family being a co-sharer undertaking to buy the share of the transferee. On such application, a valuation of such share is to be made in such manner as the Court thinks fit and, thereafter, the sale of such share to "such shareholder" is to be directed by the Court and the Court may give all other necessary and proper directions. Thus the shareholder who applies for pre-emption under Section 4 of the Partition Act must continue and retain his status as such shareholder when the order for sale to him is directed by the Court and the sale is completed accordingly. In view of this position if there is any change in the status of such shareholder by any intervening act whereby the interest of such shareholder in the property is lost, subsequent acquisition of such interest by him again will not make the same shareholder re-acquire his status as was his at the time when he made the application under Section 4. Accordingly, it appears that, if there is such cessation of the interest of the shareholder in the property within the said period leading to a change of the status of the shareholder by reason of any intervening factor, such shareholder will not retain the same capacity he had by reason of such transfer and, as such, will not be entitled to the benefit under Section 4 (1) of the Act. This aspect of the question was not required to be considered and accordingly not considered in the decision cited above. We are, therefore, of the opinion that the defendant No. 2 by reason of intermediate transfer made by her, notwithstanding subsequent acquisition of such interest by her by a subsequent deed before the final order, lost the benefit which the Court gave her by allowing her application under Section 4 of the Partition Act.

5. In view of the express and clear provisions of the section, as stated
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hereinbefore, there is no scope to give any liberal interpretation to the section, as contended by Mr. Roychowdhury. The status of the shareholder is required to be the same in the proceedings throughout till the final decree and directions are made and the sale is effected and, if that status is lost by a shareholder by reason of any intervening factor, such benefit cannot be granted to the applicant under Section 4 as grant of such benefit would cause a departure and violation of the provisions of Section 4 (1). There are also authorities which advocate strict interpretation of Section 4.

6. Mr. Roychowdhury contended that, since his client is still entitled to make an application under Section 4 by virtue of her acquisition of the share in the property, the Court should not relegate her to a further proceedings under Section 4 once again. If it is still open to Mr. Roychowdhury's client to apply under Section 4 and if she is so advised, such application if made will be considered on merits. But it is not possible for us at this stage to allow her to reap the benefit of the application under Section 4 which in view of the subsequent event disentitles her to get the benefit on her application filed on 30-4-1957.

7. For all these reasons, we are of the opinion that the impugned order has to be sustained. The Rule, accordingly, fails and is discharged. There will be no order as to costs.

8. We make it clear, however, that we are expressing no opinion on the merits of the case of parties in the proceedings, particularly, in respect of any fresh application under Section 4, if at all filed by the petitioner.

H. N. SEN, J.:— I agree.

Rule discharged.

AIR 1977 CALCUTTA 209

SALIL KUMAR DATTA AND

H. N. SEN, JJ.

Jagat Enterprises, Appellant-Petitioner v. Anup Kumar Daw and others, Respondents, Opposite Parties.

C. R. No. 3922 of 1975, D/- 24-11-1976.

C. P. Code (1908), Order 1, Rule 10 (2) — Addition of parties — Suit for ejectment by the lessor against lessee — Right of sub-lessee to be added as necessary party — Sub-lessee has no such right.

LT/AU/E571/76/PKK/WNG

Though under the law the decree for possession against the lessee is binding on the sub-lessee, the sub-lessee is entitled to take steps to resist the decree on the grounds as may be available to him. This right does not mean or imply that the sub-lessee is entitled on his own to be added as a party in the eviction suit against the lessee in his own right when he is not made a party and on his case he has an independent right in respect of his tenancy and is thus not bound by any decree as may be obtained by landlord in the eviction suit against the lessee or when the decree is obtained in fraud of the sub-lessee. (Para 11)

Even so if the landlord in such case elects to sue the lessee and according to his case in the plaint sub-lessees and others in illegal possession of the property through him, such sub-lessees and others may defend their tenancy claiming independent title or statutory protection. But in a suit for eviction of the lessee the alleged sub-lessee who is not made a party, is not entitled to be impleaded in such suit on his own to assert his alleged independent right or statutory protection as a necessary party. The sub-lessee in such case has his right to assert and defend his right or to challenge the decree as being in fraud of his rights all in other appropriate proceedings to be initiated by him. AIR 1966 SC 346 and AIR 1971 Cal 425, Distinguished. (Para 13)

Cases Referred: Chronological Paras

AIR 1971 Cal 425	12
AIR 1966 SC 346 = (1965) 3 SCR 829	5
AIR 1945 Cal 283 = 49 Cal WN 133	8

Sakti Nath Mukherjee and Tarun Chatterjee, for Petitioner; G. N. Roy, S. Naik, J. N. Halder and Mrs. P. Banerjee, for Opposite Parties.

S. K. DATTA, J.:— This Rule is directed against order No. 7 dated 11-9-1975 passed by the learned Judge, 9th Bench, City Civil Court, Calcutta in a suit for recovery of possession of the suit premises. By the impugned order the petitioner's petition under Order 1, Rule 10 of C. P. Code was dismissed. The case in plaint is as follows:—

2. The suit premises being flat No. 3 of 1st floor rear side of 184, Lenin Sarani, Calcutta hereinafter referred to as the said premises was taken on lease by Chatter Singh Dugar from Ajoy Krishna Daw on the basis of a registered lease-deed dated 22nd June, 1963 for a period of 22 years commencing from July 1, 1963 and expiring on June 30, 1985.

Chattur Singh died leaving the opposite party No. 3 as his heir and legal representative. Ajoy Krishna also died leaving a will whereby the opposite parties Nos. 1 and 2 were appointed Executors and the probate of the said will was granted in their favour. It was stated that Chattur Singh and/or his heir defaulted in payment of rent and were in heavy arrears in the sum of Rs. 30,600/- as per account set out. It was further stated that under the lease aforesaid, lessee was not to assign, sub-let or part with possession of the premises or part thereof without the written consent of the lessor. In violation of the said terms, the opposite party No. 3 sub-let, assigned or transferred possession of the premises to various companies and firms named including the petitioner without the consent of the opposite parties Nos. 1 and 2 or their predecessor-in-interest. The notice was duly given upon the said opposite party forfeiting the lease and indicating the intention of the lessors to enter the said premises. The said opposite party failed to vacate the premises as required. The present suit was accordingly instituted by the opposite parties Nos. 1 and 2 against the opposite party No. 3 for recovery of possession of the suit premises.

3. It appears that an application was filed in the said suit by the petitioner before us stating that under the terms of the lease Chattur Singh was entitled to use the suit premises for office purposes and also to accommodate therein company or firm in which he himself or his associates were interested without in any way affecting the terms of the said lease. It was further stated that the petitioner was accommodated on the basis of the right referred to above and Chattur Singh was interested in the petitioner firm as his relative was a partner therein. Further, after the death of Chattur Singh the petitioner paid all amount of rent on behalf of his heir and rent upto September 1970 was cleared. Thereafter though the rent was tendered within the prescribed time the said opposite parties refused to accept the same from the petitioner. It was further stated that the defendant opposite party No. 3 did not enter appearance in the suit and was acting in collusion with the plaintiffs to create trouble on account of family dispute. The suit was also fixed for ex parte hearing and in these circumstances the petitioner made an application for being added as party defendant to the suit and

to contest the same by filing a written statement.

4. This petition was rejected by the impugned order as according to the learned Judge the petitioner was not at all necessary party in a suit simpliciter for eviction and he could file a separate suit for appropriate relief. The rule is against this order.

5. Mr. Sakti Nath Mukherjee, learned Advocate appearing for the petitioner sub-lessee contended that the petitioner was a necessary party in the suit and accordingly the trial Court failed to exercise jurisdiction in declining him to be added as a party in the suit. In support, he referred to the decision in *South Asia Industries Pvt. Ltd. v. Sarup Singh*, AIR 1966 SC 346. In this case it appears that the respondent's predecessor leased the premises to Allen Berry & Co. (Calcutta) Ltd., which company transferred the lease to the appellant. On the ground that the transfer was made without the consent of the landlord, the respondent made an application under S. 14 (1) (b) of the Delhi Rent Control Act, 1958 to the Controller against the tenant company as also the appellant for an order for recovery of possession of the premises on the ground that the transfer of lease was without the consent of the landlord. In course of proceedings, the tenant company went into liquidation and was subsequently dissolved and its name was struck off from the proceedings. The Controller thereafter made an order in favour of the landlord for recovery of possession of the premises and this order was affirmed ultimately by the High Court. On appeal to the Supreme Court it was held by the majority judgment that the order for recovery of possession was not only confined to tenant but the order would be binding on all persons in actual possession of the premises in view of Section 25 of the Act. This section provided that the order for recovery of possession would be binding on all persons in occupation of the premises. Accordingly as the assignee was also bound by the order, it was observed by Sarkar J. (as he then was) that assignee should be a proper party in the proceeding to show that there was such requisite consent to assignment or sublease. It was further observed that the direct tenant may neglect or be incompetent in his defence or he may even collude with the landlord or he may just not bother. But if the assignee or sublessee was entitled to be heard to oppose

eviction, it would be unnatural to say that he cannot be made party to the proceedings and in view of Section 25 the eviction order would be binding on him and he would be liable to be condemned unheard. In the concurring judgment Bachawat, J. observed that the tenant and the assignee were proper parties to the proceeding for possession.

6. This decision was strongly relied on by Mr. Mukherjee in support of the contention that the petitioner as sublessee was entitled to be made party in the proceedings, particularly when it was alleged that the tenant was colluding with the landlord in suffering a decree by not contesting the suit at all.

7. This decision, in our opinion does not lay down the broad proposition that in all actions for recovery of possession between the landlord and the lessee or the tenant, the sub-lessee or the subtenant are necessary parties therein. The proposition laid down therein was in the context of the provision of the Delhi Rent Act 1958 and the sub-lessee's case that he was not a proper party in the proceeding in absence of the tenant was not accepted while the landlord impleaded him as an illegal assignee.

8. In *Sailendra Nath Bhattacharjee v. Bijan Lal Chakravarty*, 49 Cal WN 133 = (AIR 1945 Cal 283) B. K. Mukherjee J. (as he then was) speaking for the Division Bench considered the position of law in our country with reference to the law prevailing in England. In English law, it was observed, the subtenant has no right as his interest is annulled with that of the lessor, but if he claims an independent interest in the property against the landlord, he has a right to be added as a party to the suit and defend it. In regard to the law in our country it was observed—

"If the interest of the subordinate holder is of such a character that it is entirely dependent on that of the superior holder, and automatically comes to an end as soon as the superior interest is extinguished, the subordinate holder would be a privy to the judgment obtained against the superior holder even though he was not a party to the action ... a sub-lessee would be bound by a decree for possession obtained by the lessor against the lessee, if the eviction is based upon a ground which determines the underlease also, unless he succeeds in showing that the judgment was vitiated by fraud or that the

lessee collusively suffered the decree to be passed against him. If, however, the decree for possession proceeds on a ground which does not by itself annul the sub-lease, the decree would not be binding on the sub-lessee nor could the sub-lessee be evicted in execution of the decree if he had acquired a statutory right or protection, e.g. under the Bengal Tenancy Act which he could assert against the lessor. Within these limits we think a sub-lessee could be held to be bound by a decree obtained against his lessor and when he is so bound he can undoubtedly be ousted in execution of the decree obtained against his lessor under Order 21, Rule 35 of the Civil Procedure Code, though he was not made a party to the suit itself."

9. The position therefore appears to be as follows:—

(i) The decree for possession against the lessee would be binding on the sub-lessee when the interest of the sub-lessee is extinguished along with it i.e. to say the determination of the lessee's right necessarily extinguished the right of the sub-lessee; (ii) the above proposition will not apply if the interest of the sub-lessee is not annulled by the decree for possession against the lessee and the sub-lessee is entitled to his tenancy, independent of lessee or if the sub-lessee acquires the statutory right or protection which he could assert against the lessor; (iii) the sub-lessee will also be entitled to challenge the decree on the ground that it was obtained by fraud or collusion. Under Section 115 of the Transfer of Property Act, 1882, the forfeiture of a lease in fraud of the under-lessee or, where relief against forfeiture is granted does not annul the sub-lease.

10. In such circumstances it will be open for the sub-lessee to challenge the decree for recovery of possession passed against the lessee in appropriate proceeding. It was so done in the said suit by the sub-lessee where his suit was for declaration of his tenancy right independent of the lessee and for permanent injunction restraining the landlord decree holder from taking khas possession thereof in execution of the decree against the lessee.

11. It thus appears to us that though under the law the decree for possession against the lessee is binding on the sub-lease created by him, the sub-lessee is entitled to take steps to resist the decree on the above grounds as may

be available to him. This right does not mean or imply that the sub-lessee is entitled on his own to be added as a party in the eviction suit against the lessee in his own right when he is not made a party and on his case he has an independent right in respect of his tenancy and is thus not bound by any decree as may be obtained by the landlord in the eviction suit against the lessee or when the decree was obtained in fraud of the sub-lessee.

12. Mr. Mukherjee has drawn our attention to the decision in Bholanath v. Somendra Chandra, AIR 1971 Cal 425 in which it was held that in the suit for recovery of possession it is competent for the plaintiff to pray for relief against such persons as, according to him, may be in possession of the suit premises as illegal assignees, transferees or sub-lessees. In fact, under the various laws governing "premises" tenancies the sub-tenants who have been recognised as having a lawful right, are necessary parties in the eviction proceedings against the tenant. Under the West Bengal Premises Tenancy Act, 1956 under provisions of sub-sections (2), (3) and (4) of Section 13, the sub-tenants mentioned therein are necessary parties in eviction proceedings against the tenants as otherwise the decree against the tenant will not be binding on them.

13. The lease we are concerned with in this proceeding is outside the ambit of the said Act. Even so if the landlord in such case elects to sue the lessee and according to his case in the plaint sub-lessees and others in illegal possession of the property through him, such sub-lessees and others may defend their tenancy claiming independent title or statutory protection. But in a suit for eviction of the lessee the alleged sub-lessee who is not made a party, in our opinion, as already indicated, is not entitled to be impleaded in such suit on his own to assert his alleged independent right or statutory protection as a necessary party. The sub-lessee in such case has his right to assert and defend his right or to challenge the decree as being in fraud of his rights all in other appropriate proceedings to be initiated by him.

14. The Rule accordingly fails and is discharged. There will be no order for costs in the circumstances.

H. N. SEN, J.:— I agree.

Rule discharged.

AIR 1977 CALCUTTA 213

**PRADYOT KUMAR BANERJEE AND
RAMKRISHNA SHARMA, JJ.**

**Samar Roy Chowdhury, Appellant v.
Sm. Snigdha Roy Chowdhury, Respon-
dent.**

Appeal from Original Decree No. 473
of 1975, D/- 16-9-1976.*

**(A) Hindu Marriage Act (1955), Sec-
tion 12 (1) (a) (as amended in 1976) —
Impotency — Curability of impotency is
not relevant consideration.**

The question of curability of im-
potency is not a relevant consideration
for the purpose of the decision under Sec-
tion 12 (1) (a) as amended in 1976. If it
is found that there was no consummation
of marriage due to the impotency of the
respondent the petitioner is entitled to a
decree. Before the amendment, if a
party to the marriage was not impotent at
the time of the marriage but became
impotent before the institution of the
suit, the petitioner was not entitled
to a decree. Alternatively if the respon-
dent was impotent at the time of mar-
riage but was not impotent at the institu-
tion of the suit, the decree must be re-
fused. Now, however, the statute has
placed emphasis equally on the consum-
mation of the marriage and the impotency
of the respondent. If there was no con-
summation due to the impotency of the
respondent, the petitioner is entitled to
a decree. Case law discussed.

(Paras 19, 27)

**(B) Hindu Marriage Act (1955), Sec-
tion 12 (1) (a) — Impotency of wife —
Consummation — What constitutes.**

Sexual intercourse or consummation
is sometimes referred to as vera copula.
Vera copula consists of erection and in-
tromission, that is, of erection and penetra-
tion by the male of the woman. Full and
complete penetration is an essential in-
gredient of ordinary and complete inter-
course. The degree of sexual satisfaction
obtained by the parties is irrelevant. Thus
where the respondent wife was suffering
from the disease of vaginismus and the
coitus or complete penetration was not
possible, held, the petitioner was entitled
to a decree.

(Paras 10, 16)

* (Against the decree of B. K. Dutta, Addl.
Dist. J., Eighth Court, Alipore, in M. S.
No. 11 of 1975, D/- 31-7-1975).

Cases Referred: Chronological Paras

(1976) F. A. No. 313 of 1972, D/- 14-7-1976 (Cal)	28
AIR 1970 SC 137 = (1970) 1 SCR 559	10
AIR 1968 Delhi 79	26
AIR 1957 Mad 243	27
(1956) 3 All ER 769	24
(1954) 3 All ER 736	18
(1947) 2 All ER 886 = 1948 AC 274	18
AIR 1943 Nag 185 = 1943 Nag LJ 296 (SB)	21
AIR 1921 Cal 459 = 24 Cal WN 914	20
(1882) 7 PD 16	23

M. N. Ghosh, Sakti Nath Mukherjee,
B. K. Basu, S. P. Ghosh, Premangshu
Chatterjee, Tarun Chatterjee, Goutam
Laha and D. N. Sen, for Appellant;
S. Gupta, Mrs. Gupta and R. N. Sinha,
for Respondent.

BANERJEE, J.:— This appeal arises
out of an application made under Sec-
tion 12 of the Hindu Marriage Act, 1955
at the instance of the husband against
the wife for annulment of the marriage
celebrated on 13th May, 1973. The ap-
plication was filed on 13th December,
1973. The husband in his petition stated
that they were married according to the
Hindu rites on 13th May, 1973. On 14th
May, 1973 the couple returned to the
residence of the petitioner at 7, Haridas
Daw Road, P. S. Behala. On the night of
15th May, 1973 which was the Fulsajja
night, the petitioner, it is alleged, desired
and demanded to consummate the mar-
riage but the respondent refused to agree
and in fact she made terrible opposition
amounting to invincible repugnance to
the act of consummation and the peti-
tioner found her to be mentally depressed
which deterred the petitioner from making
further progress for consummation of
marriage. On May 20, 1973 the couple
went back to the quarters of Ashis Bhow-
mick, brother of the wife, where the mar-
riage was celebrated and stayed there for
the night. It is alleged that the peti-
tioner husband made an attempt for con-
summation of marriage at Garia house but
the consummation could not be made due
to the opposition of the wife respondent.
On or about 4th June, 1973 the respon-
dent went to live at Poddar Park resi-
dence from her brother's quarter and on
27th June, 1973 the wife returned to the
residence of the petitioner at Behala. Be-
cause of the repeated refusals by the
respondent to consummate the marriage,
the petitioner persuaded the respondent
to be examined by a doctor and accord-

ingly with her consent the respondent in or about the first week of August, 1973 was examined by a Gynaecologist. The doctor after due examination found the respondent to be suffering from malformation of her organ and that in her present condition she was unable to allow the consummation of the marriage and penetration is impossible. It is alleged by the husband that during short stay of the respondent at the petitioner's residence or the short stay of the couple at the quarter of Ashis Bhowmick the petitioner made repeated attempts for consummation of the marriage but there could not be any conjunction of the body. It is alleged that the respondent suffers from low physical infirmity and/or abnormality. It is stated that the petitioner possesses sound normal health of young person with the ability to consummate marriage. It is further stated that the respondent is impotent and her mental and physical condition makes consummation of the marriage a practical impossibility and such condition existed at the time of marriage and continued to be so until the institution of the proceeding. Due to the physical malformation of her female organ the wife is physically unable to have sexual intercourse. She is also mentally so high-strung that it is impossible for the petitioner to have normal sexual intercourse with the respondent. It is further stated that the respondent is physically, mentally and psychologically impotent of the type known as quoad hunc or quoad hanc or in other words the respondent is at least impotent to the petitioner and the marriage cannot be consummated. On these allegations, the petitioner-husband prayed for annulment of the marriage. On 9th February, 1974 the wife respondent filed written statement to the allegation made in the petition. It is alleged that it was the petitioner who on Fulsajja night suggested that he would proceed cautiously to consummate the marriage and asked the respondent to be ready for the coitus gradually. The respondent did not at all oppose the desire of the petitioner for consummation or demonstrate any repugnance in the said act. It is alleged that there was a consummation of the marriage on 20th May, 1973 at the quarter of the respondent's brother but the penetration was slightly painful. It is stated that both the petitioner and the respondent felt and understood that it was the usual experience of a virgin girl who is married more than a decade after

attaining puberty. Both of them agreed at that time that the trouble would be over in course of time and naturally. The respondent further stated that she never demonstrated any reluctance for cohabitation. On the contrary, it is alleged, on a few occasions the petitioner enjoyed the respondent but the respondent felt considerable pain during coitus. It is alleged that the respondent believed that the petitioner did not allow time for preparation in respondent's body and the pain she had experienced was mainly due to rashness and want of reciprocal sympathy from the husband. It is further stated that having regard to the wishes of the petitioner the respondent agreed to consult a Gynaecologist and she was taken to Dr. D. L. Poddar who suggested a minor operation. It is stated by the Doctor that the difficulty could be over without the minor operation but that would require some time and co-operation amongst the spouses. The respondent denied any malformation of female organ or that penetration was impossible. It is stated that as Dr. Poddar suggested the minor operation, the respondent was willing to have the same but the petitioner and his relatives did not agree to bear the expenses whereupon the elder brother of the respondent undertook to pay the costs but the petitioner refused to co-operate. The respondent registered herself as a patient of E. E. D. F. Health Centre in or about June 1973 in order to seek assistance or advice in the matter. The attending Gynaecologist however was of the firm view that no operation was necessary and/or advisable and that the little difficulty that might have been experienced would be over by sympathetic co-operation of the husband. It is alleged that on 17-8-1973 the doctor of E. E. D. F. Health Centre wanted to talk with the petitioner but he avoided meeting the doctor. It is alleged that the respondent possesses normal health and the marriage between the parties was consummated. The allegations of mental incapability or repugnance to sexual intercourse when approached by the husband were denied by the respondent. It is alleged that the husband never enjoyed love plays. To the husband sex acts meant absolutely casual satisfaction, that is, mere physical action and nothing more. It is alleged that the elder sister-in-law of the petitioner was the first lady of the family and the wife found out that she has no claim on her husband's income. It is alleged that all the marriage gifts were made

over to the elder sister-in-law. It is stated that it is really shocking to find that such thing could happen. The respondent suggested that she should be given some money to defray her personal expenses, the petitioner directed her to seek for the money from her sister-in-law. It is further stated that the petitioner husband was habituated in drinking and suffered from guilty conscience.

2. The petitioner was himself examined and the sister-in-law was also examined and two friends to whom the petitioner talked about the non-consummation of the marriage just after the marriage were also examined. On behalf of the respondent, two doctors, whom the respondent consulted, were examined and the respondent herself deposed. It appears from the evidence of the doctors that the respondent is suffering from painful "vaginismus" or "narrow vaginal introitus". It also appears from the evidence of the doctor that the respondent is not suffering or was not suffering from any physical defect or malformation which is of permanent nature. The court below held that the respondent was not physically impotent as the impotency is not of permanent nature and is curable. Regarding the consummation of marriage the learned Judge held that there was consummation of marriage but the consummation was painful for her as the husband was hasty in his act. From the evidence it appears that though the respondent wanted to have the operation as suggested by the doctor, the petitioner and the members of his family were not agreeable. It appears that even after the case was filed, the respondent got herself operated as suggested by the doctor. It is held by the learned Judge that she was eager to make the marriage a success. The Court believed the respondent that she was not repugnant to the consummation with the petitioner and therefore did not accept the evidence of the husband that the wife was repugnant to the consummation of the marriage.

3. At the time of hearing of the case, we asked the husband and the wife whether they can reconcile between themselves even now. It must be stated that the husband was not agreeable and the wife wanted to live with the husband.

4. The short point for consideration, therefore, before us in this case, is whether there was consummation of marriage and if it is not consummated whether it is due to impotency of the wife.

5. While the matter was pending in this Court, the Marriage Law of 1976 was enacted. The Marriage Laws (Amendment) Act of 1976 amended S. 12 (1) (a) of the Hindu Marriage Act by S. 6 of Act 68 of 1976. Section 12 (1) (a) was amended by S. 6 (1) (a) of the new Act and for Cl. (a) the following clause was substituted.

"(a) that the marriage has not been consummated owing to the impotency of the respondent."

Before the amendment the words were as follows:—

"12 (1) (a). that the Respondent was impotent at the time of marriage and continued to be so until the institution of proceeding."

6. Mr. M. N. Ghose followed by Mr. Sakti Nath Mukherjee on behalf of the appellant and Mr. Sadhan Gupta followed by Mrs. Gupta on behalf of the respondent conceded that the change of law has not in any way changed the scope of the appeal and both of them agreed that no further opportunity need be given for the disposal of the case as envisaged in S. 39 of the Marriage Laws (Amendment) Act, 1976.

7. Mr. Mukherjee on behalf of the appellant contended that there was no consummation of marriage and that on the date of filing the application for divorce the respondent was impotent and therefore the petitioner is entitled to a decree for nullity of the marriage being voidable. It is nobody's case that there was consummation after the filing of the suit. But it is argued by Mr. Mukherjee that the Court below was wholly wrong in disbelieving the evidence of the petitioner husband for the alleged fact that even after the filing of the suit the respondent underwent the operation and corrected her defect in the female organism and after correction she can no longer be impotent or on the other hand the impotency must be of a permanent nature so that the husband can get a decree. It is argued by Mr. Mukherjee that under the section it is not stated that only in case of permanent impotency or incurable impotency, the husband can get a decree. It is argued by Mr. Mukherjee that the question of impotency is relevant only during the period of marriage and filing of the suit for dissolution.

8. Mr. Sadhan Gupta on the other hand contended that there was no doubt that the respondent was suffering from the disease and there was a defect. In

the words of Mr. Gupta "undoubtedly there was a defect in the respondent but the defect was curable and in fact was cured though after the suit was filed". Therefore it is argued by Mr. Gupta that the learned Judge is right in his finding and he held that there was no repugnancy to the act of consummation on the part of the respondent.

9. In so far as the consummation is concerned only two direct evidences are available, as usual, these are of the husband and of the wife. The husband stated that he tried to consummate on the date of Fulsajiya but it could not be consummated due to the violent resistance by the wife. It is further stated that the respondent did not agree to consummate the marriage. Between 15th May, 1973 and 20th May, 1973 the husband made several attempts to consummate the marriage but failed as the respondent did not co-operate. Even on 20th May, 1973 when the husband and the wife stayed at Garia house of the brother of the wife, the attempted consummation failed. He stated that there was no penetration at all in view of the respondent's malformation of the female organ though the husband tried for consummation. As against this, the wife stated in her evidence that there was consummation for 2 or 3 days out of 8 days of attempted coitus. It is admitted by the respondent wife that the intercourse for those 2 or 3 days was painful. It is stated that the respondent wife consulted a doctor in E. E. D. F. Health Centre at the insistence of the husband. It is further stated that the husband and the sister-in-law of the husband took her to Dr. D. L. Poddar on 8th August, 1973 and it is stated that none of the doctors detected any organic defect in the respondent. Dr. D. L. Poddar suggested to use a jelly; but the husband did not use it. She denied that the respondent was impotent. It is stated that the husband did not make any approach to consummate the marriage. She stated that there was consummation of marriage on 20th May, 1973 in normal course but the respondent felt some pain and there was a full penetration by the husband. It is, however, admitted by the respondent that the coitus was painful and that the wife had to see the doctor on 9th June for the purpose as there was pain. The wife contradicted herself in cross-examination when she said that she had sex acts for 7 or 8 days between 8th July, 1973 and 15th August, 1973. It appears from the examination-in-chief that out of 15 days

there were attempts to have coitus for 8/9 days and the marriage was consummated for 2/3 days only but the intercourse was painful.

10. We are, therefore, to see whether the wife is impotent and whether coitus is possible or not. According to the Rayden on Divorce, Eleventh Edition, page 156, "sexual intercourse or consummation is sometimes referred to as *vera coupla*". *Vera coupla* consists of erection and intromissio, that is, of erection and penetration by the male of the woman. Full and complete penetration is an essential ingredient of ordinary and complete intercourse. The degree of sexual satisfaction obtained by the parties is irrelevant. In the case reported in AIR 1970 SC 137, (*Digvijay Singh v. Pratap Kumari*) it has been stated by the Supreme Court as follows:—

"A party is impotent if his or her mental or physical condition makes consummation of the marriage a practical impossibility. The condition must be one, according to the statute, which existed at the time of the marriage and continued to be so until the institution of the proceedings. In order to entitle the appellant to obtain a decree of nullity, as prayed for by him, he will have to establish that his wife, the respondent, was impotent at the time of the marriage and continued to be so until the institution of the proceedings."

For the purpose of consideration whether the consummation of marriage was a practical impossibility due to the incapacity of the wife being impotent, we are to consider the medical evidence adduced in this case. On behalf of the respondent two doctors were examined, D. Ws. 1 and 2 and P. W. 1 the other doctor who deposed, was appointed by the Court on an application being made by the petitioner husband for the medical examination of the wife. The Court directed the parties to suggest the name of the doctors. The petitioner gave 3 particular names of Gynaecologists and further prayed that any Presidency Surgeon to be appointed by the Court might examine the respondent. The respondent also suggested three names who had examined the respondent before. The learned Judge by his order appointed P. W. 1 as a doctor to examine the respondent. The respondent was examined by P. W. 1 on 23rd September, 1974. The doctor of E. E. D. F. Hospital examined the respondent on 9th June, 1975. The suit was instituted on 13th De-

cember, 1973. The doctors D. Ws. 1 and 2 examined the respondent wife on 6th March, 1974 and 7th June, 1974. One of these doctors examined the respondent on 9th June, 1973.

11. D. W. 1, stated that he examined the respondent at the Health Centre on 6th and 7th March, 1974 and stated that an operation named dilatation of introitus under general anesthesia was performed by him on 7th March, 1974. The operation was advised by a senior doctor being D. W. 2. It is further stated that after operation there should not be any mechanical defect in the marital life. He however, did not know whether the patient is psychologically impotent even after the operation.

12. From the evidence of D. W. 1 it is clear that when he first examined the respondent wife she was suffering from some ailment and was advised an operation named "dilatation of introitus". D. W. 2, however, did not name any disease. He stated that after the operation the vaginal passage becomes normal in size and shape and that post operation examination revealed that the passage was clear and normal and there should not be any relapse to narrow introitus. It appears further that the respondent wife was the patient for the ailment in the private parts on 28-2-1974. D. W. 2, another doctor of repute did not say that the respondent has any malformation of female organ on clinical examination. It is stated that the patient respondent wife complained of 'dyspareunia' which means painful intercourse. He further stated that there was some functional spasm during the intercourse and the term "vaginismus means spasm of the vagina". He stated that the respondent is capable of normal intercourse. P. W. 1, another doctor, who examined the respondent wife after he was appointed by the Court, was directed to give report. He examined the respondent on 23rd September, 1974. He stated in his report as follows:—

"On touching the vaginal introitus there was vaginismus and she adducted her thighs, the palpitation was painful. It did not permit admittance of two fingers. The right index finger can be introduced through the tough hymenal ring and there was painful vaginismus".

It appears that all the doctors were one in respect of the diagnosis of the illness of the respondent wife to be vaginismus. The doctor who examined the respondent wife and performed some operation of

dilatation of vagina felt that she is physically capable of having normal marital life but they could not say whether they are psychologically so. The doctor (P. W. 1) who was appointed by the Court however examined the respondent wife long after the operation was performed on 6th March, 1974 was of the opinion that the respondent is still suffering from vaginismus and it is not possible according to him to have a normal marital life with the functional spasm of the vagina. The ratio of the evidence is according to us that the respondent was suffering from vaginismus and the intercourse was painful and even after the operation when the doctor appointed by the Court examined the respondent she was suffering from vaginismus and he reported that on touching the vaginal introitus there was vaginismus and the respondent wife adducted her thighs and the palpitation was painful. It must be stated that on 23rd September, 1974 the respondent wife was examined. The doctor appointed by the Court was asked to send the report in a closed cover which he did. The parties to the proceeding applied for inspection of the report of the doctor appointed by the Court and in presence of both the sides, the sealed cover was opened and both the sides had the opportunity to see the report. The doctor himself was examined as P. W. 1 on 11th March, 1975. On this very relevant portion of the report, namely, that

"on touching the vaginal introitus there was vaginismus and she adducted her thighs, the palpitation was painful. It did not permit admittance of two fingers. The right index finger can be introduced through the tough hymenal ring and there was painful vaginismus".

there was no cross-examination on behalf of the respondent. It appears, therefore, that the report, in so far as the Court appointed doctor is concerned was not challenged when the doctor was in the box and deposed long after the report was made. The parties had opportunity of looking at the report. It must be stated that the Court appointed doctor examined the respondent about 9 months after the suit was filed and about 6 months after the alleged operation for dilatation of vagina was performed by D. W. 1.

13. We must therefore hold that the respondent wife was suffering from vaginismus even on 23-9-1974 after the operation for vaginal dilatation was performed in March, 1974. It appears further

that when the respondent was first examined by Dr. Poddar on 8th August, 1973 he advised fenton operation as remedy of the disease from which the respondent was suffering but which was not performed at all.

14. Mr. Mukherjee contended that she was ill on the date of the marriage and at the time of filing of the present suit and there cannot be any consummation of marriage due to the impotency of the wife. It is no concern of the petitioner to see whether the impotency is curable or not in future.

15. Mr. Gupta however contended that unless the impotency is incurable the petitioner is not entitled to a decree. It is conceded by Mr. Mukherjee and Mr. Gupta that the change in law during the pendency of this case does not affect this application at all. Mr. Gupta however contended that if the impotency is curable the petitioner is not entitled to a decree for nullity.

16. From the evidence as hereinbefore made, the respondent must be held to be suffering from vaginismus. In Novak's Text Book of Gynaecology, at p. 663, it has been found that

"dyspareunia, or painful coitus, may be due to the presence of an actual lesion or it may be of psychic origin. The latter variety is not infrequently a defence mechanism built up by the woman who for one reason or another finds coitus distasteful."

It has also been stated by the Author that

"the sexual response is a complex phenomenon theoretically divisible into at least three components: psychogenic, anatomical, and hormonal. The importance of the first factor in the female is undisputed. The importance of the last two factors has been difficult to evaluate".

... ..

"Conditions in the pelvis which make coitus difficult or painful obviously call for correction. Certainly there is not justification for the superficial habit of those physicians who, without making a thorough survey of the individual woman's problem, merely give her a pat on the back or recommend dilatation of the vagina. Such treatment is quite sure to be unsuccessful".

In the present case, in view of the doctor's evidence it is quite clear that the dilatation of vagina performed in March 1974 did not correct the condition of the wife for successful "vera copula" even 6 months after the operation of dilatation of vagina,

the disease of vaginismus was still there and if a wife is suffering from vaginismus, the coitus or complete penetration is not possible. It has been stated by the respondent that the coitus when attempted by the husband was painful and the husband categorically stated that there was no sexual intercourse between the parties due to the impotency of the wife.

17. Mr. Gupta however strenuously argued that there was no doubt that there was some defect in the respondent wife but the defect is curable and not incurable and the petitioner is not entitled to a decree. It will appear that the question of curability was considered by English Cases and it has been found that if the respondent is agreeable to cure the defect by operation that will not be a cause for granting the nullity of the marriage.

18. Mr. Gupta referred to (1947) 2 All ER 886 at p. 890 and (1954) 3 All ER 736 in support of his contention. It is true that all the cases referred to by Mr. Gupta make it clear that the impotency if curable even after the action has been taken and even after the action is pending if the wife agrees to go in for operation for curing the defect the decree may be refused; but in so far as the Hindu Marriage Act is concerned, in our opinion, the curability of the disease of impotency is of no consequence if there was no consummation of marriage owing to the impotency of the respondent. It appears that before the amendment by 1976 Act, the period of continuance of impotency was that the respondent must be impotent at the date of marriage and must continue to be so till the date of the institution of the proceeding. It has now been amended and the husband is entitled to a decree if the marriage has not been consummated due to the impotency of the respondent. In this case we are of the opinion that the marriage could not be consummated and the consummation was practically impossible due to the respondent's suffering unfortunately from vaginismus and vera copula is not possible. In the facts of the present case the full and complete penetration by the male of the female is an impossibility due to the respondent being suffering from vaginismus. During the time and long thereafter the respondent was suffering from the said disease and even by operation admittedly performed by D. W. 1 on 7th March, 1974 the disease could not be cured and it was so found to exist on 23rd September, 1974 when the Court appointed Doctor examined the respondent wife.

19. In our opinion the curability of impotency is not a consideration for the purpose of deciding the case whether the marriage is voidable under S. 12 (1) (a) of the Act under the amended or un-amended section. It will appear from S. 13 of the Act that when Legislature thought that the question of curability is to be one of consideration for the purpose of the decision whether the divorce should be granted they made provision to that effect in the Act. It has been specifically provided in S. 13 (iii) and (iv) that to get a divorce the respondent must be "of unsound mind for a continuous period of not less than 3 years immediately preceding the presentation of the petition or suffering from a virulent and incurable form of leprosy". In the present S. 12 (1) (a) curability is not mentioned at all. It is therefore clear that the question of curability of impotency is not a relevant consideration for the purpose of the decision under S. 12 (1) (a) of the Hindu Marriage Act, 1955 as amended by the Marriage Laws (Amendment) Act, 1976. It appears to us that if it is found that there was no consummation of marriage due to the impotency of the respondent the petitioner is entitled to a decree.

20. The case reported in AIR 1921 Cal 459, (Birendra Kumar v. Hemlata Biswas) is a case under S. 19 of the Indian Divorce Act, 1869. The said case, in our opinion, is clearly distinguishable. At p. 462 it has been made clear that due to the syphilis for which one of the parties was suffering, the capacity for sexual intercourse is not necessarily affected. It will be further found that in the said case the Division Bench of this Court considered the effect of S. 56 of the Contract Act in the matter of marriage contract. In the said case it has been stated in respect of the impotency vis-a-vis disease as follows:—

"The fact that one spouse is afflicted with syphilis does not necessarily make him or her impotent. Impotency is ordinarily understood to mean incapacity which admits of neither copulation nor procreation, capacity for sexual intercourse seeming to the matter chiefly regarded in the adjudged cases on the subject. Hence impotency has been taken to mean physical and incurable incapacity from entering into the marriage, that is incapacity to consummate the marriage". We have already held that in view of the different wording of the section and in view of the fact that the Legislature

has used the word "incurable" repeatedly in S. 13 and did not use the word "incurable" in S. 12 (1) (a), in our opinion, curability of the disease making the respondent impotent does not fall for consideration of the Court if it is found that the marriage has not been consummated due to the respondent's impotency.

21. In the case reported in AIR 1943 Nag 185 (SB) on which Mr. Gupta relied, it has been held that if the marriage is consummated the decree for nullity cannot be granted and held that the impotency must be present at the time of the marriage and when the suit was filed. Admittedly in the present case, in our opinion, the respondent was suffering from vaginismus at the date of marriage and it continued at least till 23rd September, 1974 when the Court appointed doctor P. W. 1 examined her.

22. It appears to us from S. 12 (1) (a) of the Act, even before the amendment was concerned, that the impotency of the respondent must be between the date of marriage and the institution of the proceeding. It appears before the amendment that the condition for getting a decree was that the respondent must be impotent at the time of the marriage and continued to be so until the institution of the proceeding. If one of these conditions is absent, the decree cannot be passed. The English case, in so far as the curability of the impotency is concerned, cannot be applied in the present case as in our opinion the wording of S. 8 (1) (a) of the Matrimonial Causes Act, 1950 or for that matter the Matrimonial Causes Act, 1857 are quite different to S. 12 (1) (a) of the Hindu Marriage Act.

23. Mr. Mukherjee relied upon a case reported in (1882) 7 PD 16 (L. v. L.) in support of his contention. In the said case the ceremony of the marriage was performed between the parties on 29th August, 1876, the man being then 27 and the woman 23 years of age. They slept together at her father's house for 3/4 nights but the marriage was not consummated as the woman told the husband that she was not fitted for it. In February, 1879 the woman was examined by a medical man who gave evidence that she was suffering from vaginismus, that there was a spasmodic affection of the parts which were extremely painful to touch and the connexion was then impossible, but that a cure might be effected with no great risk to life. The woman was informed of this, and was requested to submit

to the operation, but refused. The woman having refused, the Court granted a decree nisi for nullity of the marriage on the ground of the ends of marriage have not been attained, and it is therefore desirable that the tie between the parties should be put an end to. In our opinion, in the present case, on the evidence, as it is, the wife was suffering from vaginismus and there was no consummation during the period because of the disease of the wife.

24. Mr. Mukherjee relied upon the case reported in (1956) 3 All ER 769 (M. v. M.) in support of his contention. In the said case the lady was also suffering from vaginismus and the decree was granted as the lady took no step for correction and as such the respondent was incapable of sexual intercourse.

25. Mr. Gupta however contended that the case supports the same, inasmuch as, though the respondent might be suffering from the disease she was always agreeable to have the disease corrected by operation. In fact she was operated and the respondent is not cured of the disease. In our opinion, the consideration of this Court is not that the disease is curable at a future date but whether for the impotency of the respondent, the marriage has not been consummated. If that is brought home, the Court is not to enquire whether the disease can be cured in future. It is for the Court to see whether the ends of the marriage have been attained or not when the action was initiated.

26. Mr. Gupta referred to the case reported in AIR 1968 Delhi 79 (S. v. R.) in support of his contention. In our opinion, this case has no application. In the case the Court below came to a finding that the petitioner husband was impotent at the time of the marriage and continued to be so until the institution of the proceeding and therefore they came within the mischief of the un-amended S. 12 (1) (a) of the Act.

27. The case reported in AIR 1957 Mad 243, (T. Rangaswami v. T. Arvindammal), in our opinion, does not carry Mr. Gupta's argument any further because in the said case it was found on fact that the impotency either organic or atonic impotency had been made out. In the said case the Bench relied upon the observation of Matrimonial Causes Act, 1950. In our opinion, this observation supports the case of the petitioner and not the respondent. In so far as the curability is concerned in

the Hindu Marriage Act as amended, that is beyond the scope of scrutiny of the Court. The provision as amended is more simple than what was there before the amendment. Before the amendment, if a party to the marriage was not impotent at the time of the marriage but became impotent before the institution of the suit, the petitioner was not entitled to a decree. Alternatively if the respondent was impotent at the time of marriage but was not impotent at the institution of the suit, the decree must be refused. Now however the statute has placed emphasis equally on the consummation of the marriage and the impotency of the respondent. If there is no consummation due to the impotency of the respondent as in this case, the petitioner is entitled to a decree.

28. In an unreported case being F. A. No. 313 of 1972, Reba Banerjee v. S. Banerjee decided by Mr. Justice Dutt and Mr. Justice Sharma on 14th July, 1976 (Cal) it has been held while deciding the case under the un-amended S. 12 (1) (a) of the Hindu Marriage Act that the

"respondent was impotent at the time of the marriage and continued to be so until the institution of the proceeding even subsequent potency of the appellant long after the institution of the proceeding will not stand in the way of granting a decree in favour of the appellant wife".

We respectfully agree with the said decision. The position in law has changed to an extent hereinbefore stated, the emphasis has been laid now on the question of non-consummation of marriage due to the respondent's impotency.

29. In our opinion, therefore, the learned Judge was wrong in rejecting the application of the husband. In the facts and circumstances of the case, the petitioner is entitled to a decree prayed for. The appeal is, therefore, allowed. The judgment and decree of the Court below are set aside.

30. There will be no order as to costs.

31. Let the operation of the order be stayed till one month after the long vacation.

SHARMA, J. :— I agree.

BY THE COURT 3-12-1976.

Let the operation of the Judgment and decree be stayed for a fortnight. Office is directed to supply certified copy of the Judgment and decree immediately to Mr. Gupta.

Order accordingly.

AIR 1977 CALCUTTA 221**NIRMAL CHANDRA MUKHERJI AND
BANKIM CHANDRA RAY, JJ.**

Samarendrajit Shaw, Petitioner v. The Collector of Excise, Calcutta and others, Respondents.

Civil Rule No. 3626 of 1971, D/- 5-7-1976.

Constitution of India, Art. 227 — Power of superintendence — Scope — Error of fact, even though apparent on face of record, cannot be corrected — Proceeding and show cause notice for breach of term of excise licence — Writ petition — Held, no scope for interference under Art. 227.

The jurisdiction of the High Court under Art. 227 is limited only to seeing that the subordinate Court functions within the limits of its authority and does not extend to correction of mere error of fact by examining the evidence and re-appreciating it. An error of fact, even though apparent on the face of the record is not subject to correction by the High Court in exercise of its jurisdiction under Art. 227. An error of fact can be corrected only by a superior court in exercise of its statutory power as a court of appeal. The High Court cannot in guise of its exercising jurisdiction under Art. 227 convert itself into a court of appeal when the Legislature has not conferred a right of appeal and made the decision of the subordinate court or tribunal final on facts. AIR 1975 SC 1297, AIR 1954 SC 215 and AIR 1951 Cal 193 (SB), Relied on.

(Para 13)

On the basis of the inspection report submitted by the Inspector of Excise disclosing that there had been breach of the term of excise licence, the impugned proceeding was started against the petitioner and show cause notice was served upon him. The petitioner did not submit his explanation and before the case had been heard and decided the petitioner filed writ petition under Art. 227 challenging the impugned proceeding and show cause notice.

Held, that there was no room for any interference by the High Court under its power of superintendence. Moreover, the impugned proceeding which had been started by the Collector on the report of the Inspector was not per se without jurisdiction. The petitioner had been given opportunity of show cause against charges mentioned in the said notice. The petitioner could state his objections against

the said proceeding. If the Collector of Excise after hearing would hold against the petitioner there was provision for appeal before the Excise Commissioner and a further appeal to the Board of Revenue. Moreover, if the Collector of Excise approached in an arbitrary manner and if he did not consider all the relevant materials that would be produced by the petitioner before him in deciding the case and if his decision be biased then the petitioner could challenge the same on an application under Art. 227. AIR 1965 MP 142, Distinguished. (Para 15)

Cases Referred: Chronological Paras

AIR 1975 SC 1297: (1975) 1 SCC 858	13
AIR 1965 MP 142: 1965 Jab LJ 583	14
AIR 1954 SC 215: 1954 SCR 565	13, 14
AIR 1951 Cal 193 (SB)	13

Manjula Bose, Kalyanbrata Roy, for Petitioner; Bhabani Shankar Bagchi, Mrs. Archana Sengupta, for Respondents.

B. C. RAY, J.:— This is an application under Art. 227 of the Constitution of India and it is directed against the order No. 648 R. E. dated 25th of October, 1971 passed by the Collector of Excise, Calcutta as well as against the show cause notice dated 24th December 1970 issued by the Collector of Excise, Calcutta in Misc. Case No. 61 (F. L.) of 1970-71.

2. The petitioner is the proprietor of foreign liquor 'off' shop under the name and style of M. L. Shaw and Co. at 15, Ashutosh Mukherjee Road, Bhowanipore, Calcutta and the petitioner has been running the said business under licence granted by the Collector of Excise, Calcutta, the respondent No. 1 from year to year for more than 43 years. The petitioner furnished a security deposit of more than Rs. 10,000/- in cash including a lump fee of Rs. 300/- for the year 1971-72 in the Calcutta Collectorate Treasury in favour of the Excise Department for the E. L. 'off' licence for the said shop. On November 23, 1970, the respondent No. 2, Utpal Chakraborti, the then Inspector of Excise, Bhowanipore range, inspected his shop at about 2.20 P. M. At that time the salesman Mathurmohon Shaw was alone present in the said shop. On the demand of the Inspector the said salesman handed over to him the Inspection Report Book as well as Excise Daily Account Book. The Inspector after going through the daily Account Book enquired of him as to why the sale of liquor of 21st and 22nd of November, 1970 were not entered in the said Daily Account Book whereon the salesman Mathurmohon Shaw

intimated him that Pradip Kumar Dey who was incharge of transferring the sale figures of liquor bottles in the daily Excise Account Book from the daily Excise Ledger Book of the excise shop disappeared suddenly from the shop after closing the daily Account Book on 20-11-1970. The said salesman also stated that on 22nd November, 1970, the said salesman Pradip Kumar Dey sent a letter to the petitioner in the evening intimating that he had to leave the shop without informing anybody as he was frightened by some antisocial people on the night of 20th November, 1970 as he refused to give them liquor bottles without payment of the price for the same. The Inspector, therefore, asked the salesman to produce the daily Excise Ledger Book and daily Excise Stock Book of the shop and he accordingly handed over the same to him. The petitioner was not present in the shop at the time. The Inspector, the respondent No. 2, looked into the last entries of sales of liquors as well as of receipts in the daily Excise Ledger Book and also daily Excise Stock Book of the shop which were made upto date.

3. - The Inspector, thereafter, directed the salesman Mathur Mohan Shaw to show and count the liquor bottles (whisky in the Almirah) and the salesman began to count the same. But all of a sudden it was stopped by the Inspector who asked him to open the lock of the collapsible gate of the godown in the shop room. The salesman opened the godown and started showing him the bottles lying in the case of whisky. The Inspector, however, asked the salesman that his help was not required in the counting of bottles there in the godown and directed him to send the cooli-bearer in the godown. The salesman followed the bearer inside the godown and reminded the Inspector that the responsibility of showing and counting of the stock of liquors to him lay on the salesman and as such the salesman should be allowed to be present at the time of counting the stock of liquor bottles, but, unfortunately the Inspector refused to allow him to be there and asked him to go out. The salesman then told the Inspector that he would report the matter to the licensee and would call him over the phone but the Inspector told him that there was no necessity of informing the licensee. The salesman, however, told the petitioner over the phone about this. Subsequently, Dipendra Lal Shaw, the Sales Manager of the said shop also came and requested the Inspector to permit him

to be present to help him to count the liquor bottles but the said request was turned down by the Inspector. The petitioner, thereafter, came to the shop and found the Salesman as well as the Sales Manager standing outside the godown as they were prevented from entering into the godown for counting and verifying the stock of liquors. On the direction of the petitioner the salesman and the Sales Manager counted the stock of liquors (whisky) and found that the same tallied with the stock of liquors as entered in the daily Excise Ledger Book and Excise Stock Book of the shop. The petitioner's son Dipendra Lal Shaw then challenged the incorrect recording of figures by the Inspector and requested him to recount and verify the stock of whisky bottles in their presence. The Inspector Sri Utpal Chakraborti, however, declined to recount the stock of liquors or to verify his counting of liquor bottles as recorded by him. The Inspector hurriedly completed the writing of the Inspection Report on the Inspection Book and asked the petitioner to sign the Report Book for the alleged irregularities. The petitioner, therefore, expressed his inability to sign. On the basis of the said inspection report the Misc. Case No. 61 (F.L.) of 1970-71 was started and the petitioner was served with a notice No. 163 (F.L.) dated 24th of December, 1970 asking the petitioner to show cause within seven days of the receipt of this notice to explain as to why his licence would not be cancelled or action otherwise would not be taken against him for the irregularities mentioned therein as he violated the condition No. 15 of the licence. This notice has been marked as Annex. D to the petition.

4. It has been stated that the salesman Mathuramohon Shaw wrote a petition dated 3rd December, 1970, addressed to the Collector of Excise describing the incidence that occurred at the time of inspection by the Inspector of Excise on 23rd of November, 1970. The petitioner also stated that in the Excise daily Ledger Book liquors that have been purchased from licensed dealers under excise pass and challans have been entered and the liquors that are sold to the public under cash memos after closing of all transactions of the day are also entered in the said Ledger Book of the shop. It is from the entries of the Excise Daily Ledger Book the figures are posted in the Excise Daily Account Book. The said Excise

Daily Ledger Book and the Excise Daily Stock Book and cash memos were handed over to the Excise Inspector, the respondent No. 2 and as such there was no difficulty for him to verify the actual stock of whisky in the godown. The petitioner has also stated that he submitted monthly statements for the month of November, 1970 in the Office of the Collector of Excise on 7-12-1970 and the same was duly acknowledged by the Office. On December 16, 1970, the Inspecting Officer visited the shop and checked the daily Account Book and found the same as correct. It has also been stated that the self-same inspecting Officer also visited the shop on 24th December, 1970 and looked into the daily Account Book and no discrepancy could be found out in the stock balance of 'India-made' whisky. It has been submitted that in view of the said monthly statements being found correct the litterage fee being accepted on its basis the impugned cases as well as the impugned show-cause notice ought not to have been started against the petitioner and the same are liable to be set aside.

5. On the 16th of December, 1971, the instant Rule issued but no interim order was passed. The petitioner was given liberty to move for interim order after serving notice of the application on the opposite parties. On December 20, 1971, an order of interim injunction was made restraining the Collector of Excise, the opposite party No. 1 from proceeding with the show-cause notice till the disposal of the rule. It was also ordered that the Collector the respondent No. 1 will be at liberty to extend the excise licence for such period as he might think fit.

6. An affidavit-in-opposition sworn on 27th June, 1972 by Sri Debesh Chandra Sengupta, Collector of Excise, Calcutta has been filed. It has been stated that the Inspector of Excise, Sri Utpal Chakraborti on November 23, 1970, checked the physical stock of India-made whisky with the book balance of the prescribed Account Book namely daily Account Book and found discrepancies in the stock as noted in his inspection report. On the basis of the said inspection report the Collector of Excise, Calcutta drew up a miscellaneous proceeding being case No. 61 (F.L.) of 1970-71 and asked the licensee by memo No. 163 (F.L.) dated 24-12-1970 to show cause why his licence should not be cancelled. The petitioner without giving any explanation to the said show-cause notice moved this application. It

was also averred that the stock of whisky on counting did not tally with the stock as entered in the daily Excise Account Book. It has been submitted that the said misc. case was not started mala fide by the Collector nor the Collector acted in excess of his jurisdiction in starting the said misc. case. It has also been averred that the petitioner's licence has been renewed from time to time.

7. An affidavit-in-opposition sworn by Sri Utpal Chakraborti, the Inspector of Excise, Bhowanipore range, the respondent No. 2 was also filed. It has been stated that on 23-11-1970 he inspected the shop in question from 2-20 p.m. to 4-30 p.m. and after counting the physical stock of India made whisky thrice he was sure about the discrepancy in the stock that was shown in the daily Excise Account Book. He denied that he abused the petitioner's salesman Mathuramohon Shaw nor did he prevent him to be present in the godown at the time of counting the said stock of liquors.

8. An affidavit-in-reply sworn by the petitioner reiterating the statements and allegations made in the petition have been filed on behalf of the petitioner. A supplementary affidavit has been filed on behalf of the petitioner on 22nd August, 1972. It has been stated that the Inspection Reports in respect of the shop made by Sri S. Biswas, the Inspector of Excise, Foreign Liquor (G) dated 10-6-1972 and 11-7-1972 are necessary to be considered for the decision of this case and the said reports be considered for the decision of this case and the said reports have been annexed as Annexs. A-2 and A-3 respectively to the supplementary affidavit.

9. Mr. Kalyanbrata Roy, learned Advocate appearing on behalf of the petitioner has submitted that the inspection report submitted by the Inspector of Excise, the respondent No. 2, is wholly mala fide and bad inasmuch as the Inspector did not at all consider the daily Excise Ledger Book and the daily Excise Stock Book where the stock that was left after closing of the transactions on 21-11-1970 and 22-11-1970 had been correctly entered. The said books were handed over to the Excise Inspector but he though considered the same did not refer to them and the alleged discrepancies in stock was found by him in his inspection report on the basis of the excise Account in which the entries after closing of the transactions on 21-11-1970 and 22-11-1970 had not been entered.

10. Mrs. Manjula Bose, learned Advocate appearing subsequently on behalf of the petitioner has contended vehemently that in the shop the daily sales and purchases are entered in the daily Excise Ledger Book and the stock that remains after the closing of the sale is entered in the daily stock book. In the daily Excise Account Book the figures are entered from the daily Excise Ledger Book and from the daily Stock Book. The said Books were handed over to the Inspector of Excise who could have easily verified the actual stock position after closing of all transactions of the said two days i.e. on 21-11-1970 and 22-11-1970 from the two books and the Inspector could have verified the actual stock as entered in the said daily Excise Ledger Book and the daily Stock Book as the daily Account Book was not written up-to-date. It has also been submitted that in view of the fact that in the daily Excise Ledger Book and the daily Stock Book entries made of all the transactions that took place on the said dates and the stock that remained at the close of the transactions the respondent No. 2 ought to have verified the stock with reference to the said two books. As such there has been no violation of the terms and conditions of the licence. Moreover, sufficient explanation has been given as to why the figures could not be posted in the daily Account Book on 21-11-1970 and 22-11-1970. It has next been contended that the monthly statement of November, 1970 was submitted on 7th Dec., 1970 and the said monthly statement was checked by the Inspector of Excise, Foreign Liquor (G) on 10-6-1972 and the Inspector found the statement to be in order and litterage fee on the basis of the said monthly statement was also accepted. As such it has been contended that there is no discrepancy in the stock of India-made whisky and so the proceeding in question is a mala fide one and the same is biased and without jurisdiction. The said proceeding as well as the impugned notices are liable to be set aside.

11. It has also been submitted that the impugned proceeding is also bad inasmuch as there has been no violation of condition No. 15 of the licence. It has been submitted that the petitioner produced his licence and also produced the daily excise Ledger Book and daily Excise Stock Book as well as the cash memo which will clearly show the correct account of the sale of liquor and the posi-

tion of the stock after such sale. The petitioner also produced the daily Excise Account Book and explained the reason for not posting the figures in the Daily Account Book on 21-11-1970 and 22-11-1970.

12. Mr. Bhabani Shankar Bagchi, learned Advocate for the respondent has urged that the Collector has power to initiate proceeding for breach of the terms and conditions of the licence. In this case Mr. Bagchi submitted that the impugned proceeding has been started on the basis of the Inspector's report and notice was issued directing the petitioner to show cause against the charges mentioned in the said notice. The petitioner without submitting any explanation has challenged the said notice in this application. This application, Mr. Bagchi submitted, is premature and should be dismissed inasmuch as the proceeding started by the Collector is not without jurisdiction. It has also been submitted that whether the report of the Inspector is biased or not and whether the petitioner has violated the terms of the licence or not can be decided only after the petitioner submits his explanation and after the petitioner is heard.

13. It appears that the petitioner in this application has challenged the validity of the proceeding started by the Collector as well as the issue of the notice directing the petitioner to show cause on the charges mentioned in the notice as to why the licence should not be cancelled. The petitioner has challenged the said notice on the main ground that the proceeding was arbitrary and mala fide and as such the same should be set aside. The petitioner does not dispute that the Collector has got jurisdiction to initiate proceeding for breach of the terms and conditions of the licence and as such the instant proceeding is not per se without jurisdiction. The only challenge to the initiation of the said proceeding is that the report of Excise Inspector on the basis of which the impugned proceeding has been initiated is a biased and mala fide one inasmuch as there was no discrepancy as regards the stock of India-made whisky after the close of sale on 21-11-1970 and 22-11-1970 as the monthly statement of November was accepted as correct. To decide this question it is necessary to consider the scope of the provisions of Article 227 of the Constitution. In AIR 1951 Cal. 193 (SB), Dalmia Jain v. Sukumar Mukherjee it has been held that power

of superintendence is to be exercised only to keep the subordinate courts within the bounds of their authority and not for correcting mere errors. The said decision was relied upon in 1954 SCR 565: (AIR 1954 SC 215), Waryam Singh v. Amarnath. In (1975) 1 SCC 858: (AIR 1975 SC 1297), Babhutmal Raichand Oswal v. Laxmi Bai R. Tarta it has been observed by the Supreme Court that the jurisdiction of the High Court under Article 227 is limited only to seeing that the subordinate court functions within the limits of its authority and does not extend to correction of mere error of fact by examining the evidence and reappraising it. An error of fact, even though apparent on the face of the record is not subject to correction by the High Court in exercise of its jurisdiction under Article 227. An error of fact can be corrected only by a superior court in exercise of its statutory power as a court of appeal. The High Court cannot in guise of its exercising jurisdiction under Art. 227 convert itself into a court of appeal when the Legislature has not conferred a right of appeal and made the decision of the subordinate court or tribunal final on facts.

14. In AIR 1965 Madh Pra 142, Durg Transport Co. v. R. T. A., Raipur the petitioner company applied for renewal of its stage carriage permits in three different routes before the Regional Transport Authority, Raipur and Janata Motor Transport Co-operative Society Ltd., Durg also applied for grant of fresh permits in the said three routes in lieu of permits held by the petitioner. The R. T. A. refused to renew the permits of the petitioner and granted permits to the said co-operative society in respect of two of the said three routes and directed for inviting applications for permit in respect of the third route. Against the said order appeals were filed before the State Transport Appellate Authority and application for an interim stay of operation of the order granting permits to the respondent Society for two routes and the invitation of fresh applications for third route. The appellate authority stayed the operation of the order inviting application for the third route but it rejected the prayer for interim stay of operation of the order granting permits to respondent Society. Against the said order an application under Art. 227 of the Constitution was filed. It has been held that the Appellate Authority is undoubtedly vested with the discretion whether to grant stay or make any interim order in an appeal

pending before it. But the discretion has to be exercised according to settled legal principles and not contrary to them. The Appellate Authority in making the impugned order approached the matter in an arbitrary manner and against all legal principles and as such the said order can be quashed on a petition under Art. 227 of the Constitution. It has also been observed relying on the decision in AIR 1954 SC 215 that the power of superintendence is not restricted to cases of non-exercise or illegal exercise of jurisdiction but extends also to cases where there has been a miscarriage of justice occasioned by errors of law or procedure which cannot be corrected otherwise. This decision does not apply to this case.

15. In this case only a show-cause notice has been issued to the petitioner. The petitioner has not submitted his explanation and the case has not yet been heard and no decision has been arrived at by the Collector of Excise. As such there is no room for any interference by this Court under its power of superintendence. Moreover, as we have already pointed out that the impugned proceeding which has been started by the Collector on the report of the Inspector is not per se without jurisdiction. The petitioner has been given opportunity of showing cause against charges mentioned in the said notice. The petitioner can state his objections against the said proceeding. If the Collector of Excise after hearing holds against the petitioner there is provision for appeal before the Excise Commissioner and a further appeal to the Board of Revenue. Moreover, if the Collector of Excise approached in an arbitrary manner and if he does not consider all the relevant materials that will be produced by the petitioner before him in deciding the said misc. case and if his decision be biased then the petitioner can challenge the same on an application under Art. 227 of the Constitution.

16. It has been strenuously urged by the learned Advocate for the appellant that the entries regarding sales and purchases of liquor of every day including 21-11-1970 have been duly made in the daily excise Ledger Book and daily Stock Book from where the figures are noted in the daily Excise Account Book. The transactions in respect of the said dates were not entered as Pradip Kumar Dey, the salesman disappeared from the shop after writing the Daily Excise Account Book on the night of 20-11-1970 without leaving any intimation to the petitioner

or to the other employees of the shop. It was only in the evening of 22-11-1970 that he intimated about his unwillingness to work in the shop any longer by his letter to the petitioner and as such in the daily excise Account Book the entries in respect of transactions of the said two dates have not been made. It has also been submitted that the cash memos were produced before the Excise Inspector, the respondent No. 2, and from the same the sales of liquor on the said two dates would be evident.

17. The Inspector ought to have considered the said cash memos as well as the daily Excise Ledger Book and daily excise Stock Book and it would have revealed that there was no discrepancy regarding the stock of liquor (India-made whisky) on 23-11-1970. It was also submitted that the petitioner submitted monthly return of November, 1970 on 7-12-1970 and litterage fee was accepted on its basis by the respondents. The said return was duly checked by the Inspector of Excise, Foreign Liquor (G) on 10-6-1972 as will be evident from the inspection report and there was no discrepancy regarding stock of India-made whisky. So the charges are baseless. We have already held that the Collector of Excise had jurisdiction to start the misc. case on the basis of the Inspector's report which disclosed that there has been a breach of term No. 15 of the excise licence. Now whether there has been no violation of the said term and misc. case shall be dropped is a matter to be decided by the Collector after considering the causes shown by the petitioner and after hearing him. It is neither proper nor expedient and just to express any opinion on the merits of the said misc. case.

18. In the premises aforesaid all the contentions raised on behalf of the petitioner having failed the Rule is discharged. All interim orders are vacated. There will be no order as to costs in the circumstances of the case. Let the operation of the order be stayed for a period of six weeks.

N. C. MUKHERJI, J.:— I agree.

Rule discharged.

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JANAH AND A. N. BANERJEE, JJ.

Syed Ali Kaiser, Appellant v. Mst. Ayesha Begum, Respondent.

A. F. O. D. No. 238 of 1969, D/- 23-2-1977.

(A) W. B. Premises Tenancy Act (12 of 1956), S. 3 (1) (b) — Leases exempted from the provisions of the Act — Original lease of 15 years with option of renewal for a further period of one year — Exercise of option for renewal does not constitute a fresh lease for one year.

Held that the subsequent period of one year for which the lessee had exercised his option in terms of the lease could not be called to be a fresh lease. It was a continuation of the lease as originally executed. The lessee was therefore, not entitled to any protection under the West Bengal Premises Tenancy Act because such lease was outside the provisions of the said Act by virtue of S. 3 (1) (b) of the Act. AIR 1965 Cal 55, Followed.

(Para 5)

(B) Contract Act (1872), S. 74 — Payment of reasonable compensation for breach of contract — Wrongful occupation of lessee after expiry of period of lease.

Held that there being no fraud or misrepresentation as to the period of 15 years fixed in the lease a sum of Rs. 50/- per day agreed to be reasonable compensation for the breach of condition was not unjustified.

(Para 6)

Cases Referred: Chronological Paras

(1975) 1 Cal LJ 581	5
AIR 1969 SC 117	5
AIR 1965 Cal 55 : 68 Cal WN 1036	5
(1951) 1 KB 689	5
AIR 1922 Cal 514 : 26 Cal WN 711	5

P. N. Mitter, Sudhir Kr. Bose, Hari Narayan Mukherjee, Pronob Kumar Ghosh, for Appellant; Ranjit Kumar Banerjee and Monon Kumar Ghosh, for Respondent.

JANAH, J.:— This appeal is by the defendant and it arises out of a suit for recovery of possession of a cinema house on the expiry of the lease. The plaintiff's case is that she is the owner of premises No. 2-C, Krishna Lal Das Road on which the disputed cinema house stands. The major portion of the suit premises along with fittings, fixtures and furniture was demised to the defendant under a registered Deed of Lease dated June 29, 1951 for the purpose of showing cinema films

and for variety shows and other light entertainments. The lease was for a term of 15 years commencing from 1st June 1951 with option of renewal by the lessee for a further period of one year. The rent reserved was at a progressive rate, the rent for the last five years being at the rate of Rs. 1,150/- per month and the same rate of rent was also reserved in case the lessee exercised the option for a further period of one year. On the expiry of the original term of 15 years the defendant exercised his option for a further period of one year and on the expiry of the said further period on 31st May 1967 he was served with a notice by the plaintiff demanding possession. The defendant having failed to comply with the notice the plaintiff instituted the suit for recovery of possession. In the suit the plaintiff claimed liquidated damages at the rate of Rs. 50/- per diem on account of wrongful occupation of the defendant in terms of a covenant contained in the lease.

2. The suit was contested by the defendant and his defence, inter alia, was that the plaintiff had no locus standi to institute the suit inasmuch as she is a Pakistani National and in view of the Government of India, Ministry of Commerce Notification No. 12/2/65 E. PTY. dated 10th September 1965 issued under R. 133 (V) of the Defence of India Rules, 1962 the suit property vested in the Custodian of Enemy Property with effect from 10th September 1965. The further defence of the defendant was that he was persuaded and induced to sign the lease on the express representation and assurance that the lease was for the term of 25 years and the signature of the defendant was obtained by fraud and mis-representation. The defendant alleged that he had put his signature without knowing the contents of the document. Accordingly it was claimed that the document was vitiated for want of intelligent execution, and also fraud on the part of the plaintiff. The defendant claimed that he was in lawful occupation in accordance with the real agreement between the parties which, however, was not fraudulently incorporated in the lease.

3. The trial court upon a consideration of the evidence adduced in the suit came to the conclusion that the plaintiff was not a Pakistani citizen but that she was an Indian citizen and held that the suit was perfectly maintainable by her. On the question of fraud and mis-representa-

tion the trial court found in favour of the plaintiff and came to the conclusion that the document was executed by the defendant with full knowledge about the terms and conditions of the lease. The trial court held that the plaintiff was entitled to recover possession of the demised premises on the expiry of the period fixed by the lease. The trial court, further held that the amount fixed in the document by way of liquidated damages should be paid by the defendant for his wrongful occupation. The suit was accordingly decreed in favour of the plaintiff. Against the said decision the defendant has come up in appeal.

4. Mr. Mitter learned Advocate for the appellant has not pressed the defence case regarding fraud and mis-representation in the matter of execution of the document by the defendant. He has contended before us that the finding of the trial court that the plaintiff is an Indian citizen is not warranted by the materials on record. According to him, the trial court ought to have held that the plaintiff who was admittedly an Indian citizen on the date of execution of the lease which has been marked Ext. 1 in the case, lost her Indian citizenship as she had acquired Pakistani citizenship. In order to substantiate this contention Mr. Mitter has drawn our attention to the notice of demand upon the plaintiff by the Income-tax Department, Ext. 3 series, in which the address of the plaintiff has been mentioned as 6, Hastings Street, Calcutta. Our attention was also drawn to the Assessment Orders passed by the I.-T. O, Ext. 4 series, wherein the address of the plaintiff has been mentioned as C/o. M/s. A. N. Tagore and Company, 6 Hastings Street, Calcutta-1. From this it was contended that the plaintiff had no permanent residential address in Calcutta and that is why her address was mentioned as C/o. M/s. A. N. Tagore and Company. It appears that M/s. A. N. Tagore and Company was dealing with the income-tax matters of the plaintiff. The plaintiff being a lady obviously entrusted her income-tax matters with her lawyer and that is why such address was given. It is significant to note that in the assessment orders, Ext. 4 series, the plaintiff has been described as a "resident and ordinarily resident". This would show that the plaintiff was a resident and ordinarily resident in India and she was an assessee under the Indian I.-T. Act. In this connexion a great deal of criticism was made over the petitions filed on be-

half of the plaintiff in connexion with the defendant's petition under O. 11, R. 12 of the C. P. C. By that application which was filed on the 13th of March 1968 the defendant prayed for an order directing the plaintiff to make discovery on oath of the documents which were in her possession. In the petition of objection filed on behalf of the plaintiff on the 26th of March 1968 against the defendant's petition for discovery it was categorically stated that the plaintiff is not a Pakistani National but she was an Indian by birth and nationality and she was a holder of Indian passport. Some time, however, was prayed on the ground that the defendant was out of town. Subsequently, on the 8th July 1968 another application was filed on behalf of the plaintiff praying for some further time on the ground that the plaintiff had been to Dacca to see her sons and had not come back yet. The application was filed on the 8th July 1968. It was contended by Mr. Mitter that the plaintiff could not have returned to India within the period of validity of the passport. The passport, Ext. 2, shows that the period of validity of the passport was upto the 10th of July 1968. Mr. Mitter contended that the petition for time was filed on the 8th July 1968 and it was not possible for the plaintiff to come back to India within the 10th of July 1968. Mr. Mitter contended that this Court should, therefore, presume that she returned to India with a Pakistani passport. Apart from the fact that such a presumption is not permissible in law, the Passport, Exhibit 2, itself bears an endorsement showing that the plaintiff did, in fact, return to India on the 9th July 1968. This contention advanced by Mr. Mitter on the basis of the photostatic copies of the passport which were marked Ext. 2 (a) has, therefore, no substance in view of the endorsement appearing on the original passport Ext. 2. The oral evidence which has been placed before the Court in this connexion is that of the two witnesses examined on behalf of the plaintiff and the only witness examined on behalf of the defendant P. W. 1 is the son of the plaintiff. He has stated that his mother, that is, the plaintiff, is an Indian National and not a Pakistani National. To the same effect is the evidence of P. W. 2 the brother of the plaintiff. On the other hand, the defendant, who examined himself as D. W. 1, has stated that he has no personal knowledge if the plaintiff is a Pakistani National or not. He said that he 'heard it from them'. Apart from the

fact that the plaintiff was granted an Indian passport by the Central Government there is the undisputed fact that at the time of execution of the Deed of Lease the plaintiff was an Indian Citizen and she was an Indian citizen by birth. By merely going to Pakistan and staying there for some time the plaintiff could not have lost her Indian Citizenship unless she renounced the Indian citizenship and voluntarily opted for citizenship of another country. In this state of evidence it must be held that the trial court has rightly found the plaintiff to be an Indian citizen.

5. The next contention advanced by Mr. Mitter in support of the appeal is that the defendant was entitled to protection under West Bengal Premises Tenancy Act, 1956. This contention was advanced on the basis that the original lease which was for 15 years, expired on the 31st of May 1966. Thereafter by the clause for renewal contained in the lease the defendant exercised the option and the term of the lease was extended by one year. The contention is that this exercise of option for renewal constitutes a fresh lease for one year and, therefore, it is not covered by S. 3 (1) (b) of the Premises Tenancy Act. In support of this contention Mr. Mitter relied upon the decision in *Basanta Charan Sinha v. Rajani Mohan Chatterji*, reported in 26 Cal WN 711: (AIR 1922 Cal 514). In that case the parties entered into an agreement for a lease of certain premises at a certain rent for three years with option to the lessee to renew it for a further period of three years. After the Calcutta Rent Act of 1920 was passed an application was made to the Rent Controller for fixing standard rent. This was refused on the ground that the lease was one for five years and upwards. On revision this Court held that the lease could not be held to be one for a period of over five years inasmuch as the application for standardisation of rent was filed before the Rent Controller before the expiry of three years from the date on which the lessee was put into possession by virtue of the agreement. This case, therefore, is very much different on facts and it cannot be held to be an authority for the proposition contended for by Mr. Mitter. The next decision cited by Mr. Mitter in support of his contention is the case of *Purushottam Das Murarka v. Harendra Krishna Mukherjee*, reported in (1975) 1 Cal LJ 581. In that case the lease was initially for a period of five years. There was a condition that "if the lessee so de-

sire" the lessor shall "grant a fresh lease for a term of seven years". The question which came up for consideration was whether such a lease would be governed by the Calcutta Thika Tenancy Act or whether such a lessee was excluded from the definition of a Thika tenant by virtue of S. 2 (5) (b). Section 2 (5) (b) of the Calcutta Thika Tenancy Act provides that a tenant holding under a registered lease in which the duration of the lease is expressly stated to be for a period of not less than 12 years is not a Thika tenant. Moreover, in that case the stipulation was that the lessor shall "grant a fresh lease for a term of seven years". In view of the provision of S. 2 (5) (b) of the Act it was held that the period of the two leases could not be added up to make it a lease for a period of not less than 12 years. There was in fact no renewal of the original lease but a fresh lease was executed. That decision, therefore, is of no help to the appellant in the present case. In considering the said question the Division Bench had occasion to consider the decision of another Division Bench of this Court in the case of Satadal Basini Das v. Lalit Mohan Dey, reported in 68 Cal. WN 1036: (AIR 1965 Cal 55). In the case of Purushottam Das Murarka the Division Bench took the view that as the lease in Satadal Basini's case was initially for a period of twenty years the lessee could not have been a thika tenant. Their Lordships, therefore, did not examine Satadal Basini's case any further. It would, however, appear that in Satadal Basini's case the initial lease for twenty years was continuing when the Calcutta Thika Tenancy Act came into force on the 28th of Feb. 1949. That lease eventually came to an end on the 15th Sept. 1949. Thereafter by virtue of a clause for renewal contained in the lease the lease was renewed for a further period of six years. Therefore, although the lease was initially for a period of twenty years the subsequent period for which it was renewed was only for six years. This aspect of the matter was considered by the Division Bench in Satadal Basini's case as would appear from the following passage in the judgment of the said case:

"The controversy then reduces itself to this: what was her status after the said date? Was she a tenant? If so, was she a thika tenant? Obviously, if the defendant was not a tenant after the above date, September 15, 1949, she can have no defence to the present action for ejectment and her present appeal must fail on

that single and simple ground. If, however, she was or continued to be a tenant after the aforesaid date, the question would naturally arise as to what was the nature and character of her said tenancy." Their Lordships then proceeded to consider the two possible views of this aspect of the case, namely, that it was a new tenancy or that it was the old tenancy continued under its renewal clause subject to its terms. On a consideration of several authorities of this Court as well as of the Supreme Court their Lordships came to the conclusion that the old relationship of landlord and tenant between the parties continued and did not come to an end and the lease between them did not determine, merely by reason of expiry of the original period of twenty years but survived in or by reason of its renewal clause aforesaid, which, as one of its terms, still retained its full vigour. We respectfully agree with the view taken by the Division Bench in Satadal Basini's case and in our view the said decision applies to the facts of the present case with full force. Mr. Mitter also relied on the decision of the Supreme Court in the case of Chhatu Ram Horil Ram Pvt. Ltd. v. State of Bihar reported in AIR 1969 SC 117. In that case the Supreme Court was considering the effect of S. 4 (1) (a) of the Bihar Land Reforms Act, 1950 upon a lease which contained a clause for renewal at the option of the lessee. It was held that such a clause was merely in the nature of an encumbrance, and it did not confer upon the lessee any right to the leasehold land. It was held that by virtue of S. 4 of the Act a fresh statutory lease would come into being for the remainder of the term of that lease and the lessee had no right to exercise the option against the State. This case, in our view, can have no application to the facts of the present case. Mr. Mitter also drew our attention to certain observations of Lord Denning in Regor Estates Ltd. v. Wright, (1951) 1 KB 689 at p. 703. The observations referred to by Mr. Mitter were made in connexion with a different Act in which the language was different and the purpose of which was also different. We do not think that the said observations are of any assistance to the appellant in the present case. In our view, the subsequent period of one year for which the lessee had exercised his option in terms of the lease, Ext. 1, cannot be called to be a fresh lease. It must be held that it was a continuation of the lease as originally executed. The defen-

dant is, therefore, not entitled to any protection under the West Bengal Premises Tenancy Act because such lease is outside the provisions of the said Act by virtue of S. 3 (1) (b) of the Act.

6. The next point urged by the appellant is that the learned Judge was wrong in decreeing the suit with regard to liquidated damages at the rate of Rs. 50/- per diem. Reference was made to S. 74 of the Contract Act which provides for the payment of reasonable compensation for breach of any contract whether or not actual damages or loss is proved to have been caused thereby. It was contended that the distinction between the penalty and liquidated damages and all the intricacies of the English Common Law has been done away with by the provisions of S. 74 of the Indian Contract Act. It was accordingly argued that the court below was not right in not considering this aspect of the case. In the present case the lease provides for payment of rent at the rate of Rs. 1,150/- per month for the last five years of the period of lease as well as for the period of renewal. The finding being that there was no fraud or misrepresentation as to the period fixed in the lease, it must be held that the lease stood terminated on the expiry of the period mentioned in the lease, that is to say, on the 31st May, 1967. The defendant had been in unlawful possession of the property since that date. In the circumstances it cannot be said that the sum of Rs. 50/- per day will not be a reasonable compensation for the wrongful occupation of the defendant. In the absence of any material before the court we do not think that the learned Judge was unjustified in taking into account what the parties at the time of the contract agreed to be the reasonable compensation for the breach of any of the terms and conditions of the lease.

7. The last point urged in support of the appeal is that this Court should take additional evidence and decide the question regarding the nationality of the plaintiff. An application has been filed for the reception of the additional evidence under O. 41, R. 27 of the C. P. C. annexing therewith the original letter dated the 4th July 1969 addressed to the defendant by the Deputy Controller of Enemy Firms. After reciting the Government of India, Ministry of Commerce Notification the defendant is informed that the writer of the letter has received information that the disputed Cinema Hall

which is known as Regent Cinema is owned by Must. Ayesha Begum a Pakistan national. The defendant was accordingly asked to produce evidence before the authority concerned to dispute the aforesaid information. In the application the reason why this document could not be filed earlier has been mentioned in para. 7 in which it has been disclosed that all the papers were lying with Sri Mohini Mohan Roy learned Advocate for the defendant in the trial court and through inadvertence the said document escaped his notice and as such it could not be filed before the trial court. This mistake it is stated was detected only on the 5th of February 1977 at the house of the defendant appellants' learned Senior Advocate at the time of conference which was held on the 5th of February 1977. It has, therefore, been prayed that the said letter could not be produced before the trial court on account of the circumstances beyond the control of the appellant. The suit was decreed by the trial court on the 7th of November 1968 and the appeal was filed before this Court on the 8th of January 1969. The letter sought to be put in as additional evidence is dated the 4th of July 1969. It is beyond one's comprehension how this letter could have been filed before the trial court. The letter had no existence at that point of time. The story now set up by the appellant for reception of additional evidence appears to us to be clearly an afterthought. Moreover, the said letter cannot be a piece of evidence. Paragraph 3 of the letter reads:

"Information has been received that the "Regent" Cinema hall situated at 2-C, Krishnalal Das Road, Calcutta-2 is owned by Must. Ayesha Begum, a Pakistan national and that you have been managing the property and realising income therefrom on her behalf. If that be the case, the property in question may be deemed to have been vested in the Custodian as from 10-9-1965 and all sums realised as income from the property as from that date are payable to him".

It is clear, therefore, that there has been no decision as to whether Must. Ayesha Begum is a Pakistan national or not. The letter even does not disclose what are the information received and from whom those have been received. Moreover after a determination of the question by the civil court it was not competent for the Deputy Controller of Enemy Firms to come to a decision as to the nationality of the plaintiff.

8. For the reasons mentioned above this appeal fails and it is accordingly dismissed with costs and the application for additional evidence is also rejected.

A. N. BANERJEE, J.:— I agree.
Appeal dismissed.

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A. K. JANAH AND A. N. BANERJEE, JJ.

Sm. Annapurna Chatterjee, Appellant
v. Sm. Sabita Guha and others, Respondents.

A. F. O. D. No. 344 of 1974, D/- 3-11-1976.*

Suits Valuation Act (1887), S. 8 — Partition suit — Preliminary decree passed — Enhancement of valuation for purposes of Stamp duty before final decree — At the time of final decree the value of suit shown as the enhanced sum — Forum of appeal against final decree — Parties not entitled to approach such Appellate Court which has jurisdiction over such enhanced valuation.

In a suit for partition which was valued at Rs. 8,000/- a preliminary decree was passed. Before, however, the final decree was passed the trial Court valued the suit at Rs. 24,000/- for stamp duty and directed the plaintiff to pay stamp duty on that valuation. In the final decree the suit was shown to be valued at Rs. 24,000/-. Appellant preferred an appeal against preliminary decree before District Judge. The final decree also having been passed an appeal was filed in High Court in view of the enhanced valuation of the suit shown in the final decree. The appeal before District Judge was dismissed as it was not pressed. In appeal in the High Court against final decree:

Held that Court could not enhance the valuation of the suit once the preliminary decree was passed and it was a mistake that the suit was shown as valued at Rs. 24,000/- in final decree and the appellant instead of approaching High Court ought to have pointed out the mistake before District Judge. (1907) ILR 34 Cal 954, Ref. (Para 2)

Cases Referred: Chronological Paras
(1907) ILR 34 Cal 954 2

*(Against decree of S. Maity, Sub. J. 7th Court at Alipore in Title Suit No. 54 of 1963, D/- 26-5-1971).

Hari Prasanna Mukherjee, B. K. Panda and Mrinal Kanti Roy, for Appellant; Nripal Chandra Ray Chowdhury and Rathindra Kumar Dey, for Respondent No. 1.

JANAH, J.:— This appeal arises out of a final decree passed in a suit for partition. The appellant as well as the respondent No. 1 are purchasers from the original owners of the land in dispute. One of the original co-sharers, namely, Binapani Biswas instituted a suit for partition against her co-sharer Pranab Gopol Biswas. The suit was valued at Rs. 8,000/-. A preliminary decree was passed on April 11, 1967 and thereafter a final decree was passed on December 13, 1971. Before the final decree was passed, the trial court went into the question of valuation of the disputed property for the purpose of payment of stamp duty. Upon a consideration of the materials on record the learned Judge in the trial court came to the conclusion that the disputed property was valued at Rs. 24,000/-. The trial court directed the plaintiff to pay the stamp duty on that basis. When the final decree was drawn up, it appears that the suit was shown to be valued at Rs. 24,000/-. Against the preliminary decree the present appellant filed an appeal before the learned District Judge on February 3, 1972 upon the footing that the suit was valued at Rs. 8,000/-. On February 10, 1972 the appellant preferred the present appeal to this Court on the basis that the suit was valued at Rupees 24,000/-. It appears that on June 6, 1973 when the appeal was taken up for hearing by the learned Additional District Judge, the learned Advocate for the appellant stated that he would not proceed with the appeal any further and prayed that the appeal might be dismissed for non-prosecution. The learned Additional District Judge accordingly dismissed the appeal for non-prosecution.

2. The learned Advocate for the respondent has taken a preliminary objection before us that the present appeal is not maintainable in this Court inasmuch as the decree was passed in a suit which is valued at Rs. 8,000/-. The learned Advocate for the appellant, however, contends that the appeal being against the final decree in which the suit is shown to have been valued at Rs. 24,000/- the present appeal is maintainable in this Court. The question which arises for consideration therefore, is what is the value of the suit in which the decree appealed against has been passed? There is no dispute be-

tween the parties that the suit was originally valued at Rs. 8,000/-. That being so, an appeal would lie before the learned District Judge. The learned Advocate for the appellant has contended that by Order No. 149 dated February 12, 1971 and Order No. 154 dated September 9, 1971 the learned Judge in the trial Court while dealing with the question of valuation of the suit-land for the purpose of payment of stamp duty had come to the conclusion that the suit-land was valued at Rs. 24,000/-. He has accordingly contended that after this finding by the learned Judge in the trial court the valuation of the suit was raised to Rs. 24,000/-. In support of this contention he relies upon the valuation as given in the final decree. We are unable to accept this contention advanced on behalf of the appellant. In the two orders mentioned above there is no indication that the learned Judge raised the valuation of the suit from Rs. 8,000/- to Rs. 24,000/-. On the contrary it appears from the said two orders that the learned Judge made it quite clear that he was considering the question of valuation only for the purpose of payment of stamp duty for a final decree. Apart from this it is doubtful whether it is open to a court to enhance the value of a suit after the preliminary decree has been passed in the suit in which the value of the suit has been fixed at a certain amount. In such a case it is likely to affect the right of a party to file an appeal before the appropriate forum against the preliminary decree on the basis of the valuation of the suit as stated in the preliminary decree. It is not however necessary for us to go into this aspect of the matter in details as we find that in the present case the learned Judge in the trial court did not enhance the valuation of the suit. When the final decree was drawn up by the office of the learned Subordinate Judge, the suit was shown to be valued at Rs. 24,000/- by mistake. This mistake however did not prevent the appellant from filing the appeal before the learned District Judge. As already stated the appellant filed an appeal before the learned District Judge but allowed the same to be dismissed for non-prosecution. The appellant could have drawn the attention of the trial court about this mistake in the valuation as given in the final decree and they could have proceeded with the appeal which they had filed before the learned District Judge. It is well established that the forum in which an appeal is to be filed is

determined by the valuation of the suit (Vide Ijjatulla Bhunia v. Chandra Mohan reported in (1907) ILR 34 Cal 954).

3. We have also heard the learned Advocate for the parties on the merits of this appeal. In the facts and circumstances of the present case we are of the opinion that the preliminary objection raised on behalf of the respondents must be upheld. In view of the fact that the appeal fails on a preliminary ground regarding its maintainability in this Court we refrain from dealing with the merits of the case. This appeal, therefore, fails on the preliminary ground and it is, accordingly, dismissed. In the circumstances of the case, however, we make no order as to costs.

A. N. BANERJEE, J.:— I agree.

Appeal dismissed.

AIR 1977 CALCUTTA 232

BIMAL CHANDRA BASAK, J.

J. K. & Sons, Petitioner v. Dy. Secy., Land & Land Revenue Deptt. and others, Respondents.

Matter No. 595 of 1976, D/- 23-8-1976.

(A) W. B. Premises Requisition and Control (Temporary Provisions) Act (5 of 1947), S. 3 (1) — Order of requisition — Plea of mala fide.

Even if the Commissioner of Police was a tenant in respect of the requisitioned premises and even if a huge amount was due on account of rent of the same, that cannot, by itself make the order bad or mala fide. (Para 5)

(B) Constitution of India, Arts. 226 and 227 — Point not taken in petition and which involves question of fact — Cannot be allowed to be urged at the time of hearing. (Para 6)

(C) Constitution of India, Arts. 226 and 227 — Writ petition — Person aggrieved — Invasion of the right must be of the petitioner. AIR 1965 SC 1937, 1971 Lab IC 790 (Cal), Rel. on. (Para 6)

Cases Referred: Chronological Paras
1971 Lab IC 790 (Cal) 6
AIR 1965 SC 1937 6

ORDER:— This application under Article 226 of the Constitution is directed against an order of requisition passed on 22nd June, 1976 under sub-s. (1) of S. 3 of the West Bengal Premises Requisition and Control (Temporary Provisions) Act,

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1947 (hereinafter referred to as the said Act).

2. The petitioner's case, as made cut in the petition, is as follows: The petitioner is a partnership firm registered under the Partnership Act, 1932 and having its office at No. 9, Rabindra Sarani, Calcutta-1. It is stated that one Messrs. Cutch Oil & Allied Industries (1949) Private Ltd. is the owner of No. 9, Rabindra Sarani, Calcutta, formerly known as No. 165, Lower Chitpur Road, Calcutta. It is stated that the petitioner is the landlord and/or lessee of a portion of the second floor of No. 9, Rabindra Sarani, Calcutta. The second floor of the said building contains two main halls and they have been let out and/or rented to the Commissioner of Police, Calcutta. The first hall is in the possession of Commissioner of Police, Calcutta, on and from 30th June, 1971 and the second hall is in possession of the respondent No. 3 on and from 7th August, 1971. The rent agreed to be paid on account of the said two halls at the second floor of the said building was Rs. 2,030/- per month. The rate of rent was inclusive of taxes and cost of repairs but exclusive of service charges for electricity, water supply, cleaning etc. The service charges excluding the electricity were agreed to be Rs. 385/- per month. It is the case of the petitioner that the respondent No. 3, the Commissioner of Police, Calcutta, has wrongfully and illegally failed and/or neglected to pay the aforesaid rent on account of the said premises as also the service charge and the charges on account of electricity. The dues on account of the said charges would be a sum of Rs. 73,898.56 p. for the period from 30th June, 1971 to March 1976 for which the petitioner had already submitted its bills and have demanded the payment on account of the same. However, in spite of repeated demands, the respondent No. 3 is wrongfully and illegally not paying the said dues to the said petitioner. Subsequent to the said bill, the petitioner had submitted its bill for the period of April and May 1976. All the aforesaid amounts are still due and owing from the respondent No. 3 to the petitioner. It is alleged that on 21st June, 1976 at 4-10 P. M. the petitioner received a communication from the respondent No. 1 containing purportedly two orders. The first order dated 22nd June, 1976 is the order of requisition issued by the respondent No. 1 and the second order numbering 1818 is by the First Land Acquisition Collector, Calcutta directing the petitioner

to place the property at the disposal and control of the said respondent on and from 22nd June, 1976 at 10-30 A. M. This is the order challenged in this proceeding.

3. In this case two affidavits have been affirmed on behalf of the respondents. In one affidavit affirmed by Nirmal Chandra Roy, the First Land Acquisition Collector, Calcutta, on the 12th July, 1976 it has been stated that the notices were duly served on the owner of the said premises. It is stated that the Commissioner of Police, Calcutta, was a tenant of second floor of the said premises No. 165, Rabindra Sarani and it was in possession of the Commissioner of Police. It was further stated that the second floor was requisitioned for the accommodation of the Branch Office of Home (Special) Department, Government of West Bengal. It was further stated that the said order was duly served upon Sm. Sabitri Debi, Sm. Sita Devi, Sm. Radha Devi Shraff and Sm. Sajana Devi Sharaff of 136, Cotton Street, Calcutta and Messrs. J. K. and Sons of No. 9, Rabindra Sarani the owners of the said premises and also the Commissioner of Police who was the tenant of the same at the relevant time. The persons accepted the service of the order. It is stated that by an order dated 21st June, 1976, The First Land Acquisition Collector directed the aforesaid persons to place the said property at the disposal and control on and from 22nd June 1976 at 10-30 A. M. The said order was also served upon them on 21st June, 1976. Notice was also served on the Deputy Secretary. Pursuant to the above, an officer went to take possession of the said premises at the appointed time. Representatives of the Home Special Department and of the Commissioner of Police were present in time but none on behalf of the owners turned up. The possession of the entire second floor was taken from one Sri Sibaji Gupta, Sergeant, representative of the tenant and the possession was again delivered to Ajit Kumar Chakravarty, Special Officer, the representative of the allottee department Home (Special). The possession certificates were duly signed.

4. In an other affidavit affirmed by one Nalini Kumar Chakrabarty Assistant Secretary, Home (Special) Department on the 12th July, 1976, it has been stated that due to increase of work in the Department for Home (Special Branch) the space occupied by the said department in the

Writers' Buildings became insufficient and further accommodation had become needed to run the department efficiently. Thereafter the question of further accommodation of the said department was taken up with Public Works Department, Government of West Bengal. That department having failed to spare further accommodation in Writers' Buildings attempts were being made to secure additional accommodation as near the Writers' Buildings as possible. As soon as the Home Department came to know that Second Floor of the said premises No. 165, Rabindra Sarani, Calcutta, would be vacated by the Commissioner of Police, a tenant for the Second floor of the said premises, it was visited and found that the said premises (second floor) would be suitable for housing a record room as well as skeleton staff for the Home, Special Branch. The said premises are at 5/6 minutes' walk from Writers' Buildings. Thereafter the said department sent proposal to Land and Land Revenue Department to requisition the second floor of the said premises.

5. On behalf of the petitioner it was contended firstly that the order has been passed mala fide. In this connection, my attention has been drawn to paras. 3, 4 and 5 of the petition wherein allegations have been made regarding the tenancy of the Commissioner of Police and the alleged non-payment of rent which I have already set out. Even if the Commissioner of Police was a tenant in respect of the requisitioned premises and even if a huge amount was due on account of rent of the same, that cannot, in my opinion, by itself, make the order bad or mala fide. In this particular case I am satisfied that order of requisition in question was made for public purpose which in fact was not disputed before me. Accordingly, even if the Commissioner of Police did not pay rent that would not make a subsequent requisition order invalid. Accordingly, there is no merit in this contention and I reject the same.

6. The only other point sought to be argued before me was that the requisition was being made in respect of a wrong house and it was served on the wrong person. In my opinion this point cannot be allowed to be urged before me because this has not been taken in the petition and this involves questions of fact. It was stated that this point was taken in a supplementary affidavit but it does not appear that any leave of the Court was obtained to affirm or use any such supple-

mentary affidavit. Moreover, the respondents had no opportunity to deal with the same. In any event there is no merit in this contention. Regarding the allegation that wrong persons have been served, I should point out that in para. 5 of the petition itself it is stated that the petitioner had suddenly received communication from the respondents Nos. 1 and 2 containing purportedly two orders. In that view of the matter it is not open to the petitioner to raise any such contention. In this context I may also refer to the affidavits affirmed on behalf of the respondents mentioned by me earlier. In any event, in this application the petitioner cannot challenge the order on such ground because an objection as to non-service of notice can properly be taken not by third parties but only by the persons on whom the notice is not served. Invasion of the rights must be of the petitioner. *Noorbanu v. Deputy Custodian General*, AIR 1965 SC 1937 (Para. 10); *Chandra Kumar Datt v. Secy., Frank Ross & Co. Ltd.*, 1971 Lab IC 790 (Cal). (Paras 6 and 14).

7. Regarding the allegation that wrong premises have been requisitioned it is purely an afterthought. This premises is known as Suraiya House. It appears that previously this premises was numbered as 165, Lower Chitpur Road. Now it is known as 9, Rabindra Sarani. The description given in the Order of requisition is "Suraya House 165, Rabindra Sarani (entire second floor) Calcutta." The petitioner had no difficulty in realising which was the premises which was the subject-matter of requisition. It was specifically mentioned that it was 'Suraya House' and the petitioner also proceeded on that basis. Sufficient particulars had been given in the order of requisition. It is not being stated that there is any other 'Suraya House' in that street. There is only one 'Suraya House' the 2nd floor of which was previously occupied by the Commissioner of Police. The letter of demand also described the same in such fashion. Under these circumstances, merely because due to the change of name of some street there is any mistake, at the most this is a mere irregularity which would not make the order bad. The petitioner had no difficulty in ascertaining which premises are being requisitioned. Accordingly, there is no merit in this contention.

8. No other point was raised before me. Accordingly, the application is dis-

missed and the Rule discharged. All interim orders are vacated. No order as to costs.

9. Prayer for stay of the operation of the order is rejected.

10. Sometime after the matter was heard and judgment delivered by me, Mr. S. L. Saraf appeared before me and said that I should recall the order as he had no opportunity to make submissions on behalf of the petitioner on whose behalf he was appearing. I rejected such prayer for the reasons which would appear from the "Dictated Order" passed by me.

Rule discharged.

AIR 1977 CALCUTTA 235

SALIL KUMAR DATTA, J.

Jyotish Chandra Rakhit, Petitioner v. Smt. Parbati Bala, Opposite Party.

C. R. No. 4436 of 1974, D/- 12-7-1976.

Civil P. C. (1908), O. 21, Rr. 66 (Cal), 90

— Sale proclamation — Value of property — Fraud on Court — Court's carelessness in accepting low value — Real value more than 10 times the value put on sale proclamation by decree-holder — Court accepting low value without verification — Sale in execution — Can be set aside on grounds of fraud of decree-holder on Court and also carelessness of Court in approving sale proclamation — No question of limitation arises in the circumstances — (Lim. Act (1963), Art. 127).

Where there was no dispute that, the valuation of the property found in the suit itself in the same Court, the decree of which was sought to be executed, was more than 10 times the value which was put on the sale proclamation by the decree-holder, it was incumbent on the Court to satisfy itself that there was proper valuation for execution. The Court, in approving the sale proclamation without considering the records acts most carelessly and such carelessness is not protected by O. 21, R. 66 (as amended in Calcutta). The execution sale held on the basis of such sale proclamation, cannot be sustained on the two grounds of fraud of the decree-holder on Court and the carelessness of the Court in approving the sale proclamation in the circumstances of the case. AIR 1945 PC 67, AIR 1954 Cal 604; AIR 1971 Cal 203; (1967) 71 Cal WN 649; AIR 1956 Cal 59, Ref. (Para 3)

The valuation of the property was so grossly inadequate that the Court of law should not allow such fraud to be perpetrated particularly when it is also guilty of gross carelessness in approving the sale proclamation. It is, therefore, not merely a question of the judgment-debtor's being prevented from agitating a point after a long period of time but it is a case where the court would be justified not to uphold the sale on the basis of the evidence of clear fraud and its own carelessness, and no question of limitation arises in the circumstances AIR 1949 Cal 212, Ref. (Para 4)

Cases Referred: Chronological Paras

AIR 1971 Cal 203	2
(1967) 71 Cal WN 649	2
AIR 1956 Cal 59 : 59 Cal WN 1082	2
AIR 1954 Cal 604	2
AIR 1949 Cal 212	4
AIR 1945 PC 67 : 49 Cal WN 292	2
AIR 1934 Bom 348	4
AIR 1929 All 704	4

Ashoke Banerjee, for Petitioner; Badri Narayan Sur, for Opposite Party.

ORDER:— This rule has been obtained against the appellate order dismissing the appeal filed by the decree-holder against an order passed by the learned Subordinate Judge, First Court, Alipore allowing an application under O. 21, R. 90 of the C. P. C. setting aside the sale in execution of the decree. This decree arises out of a suit for partition and it appears that the title of the parties was declared in eight annas share in respect of the suit properties. The value of the portion allotted by the pleader commissioner to the judgment-debtor, the opposite party before me under the decree is Rs. 8,392/-. It appears that the decree-holder started a title execution case No. 22 of 1970 in respect of the said decree for getting possession of his allotment as also for realisation of the costs of the suit which, I am told, amounts to Rs. 700/-. In this case it appears that the sale proclamation was served on the judgment-debtor on 29-4-1971 and after the sale proclamation was settled which it appears, was done in absence of the judgment-debtor, the sale was fixed on 8-9-1971 at 10.30 a.m. On that very day, the decree-holder applied for permission to bid which was granted. In the sale proclamation the price of the property was given by the decree-holder as Rs. 700/-. As no objection was raised on behalf of the judgment-debtor, this price appears to have been accepted by the court in approving the sale proclama-

tion. The property was sold on the date fixed, that is, on 8-9-1971 at Rs. 2,000/- and was purchased by the decree-holder. Long thereafter, on 11-12-1972 the judgment-debtor filed an application for setting aside the sale. The application came up for hearing on contest before the learned Judge who held, *inter alia*, that the sale proclamation was served. Nonetheless the learned Subordinate Judge set aside the sale on the ground that there was fraud on court on the part of the decree-holder which vitiated the entire proceeding. Accordingly, the impugned sale was set aside. This judgment was affirmed in appeal and the present Rule as already stated is against this decision.

2. Mr. Banerjee, learned advocate appearing for the decree-holder petitioner, has submitted firstly that the opposite party is estopped from challenging the sale as she did not appear when the sale proclamation was approved by the court as she was aware of the proceeding. It was secondly submitted that the application was hopelessly barred by limitation in that the requisite time for filing objection to the sale had long passed when the application for setting aside the sale was made. It was next submitted that under the Calcutta Amendment to R. 66 of O. 21 there was no obligation on the part of the court to give its own estimate of price of the property. Accordingly it could not be said that there was any fraud on the part of the decree-holder in the sale of the property. These contentions have been disputed by Mr. Sur who is appearing on behalf of the judgment-debtor. The Privy Council in *Marudanayagam Pillai v. Manickavasakam Chettiar*, 49 Cal WN 292: (AIR 1945 PC 67) held that in drawing up a sale proclamation the court is not to act blindly on information supplied by the parties but is under a duty to check that information as far as possible in order that there may be, so far as possible, a fair and accurate statement of the particulars required, among them being any incumbrance to which the property is liable. The court further held that when material is readily available to check the information, it must be availed of and failure in this respect is carelessness of which the Court cannot be acquitted. The court further held that when a sale takes place at a serious under-value occasioned by failure on the part of the Court and of the decree-holder to carry out the obligations stated above, the case falls within the language of O. 21, R. 90 and the sale must be set aside,

when the judgment-debtor has suffered injury thereby, although the decree-holder may not have been guilty of fraud and however dilatory the judgment-debtor may have been, provided there has been nothing on his part to constitute waiver. When the decree-holder, knowing the real facts, puts a low valuation, he is guilty of fraud and cannot take advantage of it by retaining the sale, whatever the conduct of the judgment-debtor may be. This judgment came up for consideration in *Majibar Rahman Molla v. Rahu Bux Dhali*, (AIR 1954 Cal 604) where it was held that mere understatement in the valuation of sale proclamation does not amount to such fraudulent concealment as would bring the sale within the scope of S. 18 of the Lim. Act. In *Bibhuti Bhusan Dey v. Bankim Chandra Ghosh*, (AIR 1971 Cal 203), the court held that in view of the amendment to sub-r. (2) of R. 66 of O. 21, it is not obligatory on the executing court to determine the value of the property. These cases have been relied upon by Mr. Banerjee in support of his contention that in view of the Calcutta amendment to the Rule the Privy Council decision cited above has no application and court is under no obligation to put its own valuation. Mr. Sur, on the other hand, referred to the decision in *Prabodh Chandra Mukherjee v. Pashupati Mukherjee*, (1967) 71 Cal WN 649 in which it has held that when the decree-holder puts in a gross under-valuation to the property and there was blind acceptance thereof by the court, such conduct on the part of the decree-holder amounted to fraud on the court as distinguished from fraud on the party and such blind acceptance by the court of so shockingly low a value amounted to gross carelessness on its part. It was further held that limitation cannot show its head in a matter if the matter be looked at from the stand point of fraud on the court or from the court's inexcusable carelessness. In an earlier judgment in *Manmatha Chakraborty v. Sachindra Kumar Chakraborty*, 59 Cal WN 1082: (AIR 1956 Cal 59), it was held that it would be a case where the decreeholder would be guilty of deliberately putting a shockingly low valuation for the disputed property in the proclamation for sale and the sale amounts to fraud on court and would vitiate the sale apart from the question of any other material irregularity in publishing or conducting the sale.

3. In the facts of the present case, we will have to make decision on the authori-

ties, we have indicated above. There is no dispute that the valuation of the property found in the suit itself in the same Court, the decree of which was sought to be executed, was more than ten times the value which was put on the sale proclamation by the decree-holder. These facts were before the court and before approving the sale proclamation it was incumbent on the court to consider the records of the connected proceeding before it to satisfy if there is proper valuation for execution of the decree for costs against the other co-sharer in the partition suit decreed by it. The court in approving the sale proclamation acted most carelessly and such carelessness is not protected by the provision of O. 21, R. 66 with the Calcutta Amendment. There are, therefore, two grounds for which the sale cannot be sustained, namely, fraud of the decree-holder on court and the carelessness of the court in approving the sale proclamation in the state of affairs indicated above.

4. It has been held in Mahipati Halder v. Atul Krishna Maitra, (AIR 1949 Cal 212) that S. 18 of the Lim. Act can be availed of to extend the period of limitation for an application under O. 21, R. 90 of the Code where fraud has been committed by the decree-holder though not by the stranger auction purchaser. In this case, we have seen that the decree-holder obtained ex parte permission to bid on the very day the sale was fixed at 10.30 a.m. and such permission was granted without notice to the judgment-debtor. It has however been contended that the judgment-debtor should be deemed as estopped from challenging the sale as she was aware of all facts and reliance was placed on the decision in Hardani Lal v. Ram Nath, (AIR 1929 All 704) as also in Sakarlal Jannadas v. Jerbai Sorabji Patel, (AIR 1934 Bom 348). Undoubtedly, in the facts of the case, as it transpires, the judgment-debtor was served with a notice for settlement of sale proclamation long before the sale was held but no objection was filed by her against such proclamation. It however appears to me that the valuation of the property was so grossly inadequate that the court of law should not allow such fraud to be perpetrated particularly when it is also guilty of gross carelessness in approving the sale proclamation, at Rs. 700/- when it has itself fixed the price of the property put up for sale at a valuation of Rs. 8,000/- in the connected title suit. It is, therefore, not merely a question of the judgment-deb-

tor's being prevented from agitating a point after a long period of time but it is a case where the court would be justified not to uphold the sale on the basis of the evidence of clear fraud and its own carelessness, and no question of limitation arises in the circumstances.

5. For all these reasons, I am of opinion that the learned courts below were justified in allowing the application for setting aside the sale in the attending circumstances. The Rule accordingly fails and is discharged. There will be no order as to costs.

Rule discharged.

AIR 1977 CALCUTTA 237

SABYASACHI MUKHARJI, J.

Chinta Haran Dutta, Petitioner v. The State of West Bengal and others, Opposite Parties.

Matter No. 596 of 1970, D/- 5-7-1976.

(A) Police Forces (Restriction of Rights) Act (1966), Preamble and S. 3 — Police Forces (Restriction of Rights) Rules (1966) as amended in 1967 — W. B. Govt. Notification and directions dated 22-10-1970 — Act if covered by Art. 33 of the Constitution — Arts. 14 and 19 if violated.

Although the question whether the provisions of an Act fulfil or ensure the objects stated in its preamble is a matter of legislative judgment and therefore beyond the court's purview, cases of colourable exercise of power are excepted. The provisions under S. 3 of the Police Forces (Restriction of Rights) Act, 1966 and the Rules framed thereunder abrogating their right to form or participate in Labour Unions or political activities etc. having nexus with the object of the Act viz., ensuring proper discharge of duties and maintenance of discipline among the forces charged with the maintenance of public order, fall within the legislative power of the Parliament under Art. 33 of the Constitution, irrespective of Arts. 14 and 19. Plea that the Act violates Arts. 14 and 19 was rejected. AIR 1962 SC 1166 and AIR 1963 SC 812, Dist. (Paras 1 to 3)

(B) Police Forces (Restriction of Rights) Act (1966), S. 1 — Act is within the legislative competence of Parliament under Art. 33 of the Constitution. Plea that State's jurisdiction under Entries 1 and 2 of List II of Sch. VII was usurped was rejected. (Constitution of India, Arts. 33,

246 and Items 1 and 2 of List II of Seventh Schedule). (Para 5).

Cases Referred: Chronological Paras

AIR 1963 SC 812 4

AIR 1962 SC 1166 4

S. Chatterjee and S. C. Ukil, for Petitioner; B. Gupta and S. Pal, for Opposite Party.

ORDER:— This is an application by one Chinta Haran Dutta who is the honorary general secretary of the Calcutta Police Association. In this application, the petitioner on behalf of the said association challenges the enforcement of the Police Forces (Restriction of Rights) Act, 1966 and the rules framed thereunder which have been made applicable to the State of West Bengal from 1st November, 1970 by the notification dated 22nd October, 1970 and by the directions dated 22nd October, 1970. The petitioner contends that the said association was recognised long ago and by the impugned Act and the notification being made enforceable in West Bengal rights under Art. 14 and Art. 19 of the Constitution have been violated. Rights of the members of the armed forces or of the forces charged with the maintenance of public order can, however, be restricted or abrogated so as to ensure proper discharge of their duties and maintenance of discipline among them by any Act passed by the Parliament pursuant to Art. 33 of the Constitution. Therefore, by virtue of Art. 33 of the Constitution the rights of those who are charged with the maintenance of public order can be abrogated or restricted by any Act passed by Parliament, irrespective of Arts. 14 and 19 of the Constitution so as to ensure proper discharge of duties by them and maintenance of discipline among them.

2. The Police Forces (Restriction of Rights) Act, 1966 is an Act which was passed, as preamble to the said Act states, to provide for restrictions of certain rights conferred by Part III of the Constitution in their application to the members of the forces charged with the maintenance of public order so as to ensure proper discharge of their duties and maintenance of discipline among them. Counsel for the petitioner contended that the provisions of the Act were not to ensure proper discharge of the duties and maintenance of discipline among them. He, therefore, submitted that the provisions of the Act and the rules framed thereunder were not protected by Art. 33 of the Constitution. Whether particular provisions

of the statute ensure the particular objects of the legislation is a matter for legislative judgment. Whether certain provisions fulfil certain objects or not or whether other provisions could have better fulfilled those objects, is a matter on which the legislative wisdom cannot, prima facie, be questioned except on the question of colourable exercise of power. It was contended that under the Seventh Schedule of the Constitution, Entries 1 and 2 of List II, namely the State List deals with public order and police forces. Therefore, it was urged that the State Legislature had competence to legislate on public order as well as regarding the police force. The Parliament by pretending to make law so as to ensure proper discharge of duties and maintenance of discipline of those who are charged with maintenance of public order which in fact, the provisions did not, cannot usurp that jurisdiction or competency of the State Legislatures. It is, therefore, necessary to examine whether the provisions of the Act can be said to ensure proper discharge of the duties and maintenance of discipline among those who are charged with maintenance of public order. If there is rational nexus between the provisions of the Act and the Rules framed thereunder with the purpose stated in the preamble to the Act, then in my opinion, the Act can be said to be to ensure proper discharge of the duties and maintenance of discipline among those who are charged with maintenance of public order. Only to that limited extent there is scope of judicial review of the effect of this legislation, where, however, the legislation is governed by Art. 31-C of the Constitution different considerations might apply.

3. Section 3 of the Police Forces (Restriction of Rights) Act, 1966, provides as follows:

"3. Restrictions respecting right to form association, freedom of speech, etc. (1) No member of a police force shall, without the express sanction of the Central Government or of the prescribed authority,—

(a) be a member of, or be associated in any way with, any trade union, labour union, political association or with any class of trade unions, labour unions or political association, or

(b) be a member of, or be associated in any way with, any other society, institution, association or organisation that is not recognised as part of the force of which he is a member or is not of a purely social, recreational or religious nature; or

(c) communicate with the press or publish or cause to be published any book, letter or other document except where such communication or publication is in the bona fide discharge of his duties or is of a purely literary, artistic or scientific character or is of a prescribed nature.

Explanation.— If any question arises as to whether any society, institution, association or organisation is of a purely social, recreational or religious nature under Cl. (b) of this sub-section the decision of the Central Government thereon shall be final.

(2) No member of a police force shall participate in, or address, any meeting or take part in any demonstration organised by anybody or persons for any political purposes or for such other purposes as may be prescribed."

Sub-section (1) of S. 6 empowers the Central Government to make rules. I am not concerned with the provisions of Cl. (c) of sub-s. (1) of S. 3 of the Act. But, I am clearly of opinion, that between the provisions of Cls. (a) and (b) of sub-s. (1) of S. 3 there is nexus with the object, that is to say, ensurment of proper discharge of duties and maintenance of discipline among those who are charged with maintenance of public order. If that is the position, then, in my opinion, no question of violation of Art. 14 or 19 arises in the instant case. Counsel also drew my attention to the rules framed by virtue of sub-s. (1) of S. 6 of the said Act. The said Rules are Police Forces (Restriction of Rights) Rules, 1966 and the Police Forces (Restriction of Rights) Amendment Rules, 1967. The said rules so far as they are relevant for the purpose of this application in my opinion, are also not beyond the object, namely, ensuring proper discharge of duties and maintenance of discipline among those who are charged with maintenance of public order. If that is the position, then, in my opinion, the challenge made in this application cannot be sustained.

4. Counsel for the petitioner drew my attention to the observations of the Supreme Court in the case of Kameswar Prosad v. State of Bihar, AIR 1962 SC 1166 and in the case of O. K. Ghosh v. E. X. Joseph, AIR 1963 SC 812. These were made in the context of the rules regarding civil servants and the Supreme Court had no occasion to consider in those cases the question of the rights under Arts. 14 and 19 of the Constitution in so far as they are modified by Art. 33 of the

Constitution. In the premises of the said decisions cannot, in the view I have taken about the applicability of Art. 33 to the relevant provisions, have any application in the facts and circumstances of this case.

5. Inasmuch as Art. 33 applies to the impugned legislation and in view of the nature of the provisions no question of usurping jurisdiction of the State Legislature as contained in Entries 1 and 2 of List II of the Seventh Schedule arises in the instant case.

6. In the aforesaid view of the matter, this application fails and is accordingly dismissed. The rule nisi is discharged, Interim order, if any, is vacated.

7. There will be no order as to costs.

8. There will be a stay of operation of this order for three weeks.

Petition dismissed.

AIR 1977 CALCUTTA 239

AJAY K. BASU, J.

Miss. Sukla Choudhury, Plaintiff v. Miss. Manjolyn Tweedie and others, Defendants.

Suit No. 491 of 1974, D/- 7-5-1976.

(A) Constitution of India, Art. 372 and Art. 225 — Letters Patent (Calcutta), Cl. 12 — Letters Patent is valid law even after independence and promulgation of Constitution.

The plea that after independence and promulgation of the Constitution the Letters Patent of the High Court ceased to exist and that therefore jurisdiction of the High Court on its original side being one drawn from Letters Patent also ceased to exist with the result that suits could not be entertained, was rejected. AIR 1972 Cal 470 and AIR 1956 AP 161 (FB), Foll.

(Para 5)

(B) Civil P. C. (1908), S. 20 and O. 1, R. 3 — Suit for eviction of tenants — Others living with the tenants and dubbed as trespassers also impleaded — Suit held not bad for misjoinder of parties or causes of action. AIR 1975 Cal 427, Foll.

(Para 6)

(C) T. P. Act (1882), S. 106 — Effect of absence of notice of ejectment.

Where the landlady alleging A & B as tenants sued to evict them under the provisions of the W. B. Premises Tenancy

Act after issuing notice of ejectment on them but the defendants pleaded that their mother was the tenant: Held that the mother was the real tenant and non-service of notice on her was fatal to the suit.

(Para 14)

Cases Referred: Chronological Paras

AIR 1975 Cal 427 6

AIR 1972 Cal 470 5

AIR 1956 Andh Pra 161 (FB) 5

ORDER:— This is a suit filed by the plaintiff Miss. Sukla Choudhury against the defendants for ejectment and consequential reliefs. According to the plaintiff, the defendants Nos. 1 and 2 are her tenants and defendants Nos. 3, 4 and 5 are trespassers.

2. The main allegation of the plaintiff is that the defendants Nos. 1 and 2, being two young girls, were her tenants in respect of the portion of premises No. 5, Kyd Street and these two girls were of easy virtues and as such committed various acts of nuisance and immorality and under sub-ss. (m), (n) and (o) of the West Bengal Premises Tenancy Act, (sic) their tenancy has been forfeited and they should be ejected. Apart from that, it is also alleged that the defendants did not pay rent and are defaulters. According to the plaintiff, the defendants Nos. 3, 4 and 5 are trespassers who have trespassed into the said premises and likewise they should be ejected.

3. The main defence of the defendants is that the defendant No. 3, the alleged trespasser, who is the mother of the defendants Nos. 1 and 2, is the real tenant and there is no truth in the allegations against them as alleged by the plaintiff and according to the defendant No. 3, the plaintiff improperly and illegally refused to accept rent and as such rents were deposited with the Rent Controller. The other defence, of course, was legal defence, taken by the defendants' counsel Mr. John about the jurisdiction of this court and misjoinder of parties.

4. The following issues were raised:

1. Whether this Court has jurisdiction to try and determine this suit?

2. Whether this suit is bad for misjoinder of parties and causes of action?

3. Is the defendant No. 3 a tenant under the plaintiff as alleged in para. 12 of the Written Statement?

4. Has the plaintiff any cause of action against the defendants?

5. To what relief, if any, the plaintiff is entitled?

5. About the first issue Mr. John's first submission before me was that after independence and promulgation of the Constitution, the Letters Patent, which gives jurisdiction to the Original Side of this Court has become non est or non-existent and as such the Original Side, which takes jurisdiction from the Letters Patent, cannot lawfully hear and determine this suit. This point was actually taken by Mr. John in a reported judgment and in that matter Mr. John's contention was rejected. The said matter is reported in AIR 1972 Cal 470 and the same view was taken in AIR 1956 Andh Pra 161 (FB). I therefore answer issue No. 1 in the affirmative.

6. Now coming to issue No. 2, Mr. John's contention was that this court's jurisdiction has been brought by valuing the suit at Rs. 54,000/- and by adding the defendants Nos. 3, 4 and 5 as trespassers and, therefore, this suit is bad for misjoinder of parties and valuation etc. This identical point was taken by Mr. John before my learned brother Sabyasachi Mukharji, J. and His Lordship rejected the contention of Mr. John. This case has been reported in AIR 1975 Cal 427 and I agree with that decision. I, therefore, answer the issue No. 2 in the negative and hold that this suit is not bad for misjoinder of parties or causes of action.

(In Paras. 7 to 13 the judgment considers the evidence and holds that it is the defendant No. 3 who is the tenant and not defendants 1 and 2).

14. Coming to issue No. 4 as the suit has been filed against the defendants Nos. 1 and 2 as tenants and no notice of ejectment has been served on the real tenant, the defendant No. 3, I hold that the plaintiff has no cause of action in this suit against the defendants and I answer the issue accordingly.

15. In the result, the suit is dismissed. In the circumstances of this case as some of the issues were held in favour of the plaintiff. I make no order as to costs.

Suit dismissed.

AIR 1977 CALCUTTA 241**N. C. MUKHERJI AND B. C. RAY, JJ.**

State Bank of India, Petitioner v. S. Wazir Singh and others, Respondents.

Civil Revn. No. 14 of 1975, D/- 24-2-1977.

Civil P. C. (1908), Ss. 115 and O. 22 — Revision Petition — Death of one of respondents — Substitution of legal heirs — Application must be filed within 90 days and not 3 years from date of death. (1976) 1 Cal LJ 492, Overruled — (Lim. Act (1963), Art. 120).

The Provisions of O. 22, C. P. C. apply in the case of revisional applications as well. Therefore an application for substitution of legal heirs of a deceased respondent must be filed within 90 days of the date of death and not within three years from such date. Consequently an application filed beyond 90 days is barred by limitation and the revision abates as against the deceased respondent. (1913) 18 Cal LJ 141 and AIR 1970 SC 1, Followed (1975) 2 Cal LJ 191, Approved; (1976) 1 Cal LJ 492, Overruled. (Para 7)

Cases Referred:	Chronological	Paras
(1976) 1 Cal LJ 492		7
(1975) 2 Cal LJ 191		7
AIR 1972 All 504 (FB)		6
AIR 1970 SC 1		7
AIR 1953 Raj 169 (FB)		5, 7
AIR 1949 Lah 186 (FB)		4, 7
AIR 1937 Mad 385 (FB)		7
AIR 1932 PC 165 : 59 Ind App 283		7
(1913) 18 Cal LJ 141		7
(1912) 16 Cal LJ 571		7

Subrata Ray, for Petitioner.

N. C. MUKHERJI, J.:— This is an application for setting aside the order dated 18th November 1976 passed in Lawazima by the Additional Registrar recording the note of abatement of the Rule as against the opposite party No. 1.

2. On May 1, 1975 S. Wazir Singh, the opposite party No. 1, died intestate. From an affidavit-in-opposition it appeared that S. Wazir left behind besides Smt. Surendra Kaur another daughter and one son. In spite of the best efforts the petitioner could not ascertain their names and address. Subsequently the petitioner filed an application for substitution of the heirs and legal representatives of the opposite party No. 1. The Additional Registrar recorded an order of abatement of the Rule as against the opposite party No. 1 presumably on the ground that the said application for substitution was not filed

within 90 days. It is stated that the petitioner was advised by the learned Advocate that in cases of revision application the time to file an application for substitution will be three years and not 90 days. In the circumstances it is prayed that the order dated 18th November 1976 passed by the learned Additional Registrar recording the note of abatement of the Rule as against the opposite party No. 1 be set aside.

3. The only point for consideration is whether an application for substitution of the legal heirs in a revision case is required to be filed within 90 days from the date of death or within three years. It may be stated at the beginning that there are conflicting decisions on this point.

4. Mr. Subrata Ray, learned Advocate for the petitioner first refers to a Full Bench decision of Lahore High Court reported in AIR 1949 Lah 186, (Mohd. Sadaat Ali Khan v. The Administrator, Corporation of City of Lahore). It has been held in this case: "O. 22, R. 3, C. P. C. is not applicable to revisions. It cannot be read in conjunction with S. 141 as S. 141 is so drafted as to enable a court to apply the procedure in regard to suits to such proceedings as are in *pari materia* with suits and thus original in character. A revision is very much unlike a suit. The procedure provided for suits would be mostly inapt and inappropriate to proceedings in revision. Further Art. 176, Lim. Act, cannot be made applicable to a revision. Hence where a party going in revision dies pending the revision petition and an application is made by his legal representatives to be brought on record after the expiry of the period of 90 days, the petition for revision cannot be dismissed on the ground of abatement".

5. Mr. Ray next refers to a Full Bench decision of Rajasthan High Court reported in AIR 1953 Raj 169, (Babulal v. Mannilal). It has been held in this case that O. 22, C. P. C., applies to the case of suits and appeals. It does not govern the cases of revision application.

6. Mr. Ray next refers to another Full Bench decision of Allahabad High Court reported in AIR 1972 All 504, (Chandra-deo Pandey v. Sukhdeo Rai). This case lays down that "An application for substitution of heirs in a revision is an application under S. 151, C. P. C., and hence the period of limitation for bringing the heirs of deceased opposite party in revision is three years under Art. 137 of the Lim. Act, 1963."

7. Mr. Ray also relies on a recent decision of a single Judge of our Court re-

ported in (1976) 1 Cal LJ 492, (Md. Israil v. S. M. Amiral Islam). It has been held by R. Bhattacharya, J., "Reading the provisions of O. 22 of the Code, it appears that there is a provision for substitution in suits and in appeals and some other matters but not in case of revisional application filed under S. 115 of the Code. Revisional applications are not original proceedings. This is clearly a discretionary matter with the court. If for disposal of revisional applications, the High Court thinks that for ends of justice any party is to be added or if at the instance of a party any substitution is necessary though belated, for ends of justice certainly and for proper decision, the High Court should allow substitution or addition of the parties. There can be no question of limitation in this respect". It appears that his Lordship in coming to the above conclusion relied only on AIR 1953 Raj 169 (FB), (Babulal v. Mannilal). This point came up for decision long ago before a Division Bench of our High Court in (1913) 18 Cal LJ 141, (Anandamoyi Dasi v. Rudra Mahanti). Sir Asutosh Mookerjee, J. relying on an earlier decision reported in (1912) 13 Cal LJ 571, (Deo Saran v. Syedunnessa) held that "The principle recognised in R. 3 of O. 22 of the C. P. C. is applicable not only to suits but also to proceedings in revision." In AIR 1949 Lah 186 (FB), (Mohd. Sadaat Ali Khan v. The Administrator, Corporation of City of Lahore). Their Lordships considered this decision, but their Lordships were of the opinion that the observations made by Sir Asutosh Mookerjee, J. presiding over the Division Bench were obiter. We do not agree with their Lordships that the principle of law as laid down by Sir Asutosh Mookerjee, J. was obiter. It may be mentioned that before R. Bhattacharya, J. laid down in (1976) 1 Cal LJ 492 that the provisions of O. 22 of the Code do not apply in revisional application there was a decision by Salil Kumar Dutta, J., in (1975) 2 Cal LJ 191, (Md. Eusuf Mondal v. Md. Omar Ali). His Lordship held that "Rules as to abatement apply as much to proceedings in revision as to appeals. The revisional jurisdiction exercised by the High Court is a part of the general appellate jurisdiction and there is no reason why the provisions of O. 22 will not apply to revision cases in the High Court". It appears that this case was however not placed before R. Bhattacharya, J. In coming to the above conclusion S. K. Dutta, J. considered the case reported in AIR 1949 Lah 186; but his Lordship re-

lied on (1913) 18 Cal LJ 141 and was of the opinion that the matter is no longer in controversy in view of the observation of the Supreme Court in Shankar Ramchandra v. Krishnaji, reported in AIR 1970 SC 1. His Lordship quoted the relevant portion which occurs at page 4.

"When the aid of the High Court is invoked on the revisional side it is done because it is a superior Court and it can interfere for the purpose of rectifying the error of the court below. Section 115 of the C. P. C. circumscribes the limits of that jurisdiction but the jurisdiction which is being exercised is a part of the general appellate jurisdiction of the High Court as a superior Court. It is only one of the modes of exercising power conferred by the statute basically and fundamentally it is the appellate jurisdiction of the High Court which is being invoked and exercised in a wider and larger sense".

Their Lordships of the Supreme Court in making the above observations, relied on 59 Ind App 283 : (AIR 1932 PC 165), (Nagendra Nath Dey v. Suresh Chandra Dey). The Judicial Committee laid down "Any application by a party to an Appellate Court to set aside or revise a decree or order of a Court subordinate thereto is an appeal within the meaning of Art. 182 (2) of Sch. 1 of the Indian Lim. Act, 1908."

Their Lordships also relied on a Full Bench decision of the Madras High Court reported in AIR 1937 Mad 385, (P. P. P. Chidambara Nadar v. C. P. A. Rama Nadar). It was held in this case that "Art. 182 (2), Lim. Act, applies to Civil Revision petitions as well and not only to appeals in the narrower sense of that term as used in the C. P. C." After carefully taking into consideration the decisions referred to above, we are inclined to rely on the Bench decision of this Court reported in (1913) 18 Cal LJ 141, (Anandamoyi Dasi v. Rudra Mahanti) and we are also bound by the principle of law as enunciated in AIR 1970 SC 1. We are therefore of the opinion that the provisions of O. 22 apply in the case of revisional applications as well and that being so, we hold that as the application for substitution of legal heirs was filed beyond 90 days the learned Additional Registrar was right in recording a note of abatement of the Rule as against the opposite party No. 1 and the order therefore should not be recalled. As has already been stated there are two conflicting recent decisions of our High Court by two learned Judges. For the reasons stated earlier we agree with the

view expressed by S. K. Dutta, J. in (1975) 2 Cal LJ 191 and we disapprove the view expressed by R. Bhattacharya J. in (1976) 1 Cal LJ 492. This decision, however, will not prevent the petitioner from taking proper step for setting aside abatement if it is advised to do so.

B. C. RAY, J.:— I agree.

Application dismissed.

AIR 1977 CALCUTTA 243
SALIL KUMAR DATTA AND
G. N. RAY, JJ.

Aswini Kumar Chatterjee, Petitioner v. Sukhendu Nath Guin, Respondent.

C. R. No. 3763 of 1975, D/- 16-2-1977.

W. B. Premises Tenancy Act (12 of 1956), Ss. 1 and 13 — Provisions not retrospective in operation — Ejectment suit under T. P. Act — During pendency of suit provisions of W. B. Act made applicable to area where premises were situate — Provisions of Act do not apply. AIR 1976 Cal 322, Overruled — (Interpretation of Statutes — Retrospective Legislation).

The provisions of the W. B. Act have no application to pending proceedings in respect of suits for recovery of possession of the premises situate in an area to which the Act is extended when the suit was pending. AIR 1976 Cal 322, Overruled; (1976) 3 Cal H. C. (N) 301, Approved; ILR (1968) 2 Cal 183, Relied on.

Application of provisions of an Act to a pending proceeding may be made by a competent Legislature. Such application however can be made by express provision or by clear intendment. In the case in question there is no express provision providing that on extension of the operation of the West Bengal Premises Tenancy Act all pending suits should be governed by the provision of the said Act. The question of intendment will have to be considered with reference to other provisions of the Act so that all the provisions of the Act can be given a harmonious working by such retrospective operation. In other words as all the provisions of the Act are to have and to be deemed to have effective and harmonious operation, if by retrospective operation some sections of the Act are incapable of application and rendered nugatory, such retrospective operation shall not be considered to be the intendment of the legislature. If the

provisions of the West Bengal Premises Tenancy Act are made applicable to a pending proceeding, the application of the provisions of S. 17, sub-ss. (1) and (2) and following sections will be rendered completely nugatory. Therefore it is difficult to hold that there was any intendment of the Legislature that the provisions of the said Act would be applicable to a pending action on extension of the operation of the Act to the area in which the suit premises are situate. (Para 7)

Cases Referred: Chronological Paras

AIR 1976 Cal 322	3
(1976) 3 Cal HC (N) 301	3
ILR (1968) 2 Cal 183	6
AIR 1962 Cal 563 : 66 Cal WN 796 (SB)	6
AIR 1961 SC 1596	4
AIR 1941 FC 5	4

Rebati Nath Sarkar and Jagadish Ch. Das, for Petitioner; Amulya Chandra Mukherjee, for Respondent.

SALIL KUMAR DATTA, J.:— This Rule has been referred to a Division Bench by Janah, J. in view of the conflict of decisions of the two single Benches of this court on the point as to the applicability of the West Bengal Premises Tenancy Act, 1956 to a pending proceeding. Under sub-s. (3) of S. 1 of the said Act, the Act extends to the whole of Calcutta and to all areas which have been or may hereafter be constituted municipalities under the provisions of the Bengal Municipal Act, 1932. It is also further provided that the State Government may extend the operation of the Act to any other area by Notification. By Notification dated July 23, 1975 published in the Calcutta Gazette (Extraordinary) on July 24, 1975 the town of Dubrajpur was declared as municipal area. In consequence, under the provisions of the said Act referred to above, the operation of the Act extended to the said town constituted as municipality as aforesaid.

2. The petitioner instituted a suit on January 16, 1975 for recovery of possession as also arrears of rents and damages in respect of a premises held by the defendant as a monthly tenant at a monthly rent of Rs. 31/- according to Bengali calendar month. The tenancy was determined by notice calling upon the defendant to vacate the suit premises with the expiry of the month of Agrahayan 1381 B. S. When this suit was instituted, the provisions of the said Act had no operation in respect of the town of Dubrajpur in which the suit premises are situate. As the suit was pending, the provisions of

the said Act became applicable to the town of Dubrajpur on its declaration as municipality as aforesaid.

3. The defendant in course of proceeding filed an application stating that in view of the area being declared as the municipal area, the suit was to be governed under the provision of the West Bengal Premises Tenancy Act instead of the T. P. Act. This application was rejected by the learned Munsif on the view that the West Bengal Premises Tenancy Act would not apply to pending cases. When the Rule challenging the aforesaid order came up for hearing before Janah, J. it was noted in the order that in case of *Niranjan Modak v. Lakshminarayan Guin*, reported in AIR 1976 Cal 322 R. Bhattacharya, J. was of opinion that S. 13 of the West Bengal Premises Tenancy Act would retrospectively apply to such suits. A contrary view was taken by Chittatosh Mookerjee, J. in *Gurdial Singh v. Animesh Ch. Roy Gupta*, reported in (1976) 3 Cal HC (N) 301. The Rule in the circumstances has come up before us on reference by Janah, J.

4. It is well settled that the court will take into consideration even in appeal a change of law or facts that may have taken place during the pendency of the proceeding. Bhattacharya, J. has referred to several decisions of the Supreme Court in support of the above proposition. As was observed in *Lachmeshwar Prasad Shukul v. Keshwar Lal Chowdhury*, reported in AIR 1941 FC 5, it was held that the court is bound to consider any change either on fact or in law, which has supervened since the judgment was entered as was the position in that case. Bhattacharya, J. strongly relied on the decision in *S. B. K. Oil Mills v. Subhas Chandra*, reported in AIR 1961 SC 1596 where the Supreme Court was considering the provisions of S. 12 of the Bombay Rents Hotel and Lodging House Rates Control Act, 1947 which becomes applicable on its extension to particular area by notification. In this case the suit by the landlord for possession was filed on April 25, 1957 and while the suit was pending by notification of August 16, 1958, Part II of the said Act which included S. 12 was extended to the area where the premises are situated. The tenant lost in the trial court as it was held that the Act was prospective which the Supreme Court considered erroneous. It was observed:—

"But a section may be prospective in some parts and retrospective in other

parts. While it is the ordinary rule that substantive rights should not be held to be taken away except by express provision or clear implication, many Acts, though prospective in form, have been given retrospective operation, if the intention of the Legislature is apparent. This is more so, when acts are passed to protect the public against some evil or abuse. (See *Craies on Statute Law*, 5th Edn. p. 365). The sub-section (S. 12 (1)) says that a landlord shall not be entitled to the recovery of possession of any premises so long as the tenant pays or is ready and willing to pay the standard rent etc. and observes and performs the other conditions of the tenancy. In other words, no decree can be passed granting possession to the landlord, if the tenant fulfils the conditions above mentioned."

The Court further observed:—

"The point of time when the sub-section will operate is when the decree for recovery of possession would have to be passed. Thus, the language of the sub-section applies equally to the suits pending when Part II comes into force and those to be filed subsequently. The contention of the respondent that the operation of S. 12 (1) is limited to suits filed after the Act comes into force in a particular area cannot be accepted. The conclusion must follow that the present suit cannot be decreed in favour of the respondent."

4-A. Relying on this decision, Bhattacharya, J. referred to S. 13 (1) of the Act which states as follows:

"Notwithstanding anything to the contrary in any other law, no order or decree for the recovery of possession of any premises shall be made by any court in favour of the landlord against a tenant except on one or more of the following grounds... .."

5. There are several grounds for which the landlord may evict the tenant. It was noted that the Act was not in force when the suit was filed and the landlord wanted to evict the tenant under the provisions of the T. P. Act. According to Bhattacharya, J. in view of the clear language of S. 13 (1) of the Act there can be no doubt whatsoever that in spite of any other law being in force no court can pass any order or decree for recovery of possession of the suit premises evicting a tenant except on one or more of the grounds mentioned in sub-s. (1) of S. 13. Accordingly, the court even in pending cases is to see whether any order or de-

cree for recovery of possession can be passed according to the provisions of the Act and it does not matter whether the suit was originally filed under a different statute.

6. Chittatosh Mookerjee, J., on the other hand, referred to a Bench decision of this court in the case of Madho Prasad Sukul v. Gangaram Saraogi reported in ILR (1968) 2 Cal 183 where the provisions of the Act had been extended to Purulia during the pendency of the ejectment suit against the tenant. P. N. Mookherjee, J. speaking for the court observed as follows:

"It is an accepted rule of interpretation of statutes that in the absence of anything in the statute itself, either express or implied, giving it retrospective effect or operation in the case of a statute, which affect substantive or vested right, it should be construed as prospective and should not be applied to pending actions. The rule is different in procedural statutes.

The clear indication in S. 13, of which sub-s. (6) is also a part, is to point out and emphasise that the decree or order for eviction mentioned in sub-s. (1) of Section 13 obviously refers to a decree or order to be passed in a suit which is otherwise governed by the Act. A suit, which is governed by this Act, must be a suit contemplated in S. 13 (6) and must accordingly, comply with the requirements of the said sub-section. To a pending action, however, it will be impossible to apply the said sub-section. Vide in this connection, V. R. Varma v. Mohan Kumar Mukherjee, 66 Cal WN 796: (AIR 1962 Cal 563) (SB) where a similar view of Section 13 (6) was taken. Indeed, if this statute is to be given a retrospective operation in the sense that it would apply to pending actions, it would really impose upon the landlord an impossible and absurd condition of complying with a provision, which was not in existence at the date of the suit, but compliance with which would be necessary to enable him to have a decree. We do not think that the Legislature even intended or contemplated such a consequence."

7. As has been held in the judicial decisions application of provisions of an Act to a pending proceeding may be made by a competent Legislature. Such application however can be made by express provision or by clear intendment. In the case before us, there is no express provision providing that on extension of

the operation of the West Bengal Premises Tenancy Act all pending suits should be governed by the provision of the said Act. The question of intendment will have to be considered with reference to other provisions of the Act so that all the provisions of the Act can be given a harmonious working by such retrospective operation. In other words as all the provisions of the Act are to have and to be deemed to have effective and harmonious operation, if by retrospective operation some sections of the Act are incapable of application and rendered nugatory, such retrospective operation shall not be considered to be the intendment of the legislature. If the provisions of the West Bengal Premises Tenancy Act are made applicable to a pending proceeding, the application of the provisions of S. 17, sub-s. (1) and (2) and following sections will be rendered completely nugatory. As has been held by the Division Bench, it would be impossible for the landlord to comply with the provision of sub-s. (6) of S. 13 of the Act which provides for a notice of one month from the institution of the suit. We therefore find it difficult to hold that there was any intendment of the Legislature that the provision of the said Act would be applicable to a pending action on extension of the operation of the Act to the area in which the suit premises are situate. This position was also noted by Mookherjee, J. when he came to the conclusion for reasons indicated that there was no ground for holding that Legislature intended that the provision of the said Act would be applicable to pending action where it did not originally apply. As noted by the Division Bench, the suit contemplated in S. 13 (1) is a suit in respect of which a notice is given under the provisions of S. 13 (6) and read in that light the suit contemplated under sub-s. (1) of S. 13 must be one which is otherwise governed by the said Act. This position did not arise in the decision of the Supreme Court we have cited above and there was no such conflict in respect of the operation of the different sections of the Act and whatever incongruity might arise had been saved by Explanation to S. 12 of the Bombay Act which was also noticed by the said court. Accordingly, the case is distinguishable with reference to the facts as also of the provisions of the law of the case before us. In this view of the matter, we are in agreement with the decision of Mookerjee, J. that the provisions of the West Bengal Premises Tenancy Act have no application to pend-

ing proceedings in respect of suits for recovery of possession of the premises situate in an area to which the Act is extended when the suit was pending.

8. The impugned order accordingly is sustained and the connected Rule is discharged. There will be no order as to costs.

G. N. RAY, J.:— I agree.

Rule discharged.

AIR 1977 CALCUTTA 246
SALIL KUMAR DATTA AND
H. N. SEN, J.

Nirmal Kumar Banerjee, Petitioner v. Panihati Co-operative Bank Ltd. and others, Opposite Parties.

C. R. No. 1408 of 1973, D/- 8-12-1976.

W. B. Co-operative Societies Act (1940), S. 133-A (2) — Appeal to Co-operative Tribunal — Provisions of S. 29 (2) applicable — Period for obtaining copy of impugned award and its reasons, to be excluded, even though certified copy is not required to be filed with the appeal. (Lim. Act (1963), Ss. 29 (2), 12 (2)).

Under S. 133-A (2) the Co-operative Tribunal, in exercising the powers of the appellate court, will be governed by the provisions of the Limitation Act which are applicable to courts and accordingly S. 29 (2) of the said Act in respect of the provisions relating to appeals will be applicable when such application has not been expressly excluded by the Bengal Co-operative Societies Act save as regards the period of limitation for filing the appeal. The Tribunal accordingly will have the power to entertain an appeal subject to the provisions of S. 12 (2) of the Lim. Act, 1963, excluding the period for obtaining copy of the award and its reasons sought to be appealed from. Case law discussed. (Para 8)

It may be that the certified copy is not required to be filed along with the appeal. But when reasons for the award have been given, a person aggrieved is entitled to know the findings against him to consider his future course of action whether to file an appeal or other steps should be taken and for such purpose, copy of the reasons was necessary to him which could only be obtained from the certified copy thereof. Whether it is necessary that certified copies of the reasons of the award should be annexed to the memo-

randum of appeal or not, time requisite for obtaining the certified copies of these documents shall have to be excluded as plainly provided in S. 12 (2), Lim. Act. AIR 1928 PC 103, Foll. (Para 9)

Cases Referred :	Chronological	Paras
AIR 1976 SC 105 : 1976 Cri LJ 179		6
AIR 1976 Kant 69		5
AIR 1976 Raj 197		5
(1975) 79 Cal WN 573		6
AIR 1974 Raj 63		5
AIR 1973 Cal 364 : 77 Cal WN 118		6, 8
AIR 1972 Mys 311		5
AIR 1970 SC 209 : 1970 Lab IC 269		5
AIR 1970 SC 1477		6
AIR 1969 SC 872		3
AIR 1969 SC 953		6, 8
AIR 1928 PC 103 : 32 Cal WN 845		9

K. P. Sinha and Parimal Das, for Petitioner; Bhabesh Ch. Mitter, J. Islam, for Opposite Party No. 1; G. N. Roy and Biren Chakraborty, for the State.

SALIL KUMAR DATTA, J.:— This Rule is directed against order dated 20-7-1972 passed by the Assistant Registrar of Co-operative Societies, 24-Parganas (North) as the Co-operative Tribunal rejecting the petitioner's appeal on the ground of limitation. It appears that there were certain disputes between the petitioner and others and the co-operative bank and an award was passed by a Board of Arbitrators in dispute case No. 342 of 1969-70 in respect of the said dispute. The award was made on 11-12-1971 and was communicated to the petitioner on 21-12-1971. The appeal petition against the award was filed on 16-2-1972. The appellate authority, the Co-operative Tribunal, was of the opinion that under S. 134 of the Bengal Co-operative Societies Act, 1940 read with the Fourth Schedule thereof an appeal was to be filed within a month from the date of communication of the award to the person aggrieved. As this appeal was filed out of time beyond one month from date of communication, it was barred by limitation and was summarily rejected. This Rule is against this order. After the dismissal of the appeal, the petitioner filed a review petition against the order to the Government of West Bengal and the same was also rejected on March 30/31, 1973 by the Deputy Secretary, Co-operative Department of the Government. Both these orders are the subject-matter of the challenge in this Rule.

2. Mr. Sinha appearing for the petitioner submitted that the appellate authority was in error in dismissing the ap-

plication on the ground of limitation as the petitioner had applied for certified copy of the reasons of the award on 27-12-1971 and the copies were available to him on 24-1-1972. Accordingly, the petitioner was entitled to an exclusion of the time so taken under provision of S. 12 (2) of the Lim. Act, 1963. There is no dispute that if the time for copy is taken into account, the appeal would be in time.

3. The first consideration is whether the provisions of Lim. Act, 1963 apply to proceedings before tribunals under the Act. Mr. Mitter appearing for the co-operative bank has referred to various decisions in support of his contention that the provisions of Lim. Act have no application to the proceeding under the Bengal Co-operative Societies Act. He has referred to the decision in *K. Venkateswara Rao v. Bekkam Narasimha Reddy* reported in AIR 1969 SC 872 in which the court held that the Lim. Act cannot apply to proceedings like an election petition in the High Court inasmuch as the Representation of the People Act is a complete and self contained Code which does not admit of the introduction of the principles or the provisions of law contained in the Lim. Act. Lim. Act, 1963 states in its preamble that the Act is for consolidation and amendment of the law of limitation of suits and other proceedings and for other purposes connected therewith. Section 29 (2) of the Act is in the following terms:

"Where any special or local law prescribes for any suit appeal or application a period of limitation different from the period prescribed by the Schedule, the provisions of S. 3 shall apply as if such period were the period prescribed by the Schedule and for the purpose of determining any period of limitation prescribed for any suit, appeal or application by any special or local law, the provisions contained in Ss. 4 to 24 (inclusive) shall apply only in so far as, and to the extent to which, they are not expressly excluded by such special or local law."

4. On perusal, the section would indicate that where a provision of the period of limitation prescribed in any special or local law was different from the period under the Lim. Act, such period shall be deemed to be the provision for the purpose of limitation as if such period was the period prescribed by the Schedule to the Act. It further provides that for the purpose of determining any period prescribed for any suit, appeal or application by any special

or local law, Ss. 4 to 24 inclusive shall apply, only in so far as, and to the extent to which, they are not expressly excluded by such special or local law. Accordingly, if there is any specific provision excluding the operation of those sections in any local or special law those sections will cease to apply to matters in connection therewith. It was accordingly held in the decision of *K. V. Rao* that in view of the provisions of S. 86 (1) of the Representation of the People Act, the provisions of the Lim. Act would not be applicable.

5. Mr. Mitter relied on the case of *Nityanand v. Life Insurance Corporation of India*, reported in AIR 1970 SC 209 where the Court was considering the scope of Art. 137 of the Lim. Act, 1963. It was laid down there that this Article only contemplated applications before the court as it was included in the Third Division of the Schedule to the Lim. Act of 1963 which related to applications only before the Court. Accordingly, provisions of Ss. 4 and 5 of the Lim. Act were inapplicable to such applications before Labour Courts and the Scheme of the Lim. Act is that it only deals with applications to Courts. Mr. Mitter also referred to the decision in *Bando Banaji v. Bhaskar Balaji*, AIR 1972 Mys 311 in which it was held that in order to attract S. 29 (2), the proceedings initiated under a special or local law must also be those which are legally capable of being instituted before a court only. In coming to this decision, the court relied on the decision in *Joshi's case*, we have just referred to. The next case referred to is *M/s. Capstan Meter (India) Ltd. v. State of Rajasthan*, reported in AIR 1974 Raj 63, in which it was held that, in an application under S. 18 of the Land Acquisition Act, provisions of S. 12 (2) have no application because it was neither an appeal nor an application for review. In *R. T. Chinnavenkatesh v. Senior Regional Transport Officer and Licensing Officer of Mysore-4*, AIR 1976 Kant 69, it was held that S. 29 (2) of the Lim. Act does not say that the provisions of the Lim. Act would be applicable to appeals filed under a taxing statute. Hence it is not possible to apply by analogy the principle underlying S. 5 of the Lim. Act to appeals filed under S. 15 of the Karnataka Motor Vehicles Taxation Act (35 of 1957). In this decision, the court found that the provisions of the Lim. Act would be applicable only if it was stated in the relevant section that it would apply to taxing statute.

In *Lakshmi Chand v. State of Rajasthan*, AIR 1976 Raj 197, it was held that the provisions of S. 5 of the Lim. Act would be applicable only to appeals and applications filed in a court of law within the strict sense of the term and cannot be invoked in cases of applications and appeals presented before the Tribunals which are not courts of law but are statutory bodies performing quasi-judicial functions.

6. Mr. Sinha referred us to the decision in *Maloji Rao v. State of Madhya Pradesh* reported in AIR 1969 SC 953 in which the court condoned the delay in filing the appeal on exclusion of the time taken for obtaining the copy of the judgment. It was provided in S. 34 of the Ryotwari Act provisions whereof were applicable to the case that subject to the provisions of Lim. Act in force at the time, no appeal shall be filed before the Board after the expiry of 90 days. It was held that in hearing an appeal under the Act, the court must guide itself by the provisions of the Lim. Act in force for extension and computation of the period of limitation. The Court considered the provisions of S. 29 (2) of the Lim. Act, 1908 and held that this section goes to show that unless excluded by the Jagirs Act or Ryotwari Act, S. 12 of the Lim. Act would be applicable to appeals filed before the Board of Revenue under any of the provisions of these Acts. Mr. Sinha also referred to the case of *D. P. Mishra v. Kamal Narayan Sharma*, reported in AIR 1970 SC 1477 in which the court was considering a case under the Representation of the People Act. It was held there that the period of limitation provided therein was a special law within the meaning of S. 29 (2) and the period when the court was closed could be excluded in computing the period of limitation prescribed in S. 177-A when the High Court is to hear the appeal as an appeal from original decree. In the case of *Magnuram v. Delhi Municipality*, reported in AIR 1976 SC 105, it was held that under S. 29 (2) of the Lim. Act, 1963, unless there is express exclusion S. 5 could be availed of for the purpose of extending the period of limitation by special or local law, if there was sufficient cause for not presenting the application in Court within the period of limitation. In *Sunit Paramanik v. Santipur Industrial Co-operative Society Ltd.*, 77 Cal WN 118: (AIR 1973 Cal 364) a bench decision of this Court considered S. 29 (2) of the Lim. Act, 1963. It was held that by reason of the provisions of sub-s. (2) of S. 29 of the Lim. Act, 1963, the period of limitation pre-

scribed by the Co-operative Societies Act is to be deemed to be the period of limitation prescribed by the Lim. Act and the provisions of Ss. 4 to 24 would apply to the said period. In *Treasury Building Co-operative Society Ltd. v. Sukumar Ganguly*, (1975) 79 Cal WN 573, it was held that provisions of S. 29 (2) of the Lim. Act, 1963 would apply to the period of limitation prescribed under the Bengal Co-operative Societies Act and the provisions of Ss. 4 to 34 of the Lim. Act will be applicable for computing the period of limitation in maintaining a suit under the Co-operative Societies Act.

7. A review of the decisions indicate that the provisions of the Lim. Act, 1963 are applicable to suits, appeals and applications before the courts. These provisions in respect of the period of limitation can be modified by any special or local law for such proceedings before any court and unless expressly excluded, the provisions of Ss. 4 to 24 inclusive will be applicable in all these proceedings. In respect of proceedings before the Tribunals and authorities other than courts, the provisions of the Lim. Act would be applicable if they are expressly or impliedly extended to such proceeding by the special or local law. Under S. 29 (2), of the Lim. Act, 1963, the provisions of S. 3 will apply with such modifications as may be provided in such special or local law and unless expressly excluded the provisions of Ss. 4 to 24 inclusive shall also apply to such proceedings.

8. Under the provisions of S. 133-A (2), of the Bengal Co-operative Societies Act, 1940 the Tribunal shall hear the appeals under the Act as specified in its Sch. 4 and shall exercise all the powers conferred under the appellate court by O. 41 in the First Schedule to the C. P. C. In respect of such appeals the Tribunal called the Co-operative Tribunal, in exercising the powers of the appellate court, will be governed by the provisions of the Lim. Act which are applicable to courts and accordingly S. 29 (2) of the said Act in respect of the provisions relating to appeals will be applicable when such application has not been expressly excluded by the Bengal Co-operative Societies Act save as regards the period of limitation for filing the appeal. The Tribunal accordingly will have the power to and will entertain an appeal subject to the provisions of S. 12 (2) of the Lim. Act, 1963 excluding the period for obtaining copy of the award and its reasons sought to be appealed from. The Supreme Court also held that

when the Lim. Act has been made applicable, the provisions under S. 29 (2), unless otherwise excluded, shall be applicable to tribunals like the Board of Revenue as was held in the decision in Maloji Rao's case reported in AIR 1969 SC 953. For all these reasons, we accept the contention raised by Mr. Sinha and hold that the provisions of S. 29 (2) would be applicable to appeals under the West Bengal Co-operative Societies Act, 1940 also as held in Sunit Pramanik's case (AIR 1973 Cal 364).

9. Mr. Mitter has next contended that there was no rule that certified copy of the reasons of the award was to be annexed with the Memorandum of Appeal. Accordingly, the petitioner is not entitled to avail of the time that was required for obtaining the certified copy. It may be that the certified copy is not required to be filed along with the appeal. But when reasons for the award have been given, a person aggrieved is entitled to know the findings against him to consider his future course of action whether to file an appeal or other steps should be taken and, for such purpose, copy of the reasons was necessary to him which could only be obtained from the certified copy thereof. It was held in *Jijibhoy N. Surty v. T. S. Chettyar*, 32 Cal WN 845: (AIR 1928 PC 103), by the Privy Council that S. 12 of the Lim. Act is unrestricted in its scope and is a positive enactment. It does not make the exclusion of the time requisite for obtaining the certified copies of the judgment and decree dependent upon these documents being required to be annexed to the Memorandum of Appeal by the rules of the C. P. C. or the rules as amended by the High Court. In computing the period of limitation therefore such time shall always be excluded whether these documents are necessary to the presentation of the appeal or not. This ruling conclusively lays down that whether it is necessary that certified copies of the reasons of the award should be annexed to the Memorandum of Appeal or not, time requisite for obtaining the certified copies of these documents shall have to be excluded as plainly provided in S. 12 (2).

10. Mr. Mitter has further contended that reasons of the award do not form any part of the award and, accordingly, the time taken for obtaining the certified copy thereof should not be excluded from computation of the period of limitation. According to Mr. Mitter, it was not necessary for an aggrieved party to look into

the reasons that might be the basis of the award. He could simply file an appeal by stating that he was aggrieved by the award. This contention in our opinion, cannot be accepted by us, as it should always be open to the aggrieved party to know the reasons on which some findings are arrived at against him. Accordingly, for all these reasons, we are of the view that the time requisite for obtaining the certified copy of the entire award should be excluded for computing the period of limitation under S. 12 (2) of the Lim. Act in respect of an appeal under the Bengal Co-operative Societies Act, 1940.

11. As we have already indicated, there is no dispute that if such time is taken into consideration, the appeal is well within time, as provided in S. 134 read with 4th Schedule, Item 7 of the Bengal Co-operative Societies Act, 1940. The appellate authority was, therefore, in error in exercise of its jurisdiction in rejecting the appeal on the ground of limitation.

12. For all these reasons, the impugned order of the Assistant Registrar rejecting the appeal cannot be sustained and is set aside. The other consequential orders are also set aside as they are based on the order rejecting the Memorandum of Appeal.

13. The Rule is, accordingly, made absolute. We direct that the appeal be registered and be disposed of in accordance with law. There will be no order as to costs. Let the records be sent down at once.

H. N. SEN, J.:— I agree.

Rule made absolute.

AIR 1977 CALCUTTA 249

S. K. DATTA AND H. N. SEN, JJ.

The Calcutta State Transport Corporation, Petitioner v. Lakshmi Rani Pal and others, Opposite Parties.

C. R. No. 857 of 1968, D/- 11-11-1976.*

Motor Vehicles Act (1939), S. 110-C — Procedure — Exclusion of O. 18 of Civil P. C. by State Rules — Effect — Order for re-examination of witnesses — Validity. (Constitution of India, Art. 226).

Where the entirety of O. 18 of C. P. C. has been excluded by Rules framed by

*(Against order of B. Basak, Member, M. A. C. T., Howrah in M. A. C. C. No. 127 of 1963, D/- 5-2-1968).

the State of West Bengal under the Motor Vehicles Act, in a Motor Accident Claim Case, the Tribunal is entitled to follow its own procedure for ends of justice in the context of circumstances of a case. Consequently the order of Tribunal for re-examining witnesses of both the parties for patching up the lacuna in evidence does not offend any provision of law and it is consistent with natural justice. AIR 1964 Punj 235 and (1967) 71 Cal WN 747, Ref. (Para 4)

Cases Referred: Chronological Paras
 (1967) 71 Cal WN 747 3
 AIR 1964 Punj 235 2

Somen Bose, Mukul Ghose and S. Pal, for Petitioner; A. N. Roy Choudhury and Sadhan Chandra Pal, for Opposite Parties.

S. K. DATTA, J.:— In this Rule the Calcutta State Transport Corporation has challenged an order dated 5-2-1968 passed in motor accident claim case No. 127 of 1963.

2. It appears that there was admittedly a collision between Car No. WBC 7862 and State Bus No. WBS 1675 at the junction of Raja Dinendra Street and Ultadanga Road at about 12 noon on 13-8-1963. As a result of this collision one of the passengers died and several passengers were injured. The person who died was the husband of the opposite party No. 1 and the father of the other opposite parties. The learned Judge was of the opinion that on the evidence adduced by the parties it was very difficult to decide either way. Accordingly, for ends of justice, by the impugned order he directed that an opportunity should be given to the claimants to examine further the P. Ws. 1, 2 and 3 and also to examine E. C. D'Souza, mechanical expert, who examined the Bus after the accident in connection with the criminal case arising out of the said accident, with like opportunity to the Corporation to examine its witnesses. The learned Judge relied on AIR 1964 Punj 235, *New India Assurance v. Punjab Roadways* wherein it was held that in the absence of a restraining provision a tribunal is at liberty to follow any procedure which it may choose to evolve for itself so long as such procedure is orderly and consistent with the rules of natural justice and does not contravene any provision of law. This order has been impugned in this Rule.

3. It has been contended that since O. 18, R. 17 has been excluded in such trial, there is no scope for allowing further evidence to be adduced in re-

examination in particular to patch up a lacuna in the evidence. He has also relied on the decision in *Shyamapada Neogy v. Asoke Kumar Biswas* reported in (1967) 71 Cal WN 747 in which it was held that the recall of witness after closure of evidence would cause surprise and gravest of prejudice to the other side and it was further held in that case that it was really to fill up the lacuna in the case, the pretext of re-examination was taken.

4. As was held in the Punjab case, no procedure has been laid down for trial of claims by the Tribunal. It may also be mentioned that the entirety of O. 18 of the C. P. C. has been excluded in such trial by the Rules framed by this State under the Motor Vehicles Act, 1939. In absence of restraint, the Tribunal is entitled to follow its own procedure for ends of justice in the context of circumstances of a case. Such procedure however will have to be consistent with the principles of fair play and natural justice and should not cause any prejudice to any party. Further in respect of claims for compensation arising from accident, where the involvement of a particular vehicle is not in dispute, the question of onus becomes immaterial. In such case it is only proper for the person liable to answer the claim for compensation to establish that his vehicle was not responsible for the accident or it was due to any contributory negligence of the injured person or the other vehicle or to any other relevant cause. The Tribunal will take into consideration the entirety of the evidence adduced before it by the parties in arriving to its finding while making his award under S. 110-B of the Act.

5. In this case, in the context of the admitted accident and involvement of the Corporation's vehicle therein leading to the death of the husband and father of the petitioners, the Tribunal deemed it fit in interest of justice to allow the petitioners another opportunity to examine the witnesses already examined as also the mechanical expert who examined the vehicle after the accident. Like opportunity was also given to the Corporation to examine its witness already examined as also the driver who then drove the vehicle and any other witness as the Corporation would think necessary. Needless to mention, witnesses of one party will be subject to cross-examination by the other party. Such procedure, in our opinion, does not offend any provision of law while it is consistent with natural

justice and fair-play and will not cause any prejudice to the Corporation.

6. In the circumstances, the Rule fails and is discharged. There will be no order for costs. Let the case be disposed with utmost expedition.

H. N. SEN, J.:— I agree.

Application dismissed.

AIR 1977 CALCUTTA 251 SPECIAL BENCH

SANKAR PRASAD MITRA, C. J.,
SABYASACHI MUKHARJI AND
SALIL KUMAR DATTA, JJ.

The State of West Bengal, Petitioner v. Sailendra Kumar Sen, Respondent.

Civil Revn. Cases Nos. 1817 and 1818 of 1972, D/- 9-11-1976.

W. B. Estates Acquisition Act (1 of 1954), S. 5-B (as inserted by Act 28 of 1954) — Effective date of applicability.

The effective date in S. 5-B in respect of sales of raiyati and under raiyati holdings under the relevant statutes mentioned therein is the first day of June 1954 as therein provided.

Section 5-B does not operate as a bar to the execution of decree for arrears of rent as money decree against raiyati or under-raiyati interest and S. 168-A (1) is impliedly repealed by vesting of the interest of intermediaries (which include raiyats and under-raiyats) in the State.

(Para 37)

It accordingly appears that notwithstanding S. 5-B, till vesting there is no bar to the voluntary sales of tenures or holdings of raiyats or under-raiyats or to sales of such interest in execution of money decrees under the provisions of C. P. C. If any such sale has taken place during the material period till vesting and was or could be treated as a sale under the Code if otherwise valid and not under the provisions of the aforesaid Acts, such sale will not be void or deemed to be void under S. 5-B and has to be sustained as a valid sale in law.

(Para 30)

Cases Referred: Chronological Paras

(1975) 79 Cal WN 216	20, 22, 36
(1973) 77 Cal WN 969	19
(1970) 74 Cal WN 400	14, 17, 34
(1967) 71 Cal WN 300	13, 20, 22
ILR (1966) 1 Cal 495	18, 27
AIR 1964 SC 1511	26
(1963) 67 Cal WN 129	18
(1963) 67 Cal WN 452	13, 29

AIR 1958 Cal 253 : 62 Cal WN 172 16, 33
(1958) 62 Cal WN 373 16, 33
(1978) 6 Ind App 47 (PC) 34

P. K. Sen Gupta and Tapan Kumar Sen Gupta, for Petitioner; Amarendra Mohan Mitra, Swadesh Bhushan Bhunia and Prabir Kumar Samanta, for Respondent.

SALIL KUMAR DATTA, J.:— The Division Bench consisting of A. K. Sen, B. C. Roy, JJ. has referred the above revision cases to the Special Bench in view of the questions of great public importance involved therein. The questions relate to the interpretation of the provisions of S. 5-B of the West Bengal Estates Acquisition Act, 1953 (West Bengal Act 1 of 1954) hereinafter referred to as the said Act, with reference to the date of their application to raiyati and under-raiyati holdings and consequences arising therefrom.

2. The relevant facts are as follows:—

On December 18, 1970 the Assistant Settlement Officer Settlement 'C' Camp No. IIA, Diamond Harbour, initiated proceedings under S. 44 (2a) of the said Act for revising the finally published record-of-rights in respect of some khatians within his jurisdiction, which, according to him, were incorrectly recorded with auction purchaser the opposite party herein, as raiyat. Proceedings in respect of entries of khatians Nos. 10, 11 (624, 625 Khanda) of Mouza Haradhanpore gave rise to Case No. 156 of 1970 (under S. 44 (2a)) while proceedings in respect of entries of khatians Nos. 6, 7, 13, 15 and 24 (302, 308, 309 and 310 Khanda) of Mouja Kailpara was registered as Case No. 22 of 1970 (under S. 44 (2a)). It appears that the lands were purchased by the opposite party in rent execution sales, on November 6, 1954 in respect of Haradhanpore lands and on Dec. 3, 1954 in respect of Kailpara lands. It was held by the Assistant Settlement Officer in the said S. 44 (2a) proceedings, following some decisions of this Court, that on the issue of the notification under S. 49 bringing the provisions of Chap. VI, relating to acquisition of interests of raiyats and under-raiyats, into force, S. 5-B applied with retrospective effect to raiyati and under-raiyati holdings, as if they were estates as contemplated in the said section. As a result, in accordance with S. 5-B which provides that there could be no sale of estates under the Bengal Tenancy Act after June 1, 1954 and any sale held thereafter is to be deemed as void and of no effect the auction purchases in rent sales made admittedly after that date by the

opposite party were thus void and of no effect. Accordingly by orders dated January 8 and 27, 1971 the record-of-rights in respect of above khatians were directed to be revised as recording the names of the former recorded raiyats as raiyats with possession of the lands with the auction purchaser as adverse to the recorded raiyats.

3. Appeals were preferred against the aforesaid orders by the opposite party under S. 44 (3) giving rise to E. A. Appeals Nos. 86 and 87 of 1971 respectively. By an order dated December 9, 1971 the learned Ninth Additional District Judge, Alipore as the Tribunal under S. 44 (3) allowed the appeals on contest and set aside the impugned orders holding that S. 5-B had no application to raiyati interest and the Assistant Settlement Officer was not justified in treating the auction purchases as invalid. The State of West Bengal has obtained the connected rules against the said orders of the learned Tribunal which on reference, are now before us.

4. We shall now consider the relevant sections of the West Bengal Estates Acquisition Act, 1953. S. 4 is as follows:

"4. (1) The State Government may from time to time by notification declare that with effect from the date mentioned in the notification, all estates and the rights of every intermediary in each such estate situated in any district or part of a district specified in the notification, shall vest in the State free from all incumbrances.

(2) The date mentioned in every such notification shall be the commencement of an agricultural year and the notifications shall be issued so as to ensure that the whole area to which this Act extends, vests in the State on or before the 1st day of Baisakh of the Bengali year 1362" (April 15, 1955).

5. The intermediary has been defined as in S. 2 (i) as

"2.(i) 'intermediary' means a proprietor, tenure-holder, under tenure-holder or any other intermediary above a raiyat or a non-agricultural tenant and includes a service tenure-holder and, in relation to mines and minerals, includes a lessee and a sub-lessee...."

6. This definition by itself did not include raiyati or under-raiyati interest in any holding.

7. By West Bengal Estates Acquisition (Amendment) Act, West Bengal Act XIII of 1954 which received the President's assent on April 23, 1954, S. 5-A was in-

serted with retrospective effect from the date of commencement of the parent Act. The relevant excerpt is as follows:—

"5-A. (1) The State Government may after the date of vesting enquire into any case of transfer of any land by an intermediary made between the 5th day of May, 1953 and the date of vesting, if in its opinion there are prima facie reasons for believing that such transfer was not bona fide.

(2) If after such enquiry the State Government finds that such transfer was not bona fide, it shall make an order to that effect and thereupon the transfer shall stand cancelled as from the date on which it was made or purported to have been made."

8. Section 5-B was inserted with retrospective effect from the 1st day of June, 1954 by West Bengal Estates Acquisition (Second Amendment) Act, 1954 West Bengal Act XXVIII of 1954 which received the President's assent on October 2, 1954. The relevant portion is as follows:—

"5-B. On and from the 1st day of June, 1954, no estate, tenure or under-tenure shall be liable to be sold under the Bengal Land Revenue Sales Act, 1859 or the Cooch Behar Revenue Sales Act, 1897 or the Bengal Patni Taluks Regulation, 1819 or the Bengal Tenancy Act, 1885, as the case may be, and any sales which took place on or after that day under any of those acts or that regulation shall be deemed to have been void and of no effect"

9. Chapter VI is concerned with acquisition of interests of raiyats and under-raiyats and comprises of Ss. 49 and 52. Sections 50 and 51 being omitted with retrospective effect. Section 49 and S. 52 were substituted with retrospective effect for the original section by West Bengal Estates Acquisition (Amendment) Act (West Bengal Act XXXV of 1955) and received the President's assent on November 25, 1955. The relevant provisions are as follows:—

"49. The provisions of this Chapter shall come into force on such date and in such district or part of a district as the State Government may, by notification in the Official Gazette, appoint and for this purpose different dates may be appointed for different districts or parts of districts."

10. Section 52 substituted with retrospective effect for the original section by the aforesaid Act in relevant extracts is as follows:—

"52. On the issue of a notification under S. 49 the provisions of Chaps. II, III, V,

and VI shall, with such modifications as may be necessary, apply mutatis mutandis to raiyats and under-raiyats as if such raiyats and under-raiyats were intermediaries and the land held by them were estates and a person holding under a raiyat or an under-raiyat were a raiyat for the purposes of Cls. (c) and (d) of S. 5"

11. By notification No. 6804 L Ref. dated the 9th April, 1956 (published in Calcutta Gazette Extraordinary of same date, Part I, p. 743), Chap. VI came into force in all districts of West Bengal with effect from the 10th day of April 1956.

12. The points for determination in this reference are— (1) what is the effective date in S. 5-B in respect of sales of raiyati and under-raiyati interest under the statutes mentioned therein.

(2) whether during the period S. 5-B operated as a bar to the execution of rent decree as money decree against raiyati and under-raiyati interest and what is the effect of vesting on S. 168-A of the Bengal Tenancy Act, 1885.

13. The Judicial decisions on this aspect have not been uniform. In the earliest decision in Prahlad Chandra Dey v. Govinda Chandra Dey, (1963) 67 Cal WN 452, S. K. Sen, J. held as follows:—

"... ..the effective date to be inserted in S. 5-B when we are concerned with the sale of raiyati jotes cannot be any date earlier than 25th November, 1955, when Ss. 49 and 52 of Chap. VI were substituted for old sections; and the date to be substituted in S. 5-B for avoiding the court sales of raiyati jotes would be 10th April, 1956, the date of the issue of notifications under S. 49, and not the date on which the Ss. 49 and 52 in their present forms were substituted by amendment of the Estates Acquisition Act. It is to be observed that in S. 52, it is clearly provided that the provision of Chaps. II etc. shall not apply as they are, but they shall apply with necessary modifications. When the Act became applicable to raiyati jotes from a much later date, it is also necessary modification of S. 5-B of Chap. II that the date mentioned in S. 5-B from which Court sale of raiyati jotes should become void would be a much later date viz. the date on which by notification the Act was made applicable to raiyati interests."

In Aftabuddin Ahmed v. State of West Bengal, (1967) 71 Cal WN 300, R. N. Dutt, J. was considering the effective date in S. 5-A in respect of raiyati and under-raiyati holdings and it was observed,

"When the words of S. 5-A specifically mentioned a certain date there is no scope to hold that in respect of raiyats and under-raiyats the effective date would be some other date because otherwise the raiyats and under-raiyats would be adversely affected... ..the effective date in S. 5-A of the Act in respect of raiyats and under-raiyats also is 5th day of May, 1953."

14. In Haripada Pramanik v. Gopal Chandra Maity, (1970) 74 Cal WN 400 the Court was considering sales of raiyati holdings of judgment debtor in 1960 by the auction purchaser. It was observed—

"In the present case, the interest that was sold was that of a raiyat. Chapter VI of the West Bengal Estates Acquisition Act, which deals with raiyats and under-raiyats, came into force on the 10th day of April, 1956, on the issue of a notification under S. 49 of the Act and thereupon S. 5-B became applicable to raiyats and under raiyats with such modifications as might be necessary".

15. The Division Bench held that even so there was no bar on the ex-landlord to execute the decree under the C. P. C. treating them as money decrees, as a rent sale thereafter under the Bengal Tenancy Act was neither permissible nor possible. There was no bar in S. 5-B of the Act to such sale of the lands held by the judgment-debtors then under the State.

16. In earlier Bench decisions in Ahi-dhar Ghosh v. Sm. Nisi Bala, 62 Cal WN 172: (AIR 1958 Cal 253), it was held that when as a result of vesting, the defaulting tenure ceased to exist, the proviso of S. 168-A (1) of the Bengal Tenancy Act would apply, that is to say, other properties of the ex-tenant might be proceeded against. In another case in Hiranmoyee v. Apal Choudhury, (1958) 62 Cal WN 373 it was held by another Division Bench that on vesting the decree holder is entitled to proceed against the properties of the ex-tenant other than the defaulting tenure and the bar of S. 168-A of the Bengal Tenancy Act would not apply to such a case. It was further held that there was an implied repeal of S. 168-A of the Bengal Tenancy Act by S. 5-B of the said Act.

17. The Division Bench in Haripada Pramanik's case (1970) 74 Cal WN 400 following the above two Bench decisions held:—

"There is, therefore, no reason why the sales in question would not have the effect of sales under money decrees. The judg-

ment-debtor had lost the original holdings on the vesting of his interest in the State, but he still had some interest in the lands which constituted those holdings in view of the provisions of S. 6 of the Estates Acquisition Act. It is this interest which passed to the auction purchaser upon his purchase of the disputed lands."

18. In *Ambujakhya Mukherjee v. State of West Bengal*, ILR (1966) 1 Cal 495, P. B. Mukherjee, J. (as his Lordship then was) on p. 525-6, para. 55 was meeting the argument that raiyati lands could not be vested in the State under the said Act in view of the enforcement of Chap. VI after expiry of Baisakh 1, 1362 as provided in S. 4 (2). His Lordship referred to the observations made by him in *Haranath Ghosh v. State of West Bengal*, (1963) 67 Cal WN 129 as set out below:—

"The words 'mutatis mutandis' following the word 'modification' make it abundantly clear as to the modifications intended under S. 52 of the Act. In other words, the word 'modification' in S. 52 of the Act means contextual adaptation of these chapters of the Act to the case of raiyats and under-raiyats and not amendment of the substantive provisions and effects of those chapters. The contextual adaptation is only intended to make these chapters applicable to the case of raiyats and under-raiyats... .."

19. Janah, J. In *Basdeo Singh v. Binode Behari*, (1973) 77 Cal WN 969 observed as follows:—

"According to the view taken in *Ambujakhya Mukherjee v. State*, therefore, it is not permissible to read 10th April, 1956 or any other date in place of 1st June, 1954."

20. In the Bench decision in *State of West Bengal v. Bithika Maity*, (1975) 79 Cal WN 216 the Court was of opinion that the proposition enunciated in the case of *Aftabuddin Ahmed*, ((1967) 71 Cal WN 300) in respect of S. 5-A applies with all its force to cases under S. 5-B as well. It was observed:

"When legislature made Ss. 49 and 52 of the Act retrospective with effect from the day when the Act first came into force, it must be said that the date mentioned in S. 5-B must be the effective date not only in respect of intermediaries whose estate vested in the State under S. 5 but also in respect of intermediaries whose estate vested under S. 52 of the Act that is raiyats and under-raiyats. When the words of S. 5-B specifically

mentioned a certain date there is no scope for holding that in respect of raiyats and under-raiyats the effective date would be some other date because otherwise the raiyats and under-raiyats would be adversely affected. The legislature must have considered this aspect of the matter when it made Ss. 5-A, 5-B and 52 retrospective from the date when the Estates Acquisition Act first came into force. It being in the domain of legislature court cannot question the same."

21. The Bench making the present reference was also of opinion that the interpretation given by S. K. Sen, J. would be beyond the powers of Court. Such alteration of date in S. 5-B would mean legislation by Court beyond the authority of S. 52 which authorised only contextual adaptation of provisions of S. 52 to raiyati or under-raiyati interest brought under the purview of the Act on the notification of S. 49.

22. Mr. P. K. Sen Gupta learned Government Pleader, relying on the *Aftabuddin's* case ((1967) 71 Cal WN 300) as also on the Bench decision in *Baithika Maity's* case ((1975) 79 Cal WN 216) contended that the provisions of S. 5-B became operative on and from June 1, 1954 for all purposes. It is not open to the Court to fix another date for the purpose when the legislature in its wisdom fixed the relevant date for purpose of S. 5-B. Mr. Amarendra Mohan Mitra as also Mr. Swadesh Ranjan Bhunia learned Advocates for the opposite parties, contended on the other hand that S. 5-B could only be operative only on the vesting raiyati and under-raiyati interest in the State by notification made under S. 52. Their rival contentions will now have to be examined.

23. Under Acts and regulation mentioned in S. 5-B the defaulting Estate, tenure or under-tenure only could be put to sale in execution of a decree for rent of such estate, tenure or under-tenure. As a result of vesting of the intermediary interest, the defaulting estate, tenure or under-tenure ceased to exist, so that after vesting it is no longer possible to put such interest to sale. It is thus obvious that normally any rent sale under the aforesaid statutes taking place prior to vesting would be valid in law and would entitle the auction purchaser to the defaulting estate, tenure or under-tenure.

24. Chapter VI which provides for acquisition or interests of raiyats and under-raiyats, was brought into force in all districts of West Bengal with effect from

April 10, 1956 by notification No. 6804 L Ref. dated April 9, 1956 as provided in S. 49. On the issue of notification, provisions of Chaps. II, III, V and VII applied with such modifications *mutatis mutandis* to raiyats and under-raiyats as if such raiyats and under-raiyats were intermediaries and the lands held by them were estates. As a result, provisions of Ss. 4, 5-A and 5-B which were included in Chap. II became applicable to raiyats and under-raiyats in respect of the lands held by them with effect from April 10, 1956 and interest of the raiyats and under-raiyats thereupon vesting in the State. On such vesting, the interests of raiyats and under-raiyats ceased to exist and if thereafter they chose to retain lands in their khas possession under S. 6 of the said Act they were to be deemed to be a direct tenant under the State and such tenancy would be a new and different tenancy altogether.

25. It is therefore obvious that in execution of rent decree for arrear of rent passed prior to vesting under the statutes mentioned in S. 5-B, after vesting of the interests of raiyats and under-raiyats it was no longer possible to put the defaulting holding to sale as such holding then ceased to exist. There was or could be no legal bar in usual circumstances to put such defaulting holding to sale in execution of rent decree prior to vesting when such holding had its existence. The question now is whether it is competent for legislature to prohibit such rent sale with effect from an earlier date before vesting as was sought to be done by provisions of S. 5-B read with S. 49 and notification as also S. 52. It may be noted that the legislature took into consideration that by reason of the belated legislation codified in S. 5-B there might be sales of interest of intermediaries in tenure or holdings during the period prior to vesting S. 5-B accordingly provided that on and from 1st day of June 1954 no such interest would be liable to be sold under the statutes mentioned therein and any sale which took place after that date under the said statutes was to be deemed as void and of no effect.

26. As has been recognised in judicial decisions the legislature is undoubtedly competent to take away vested rights by means of retrospective legislation. Unless however a clear and unambiguous intention is indicated by legislature by adopting suitable and express words in respect thereof, no provision of a statute should be given retrospective operation if there-

by vested rights are affected. The Supreme Court in *Rafiquennessa v. Lal Bahadur Chetri*, AIR 1964 SC 1511 added that a statutory provision is held to be retrospective either when it is so declared by express terms or the intention to make it retrospective clearly followed from the relevant words and the context in which they occur.

27. In the case before us, by reason of of the provisions of S. 52, there was, as held in *Ambujakhyas case*, ILR (1966) 1 Cal 495 a contextual adoption of the provisions of S. 5-B to raiyati and under-raiyat holdings in express clear and unambiguous language. It is accordingly not possible for the Court to fix another date in S. 5-B which would be in direct contravention of the provisions adopted by the legislature. We have however made attempts to ascertain why the particular date namely June 1, 1954 was selected as the relevant date where from the rent sales of tenures and holdings are to be declared as void. No nexus could apparently be found for enforcement of the provisions from that date unlike S. 5-A where in the date, 5th May 1953 was the date when the bill for acquisition of intermediary interest resulting in the parent Act was published in the Calcutta Gazette, which led to a spate of transfer for defeating the purposes of the Act. In the objects and reasons of the amending Act XXVIII of 1954, it was merely stated to be as follows:—

"to exempt all estates and tenure from sale under the Bengal Revenue Sales Act, 1859 (IX of 1859) or the Cooch Behar Revenue Sales Act, 1897 (Cooch Bihar Act V of 1897) or the Bengal Patni Taluks Regulation, 1819 (Bengal Regulation VIII of 1819), as the case may be, on and from the first day of June 1954". (and even there the Bengal Tenancy Act, 1885 appears not to be included though it is included along with the aforesaid statutes in S. 5-B).

28. The Objects and Reasons of the West Bengal Estates Acquisition Act, 1953, as is well known, is *inter alia* to eliminate the interests of all zamindars and intermediaries and also to permit the intermediaries to retain possession of their khas land upto certain limits and to treat them as tenants holding directly under the State. It was also the intention of the legislation to make the actual cultivators tenants directly under the Government. If an auction-purchaser is permitted to acquire the interest of the defaulting holding in a rent sale upto vesting he

would be entitled under the law to annul the subordinate interest of actual cultivators under the defaulting holding till vesting who would otherwise be entitled to hold the lands in their khas possession under the Government upon vesting. It seems obvious that to safeguard the interest of actual cultivators and to avoid an uncertain state of affairs at the time of vesting which annulment of subordinate interest on rent sale till date of vesting might create, the legislature thought it fit to prohibit rent sale with effect from an earlier date by making suitable legislation which it was competent to promulgate. Such interpretation accordingly appear to be consistent with the aim, scope and object of the Act.

29. On the issue of notification under S. 49 as we have seen the provisions inter alia of Chap II applied mutatis mutandis to raiyats and under-raiyats as if they were intermediaries. Accordingly as soon as S. 5-B within Chap. II applied to raiyati and under-raiyati interest the relevant provisions thereof became applicable, and the sale under any of the statutes mentioned therein after 1st day of June 1954 was to be deemed to have been void and of no effect. According to the decision of S. K. Sen, J. in Prahlad's case ((1963) 67 Cal WN 452) noted above the date mentioned in S. 5-B is to be the date on which by notification the Act was made applicable to raiyati interest. This conclusion overlooks that on vesting of raiyati and under-raiyati interest which obliterated such interests, there could be no sale under those acts of such interests which ceased to exist. The provisions of S. 5-B on such interpretation taking the effective date as the date of vesting would be wholly redundant and unnecessary. It is a rule of interpretation of statutes that each and every provision of a statute must be given full operation and effect. In view of the express provision in S 5-B we are of the opinion that the effective date in respect thereof is the first day of June 1954 in respect of sales of raiyati and under-raiyati holdings under the statutes mentioned therein and such provision is undoubtedly with the competency of the legislature.

30. It is further to be noted that S. 5-B declares void sale of tenure or holding held on and from June 1, 1954 under the statutes mentioned therein. It contains no prohibition in respect of sales in execution of decree under the C. P. C., as this section is concerned only with the sales under the aforesaid statutes. A tenure or

holding as is well known till vesting was transferable and heritable under the provisions of the Bengal Tenancy Act and other connected regulations. There could accordingly be no legal bar in the sale of such tenure or holding till vesting so long they were in existence in execution of decrees for money against the holder thereof while under S. 5-B after June 1, 1954 there could be no sale of such tenure or holding under the provisions of the said statutes. It accordingly appears to us that notwithstanding S. 5-B, till vesting there is no bar to the voluntary sales of tenures or holdings of raiyats or under-raiyats or to sales of such interest in execution of money decrees under the provisions of the C. P. C. If any such sale has taken place during the material period till vesting and was or could be treated as a sale under the Code if otherwise valid and not under the provisions of the aforesaid Acts, such sale will not be void or deemed to be void under S. 5-B and has to be sustained as a valid sale in law.

31. Under S. 143 (2) of the Bengal Tenancy Act, subject to rules under the Act and other provisions thereof, the C. P. C. applies to all suits between landlord and tenant. All such suits are to be entered in a special register instead of the register of Civil suits (S. 146). There are certain specific provisions in the Act in respect of suits for recovery of rent and of appeals from decrees therein. As a result a decree for arrears of rent due in respect of a tenure or holding may thus have the effect of a rent decree if the formalities are complied with as required under S. 148 and under S. 65 if it is a rent decree, the tenure of the holding shall be liable to sale in execution.

32. Chapter XIV (Ss. 159-177) provides for sales for arrears under decree obviously for rent being under the said Act. Under S. 159 (1), the purchaser takes subject to protected interests but with power to annul interests defined as incumbrances. "Incumbrance" under S. 161, with reference to tenancy, means any lien, sub-tenancy or other right or interest created by the tenant on his tenure or holding or in limitation of his own interest therein and not being a "protected interest". Sections 164, 165 and 166 provide for procedure for sale with power to annul incumbrance. In order to constitute a sale under the Act, there must be a rent decree contemplated under S. 65 and the sale must also be in conformity with provisions of Chap. XIV.

33. Section 168-A (1) provides that a decree for arrears of rent due in respect of a tenure or holding whether having the effect of rent decree or money decree can only be executed against the defaulting tenure or holding. Under its proviso this provision will not apply if otherwise than by surrender the term of the tenancy expires before an application is made for execution of such decree. By reason of vesting it could be said that there is a statutory surrender or extinction of the tenancy. So that there is an implied repeal of S. 168-A (1) of the Act, leaving the decree-holder free to execute his decree whether having the effect of a rent decree or money decree, against any other property of the ex-tenant. We accordingly approve of the Bench decisions in cases of Adhidhar Ghosh, (AIR 1958 Cal 253) and Hiranmoyee, ((1958) 62 Cal WN 373) referred to the above and hold that vesting of the interest in a tenure or holding by implication repealed the provisions of S. 168-A (1) of the Act and attracted the proviso thereunder leaving the decree-holder free to execute his decree as money decree in view of S. 5-B of West Bengal Estate Acquisition Act against any other property of the judgment-debtor tenure-holder or tenant.

34. The Bengal Tenancy Act, as it appears, contemplates that if the formalities of Chap. XIV are complied with in execution of a rent decree, the tenure or holding will be sold and the auction-purchaser will be entitled to additional rights provided therein, including the right to annul incumbrances like sub-tenancies created by the defaulting tenant. In case such formalities are not complied with in the execution case when a sale is held, such sale will be one under the C. P. C. wherein only the judgment-debtor's interest will pass on to the auction-purchaser who will not be entitled to the benefits like annulment of incumbrances to which an auction-purchaser under the said Act would be entitled. Where by reason of the statutory bar there cannot be in law a sale of the defaulting holding under the Bengal Tenancy Act and other Statutes and sale if held under any of those Acts, are to be deemed as void, there is no impediment by S. 5-B to auction sales under the C. P. C. in execution of a money or rent decree. Such sale if held accordingly is to be treated and have the effect of sale as money decree under the Code as was held in Haripada Pramanik's case (1970) 74 Cal WN 400. Being a sale within June 1, 1954 and prior to vesting

of the holding, the auction-purchaser became entitled to the interest of the defaulting raiyat in the holding which was put up to sale now to be deemed as in execution of the money decree in view of the statutory prohibition under S. 5-B. Similar view was taken in Doolar Chand v. Lalla Chabeel Chand, (1878) 6 Ind App 47 at p. 51 wherein the Privy Council observed:

"Now it is clear that in attaching the property of a judgment-debtor, whether in an under-tenure or in an ordinary lease-hold interest, under Act VIII of 1859, you can only attach and sell the right, title and interest of the judgment-debtor; but you proceed to sell a tenure under S. 59 of Act VIII of 1859, then you sell the tenure; and by virtue of S. 66 of the same Act, the purchaser, under the provisions of Ss. 59 and 60 of the Act, acquires it free of all incumbrances which may have accrued thereon by any act of any holder of the said under-tenure, his representatives or assigns, unless the right of making such incumbrances shall have been expressly vested in the holder by the written engagement. So that if this tenure had been sold under the provisions of S. 59, the sale would have got rid of all under-tenures, and the purchaser would have been entitled to the whole interest in the tenure, free from all encumbrances in the same way as if the tenure had been sold under the provisions of the law for the sale of an estate for arrears of Government revenue."

35. In view of the perwaunah, the notice of sale, and the certificate of sale it was held that only the rights and interest of the judgment-debtor were sold and not the tenure.

36. In Bithika Maity's case ((1975) 79 Cal WN 216) it was correctly decided that the effective date in S. 5-B in respect of raiyati and under-raiyati holdings is also the first day of June 1954. The decision however failed to take notice that the impugned sale therein held on September 10, 1954 could be treated as sale under the C. P. C. as a sale in execution of a money decree. This aspect of the case was not taken in consideration possibly because the case was heard ex parte. We are accordingly unable to approve the decision that all sales between the first day of June 1954 to the vesting of raiyati interest are to be deemed as being under the Statutes mentioned therein and hence to be declared void as was summarily held by it. On the contrary, such sales though deemed as invalid and of no effect under

the aforesaid acts, are to be treated and will have the effect of sales under the C. P. C. in execution of money decrees, if otherwise valid. Accordingly accepting Mr. Mitra's contention, we hold that the name of the opposite party being auction-purchaser of the right, title and interest of the judgment-debtor was validly recorded as raiyat in respect of the disputed holdings in the finally published record-of-rights in place and stead of defaulting judgment-debtors who held the said holdings.

37. We accordingly hold that

(i) The effective date in S. 5-B in respect of sales of raiyati and under-raiyati holdings under the relevant statutes mentioned therein is the first day of June 1954 as therein provided.

(ii) Section 5-B does not operate as a bar to the execution of decree for arrears of rent as money decree against raiyati or under-raiyati interest and S. 168-A (1) is impliedly repealed by vesting of the interest of intermediaries (which include raiyats and under-raiyats) in the State.

38. In the circumstances the initiation of the proceeding by the Assistant Settlement Officer under S. 44 (2a) in view of the provisions of S. 5-B in the light of the above discussions must be held to be without jurisdiction. The tribunal's order under S. 44 (3) setting aside the orders of the Assistant Settlement Officer in the connected proceedings, are affirmed though for different reasons as indicated above and the connected Rules are discharged. There will be no order for costs in the circumstances.

SANKAR PRASAD MITRA, C. J.:— I agree.

SABYASACHI MUKHARJI, J.:— I agree.

Order accordingly.

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SPECIAL BENCH

SANKAR PRASAD MITRA, C. J.

SABYASACHI MUKHARJI AND

SALIL KUMAR DATTA JJ.

The India Jute Company Ltd. Applicant v. The Regional Director, West Bengal, Region, Employees' State Insurance Corporation and another, Respondents.

Matter No. 157 of 1973, D/- 9-11-1976.

BU/BU/A326/77/SSG

Employees' State Insurance Act (1948), Ss. 2 (9), 38 — Persons employed in registered office or head office of a company, if employees within S. 2 (9) — Applicability of S. 38.

Persons who are employed in registered office or head office at Calcutta, of a Company running a jute and cotton factory at Serampore in Hooghly and who are engaged in types of work referred to in S. 2 (9) are employees within the Act. Case Law discussed. (Para 41)

The definition of "employees" in S. 2 (9) as amended in 1966 is an exhaustive one. It is a beneficial piece of legislation and it had to be given a meaning that would give benefit to those for whom it is intended. After the amendment the administrative staff engaged in purchase of raw materials or the distribution or sale of the products of a factory whether the work is done in the factory or elsewhere would be 'employees' within the Act. Section 38 of the Act, does not appear to be an impediment. This section opens with the words "subject to the provisions of this Act". These words bring within their scope the amended definition of 'employee'. There is, therefore, no difficulty in covering employees who are not actually working in the factory premises provided that they do any type of work specified in S. 2 (9) as it now stands. Decisions of Calcutta High Court after amendment in 1966 approved.

(Para 40)

Cases Referred:	Chronological	Paras
1976 Lab IC 868 : 32 Fac LR 255 (Andh Pra) (FB)		33
(1976) Matter No. 672 of 1976 (Cal)		24
(1975) 31 Fac LR 237 : 46 FJR 287 (Mad)		33
(1974) 29 Fac LR 275 : (1974) 1 Cal HC (N)		28
(1974) Matter No. 320 of 1974 (Cal)		23
(1974) Appeal No. 119 of 1974 (Cal)		38
ILR (1974) 2 Ker 536		33
1974 Lab IC 701 : (1973) 1 Lab LJ (Mad)		304
1973 Lab IC 706 : (1973) 1 Lab LJ (Delhi)		259
(1970) Matter No. 343 of 1970 (Cal)		24, 25
(1970) Matter No. 176 of 1970 (Cal)		38
1970 Lab IC 1108 : AIR 1970 Delhi 167		31
(1970) 38 FJR 368 : (1971) 73 Pun LR (D)		59
(1969) Matter No. 33 of 1969 (Cal)		38
(1968) Matter No. 738 of 1968 (Cal)		38
AIR 1967 SC 1364 : (1967) 1 SCWR 800		17
(1965) Matter No. 452 of 1965 (Cal)		24, 26
AIR 1963 Punj 422 : 24 FJR 371		29
AIR 1961 Mad 176 : (1961) 1 Lab LJ		593
		15, 29

1977 India Jute Co. v. E. S. I. Corpn., W. B. (SB) (Mitra C. J.) [Prs. 1-8] Cal. 259
 (1959) F. M. A. No. 143 to 170 of 1959 28
 (Cal)

(1957) 1 Lab LJ 267: 11 FJR 462 (Bom) 15
 (1584) 3 Co. Rep. 7b: 76 ER 637 19

P. P. Ginwala with P. K. Mullick and T. K. Mitra, for Applicant; Arun K. Dutt with D. K. Basu, for Respondents.

SANKAR PRASAD MITRA, C. J.:— This matter has been referred to a larger Bench by A. N. Sen, J. on the 13th August, 1975, under Chapter V Rule 2 of the Original Side Rules. The petitioner has its registered office at No. 16, Strand Road in Calcutta within the Ordinary Original Civil Jurisdiction of this Court. The petitioner has a jute factory and a cotton factory at Serampore in the district of Hooghly. The business of the petitioner is manufacture and sale of jute and cotton textile goods. The petitioner's Calcutta office is stated to be a commercial establishment where the petitioner employs clerical and other staff.

2. The petitioner has made this application under Article 226 of the Constitution for a Writ in the nature of mandamus commanding the respondents to forbear from giving any effect to certain directions or orders contained in letters mentioned in the petition or otherwise applying or seeking to apply the provisions of The Employees' State Insurance Act, 1948 to the petitioner in respect of persons employed at its registered office or head office at No. 16, Strand Road in Calcutta. The petitioner has also prayed for other reliefs including an interim order of injunction.

3. Before we proceed any further it would be convenient to set out the relevant portions of some of the sections of The Employees' State Insurance Act, 1948, hereinafter called "the Act".

4. Sub-ss. (2), (3), (4) and (5) of S. 1 of the Act read as follows:—

"(2) It extends to the whole of India.

(3) It shall come into force on such date or dates as the Central Government may, by Notification in the Official Gazette, appoint, and different dates may be appointed for different provisions of this Act and for different States or different parts thereof.

(4) It shall apply, in the first instance, to all factories (including factories belonging to the Government) other than seasonal factories.

(5) The appropriate Government may, in consultation with the Corporation and where the appropriate Government is a State Government, with the approval of the Central Government, after giving six months' notice of its intention of so doing by notification in the Official Gazette extend the provisions of this Act or any of them, to any other estab-

lishment or class of establishments, industrial, commercial, agricultural or otherwise."

5. The points to be especially noted are (i) by the Central Government's notification in the Official Gazette, date or dates may be appointed for the coming into force, of different provisions of the Act; (ii) the Act shall first apply to all factories including Government factories but not to seasonal factories; and (iii) the State or the Central Government, as the case may be, may by notification in the Official Gazette extend the provisions of the Act or any of them to any other establishment or class of establishments industrial, commercial, agricultural or otherwise except that the State Government's notification has to be made with the Central Government's approval.

6. Section 2 (9) of the Act is vital for our purposes. It says:—

"'Employee' means any person employed for wages in or in connection with the work of a factory or establishment to which this Act applies and—

(i) who is directly employed by the principal employer on any work or incidental or preliminary to or connected with the work of the factory or establishment, whether such work is done by the employee in the factory or establishment or elsewhere; or

....

[and includes any person employed for wages on any work connected with the administration of the factory or establishment or any part, department or branch thereof or with the purchase of raw materials for, or the distribution or sale of the products of, the factory or establishment; but does not include—]

(a)

(b) Any person so employed whose wages (excluding remuneration for over time work) exceed five hundred rupees a month:

Provided that an employee whose wages (excluding remuneration for over time work) exceed five hundred rupees a month at any time after (and not before) the beginning of the contribution period shall continue to be an employee until the end of that period;"

7. The portions of the above sub-section which are in square brackets were introduced by Act 44 of 1966 which came into force with effect from 28 January, 1968.

8. In the statements of objects and reasons for this amendment in 1966 it is stated: "The existing definition of the term 'employee' does not cover administrative staff engaged in sale, distribution and other allied functions. The definition is being amended to cover such employees."

9. The petitioner, in the instant case, has administrative staff whose wages (excluding remuneration for over time work) do not exceed Rs. 500.00 a month engaged in sale and distribution of products of the petitioner's factories and other allied functions. They are not employed in any of the factory premises. They are in the petitioner's head office or registered office at No. 16, Strand Road in Calcutta which the petitioner claims to be a commercial establishment. The Employees' State Insurance authorities wanted to apply the provisions of the Act to the petitioner in respect of the said employees at its registered office or head office. The petitioner's contention is that there has been no notification under Section 1 (5) extending the provisions of the Act to the petitioner's commercial establishment at No. 16, Strand Road. And in the absence of such notification the said employees cannot be brought within the purview of the Act.

10. We now come to S. 38 of the Act which is as follows:—

“Subject to the provisions of this Act, all employees in factories or establishments to which this Act applies shall be insured in the manner provided by this Act.”

11. Strong reliance was placed on behalf of the petitioner on this section. It was urged that since the Act has not been made to apply to the establishment at 16, Strand Road, no employee in that establishment can be covered by the provisions of the Act.

12. Apart from the above section we may make a passing reference to Sections 73A, 87, 88, 89 and 90 of the Act. These sections respectively provide for (a) the employer's special contribution in lieu of contributions payable under Chapter IV, (b) exemption of person or class of persons by the appropriate Government, (c) the Employees State Insurance Corporation's right to make a representation to the appropriate Government against proposals for exemption and (d) exemption of factories or establishments belonging to Government or any local authority.

13. Mr. Ginwalla appearing for the India Jute Co. Ltd., has drawn our attention to the above provisions of the Act and has proceeded to argue that in order that an employee may come within the Act he must be employed in a factory in the sense that he is under the control of authorities attached to the factory. He must be answerable to the factory authorities for works done by him; he must apply to the factory authorities for leave; he must be subject to the standing orders of the factory; his wages must be disbursed by and under the instructions of the factory authorities; his wages must be de-

bited to the factory account; and if any disciplinary action be taken against him, it must be taken by the factory authorities. According to Learned Counsel if these conditions are fulfilled, it does not matter where the employee concerned is working. He has urged that by amending the definition of 'employee' in S. 2 (9) in 1966, the operation of the Act has not been extended to those who are not attached to the factory premises at all. Prior to the amendment the employees actually working in the factory that is, the manufacturing process of the factory as well as employees connected with the manufacturing process were 'employees' within the meaning of the Act. After the amendment employees in the administration engaged in sale, distribution or other allied functions would be "employees" within the Act provided that their work is based on the factory itself and they are controlled by persons in charge of the factory.

14. Mr. Ginwalla has argued that there is a difference between the application of an Act and the interpretation of words used in the Act. These are two different matters which are dealt with in different sections of every Act. The first section of an Act tells us to what things and to what areas it would apply. The second section tells us what meaning is to be given to the words used in the Act in the situations to which the Act is applicable. The functions of these two kinds of the sections are not the same. By altering the definition, says Learned Counsel, the sphere of application of an Act cannot be altered or extended. In the instant case when the Act prescribes that it would apply to factories, it cannot be extended in view of provisions of S. 38 to establishments for which no notification has been issued under S. 1 (5).

15. Reliance has been placed by Counsel on a number of decisions. In *Employees' State Insurance Corporation v. Ganpatiya AIR 1961 Mad 176*, a Division Bench of the Madras High Court was considering Ss. 2 (9) (i), 38 and 39 of the Act before its amendment. The Madras High Court has said that persons employed in the Managing Agent's office of a mill which is concerned purely with the administrative side of the mill and the sale of finished products, and who are not in any way connected with the manufacturing process or with the work of the factory, are not "employees" within the meaning of S. 2 (9) (i). Hence they are not liable to pay contributions under the Act. The Madras High Court in this case has followed a Division Bench of the Bombay High Court in *Employees State Insurance Corporation*

Bombay v. Raman, (1957) 1 Lab LJ 267. The question raised in that case was whether a person employed in the administrative office of J. K. Chemicals Ltd. was an 'employee' within the meaning of the Act. The Bombay High Court observed: "Nevertheless, before the respondent can be said to be an employee within the meaning of S. 2 (9) (i), it must be shown that he has been employed on any work, of or incidental or preliminary to, or connected with the work of the factory. It is necessary to emphasise that on the facts admitted in this case it is not shown that the work of the factory was to sell the products of the factory. The work of the factory in the present case began with the collection of raw materials and ended with the production of finished articles. If that be so, it would be difficult to accede to the argument that the work of selling the products of the factory was connected with the work of the factory. The work of selling cannot be said to be incidental or preliminary to the work of the factory. It is obviously not preliminary, and it cannot be incidental in that sense. It is true that the expression "connection with" may be larger in its denotation than "incidental" or "preliminary". But this expression also must be construed in the light of the facts as to which there is no dispute in the present case."

16. From these two judgments, Mr. Ginwalla submits, it is clear that persons connected with sale and distribution of products of the factory were not employees within the meaning of the Act before the amendment. The amendment has brought them within the definition; but their work must be under the control and supervision of those who run the factory.

17. In support of his above contention Mr. Ginwalla referred to the Supreme Court's decision in the *Nagpur Electric Light and Power Co. Ltd. v. Regional Director Employees' State Insurance Corporation* AIR 1967 SC 1364. The Supreme Court has said that if some of the employees work outside the factory, but their duties are connected with the work of the factory they are employees within the meaning of S. 2 (9) (i). In the case before the Supreme Court some employees were employed in sub-stations. The sub-stations were not independent factories. The sub-stations attended to work directly connected with the work of the factory. They were, therefore, employees under S. 2 (9) (i).

18. Learned Counsel has urged that before the amendment of 1966 the law clearly was that a person directly employed on any work of or incidental or preliminary to or connected with the work of the factory was

an employee within the Act. But a person employed on any work connected with the administration of the factory or any part, department or branch thereof or the distribution or sale of the products of the factory was not an employee.

19. To appreciate the scope of the 1966 amendment, argues Counsel for the applicant, one has to remember what Lord Coke said in *Heydon's case* (1584) 3 Co. Rep. 7b. According to Lord Coke one has to examine (a) what was the law before the Act was passed; (b) what was the mischief or defect for which the law had not provided; (c) what remedy Parliament had appointed; and (d) the reason of the remedy.

20. If we apply these principles to the instant case, we find that before the amendment Courts took the view that persons connected with the administration of a factory were not 'employees'. The work of a factory commenced with the collection of raw materials and ended in the manufacture of goods. Persons employed in the sale or distribution of the factory's products were not 'employees' under the Act even though they were employees of the factory itself. The amendment, according to Mr. Ginwalla, was necessary for remedying this situation. The amendment is intended to meet the difficulties of covering the administrative staff of the factory which were pointed out by the Bombay and Madras High Courts.

21. Mr. Ginwalla also submitted that if an extended meaning be given to the word 'employee', it would result in discrimination between one class of employees and another. In the Head Office of a Company situated away from the factory there may be administrative staff engaged in sale or distribution of factory products as well as administrative staff engaged in maintenance of share register, keeping of accounts and similar other types of work. The first category of employees would be covered by the Act and the second category would remain outside the Act.

22. Since rights under Art. 14 are now suspended it is not open to Mr. Ginwalla to take this point until the emergency is lifted. In any event, this is in our opinion a case of reasonable classification having a nexus to the object and purpose of the Act viz. to provide benefits in case of sickness, maternity and employment injury to a class of employees covered by the Act for whom, according to Parliament, special provisions should be made.

23. This application has been heard along with several other applications of other employers who had also challenged orders or

directions of the State Insurance Corporation with a view to bringing administrative staff engaged by them who are connected with sale or distribution of factory products within the scope of the Act. We have heard arguments of Learned Counsel appearing on behalf of the other employers as well. And it would be convenient to note briefly the points raised by them in this connection. Mr. Ajit Roy Mukherjee appeared for the petitioner in Matter No. 320 of 1974 (*Hindusthan Lever Ltd. v. Employees' State Insurance Corporation*). Mr. Mukherjee's grievance is that the State Insurance Corporation authorities are trying to extend the operation of the Act to establishments other than factories where no manufacturing process is going on. They are doing it to circumvent the provisions of S. 1 (5) of the Act. Mr. Mukherjee has referred to Chapter V of the Act on the benefits that the employees would derive if they come within the Act, e. g. sickness, maternity, disablement, medical and funeral benefits. Under S. 59-A there are provisions for medical benefit by the Corporation in lieu of the State Government. The State Government has to share the cost of such benefit in such proportion as may be agreed upon between the State Government and the Corporation. The State Government, therefore, is vitally interested in the extension of the scheme which affects its own budget; but the role of the State Government would be completely ignored if the Corporation is allowed to extend the operation of the Act in the manner it had been seeking to do. Mr. Mukherjee has also adopted the arguments of Mr. Ginwalla.

24. The answer to the point raised by Mr. Mukherjee is that the State Government is a party to some of the applications before us and in spite of notice being served it has not either chosen to appear or make its submissions to this Court e. g. in Matter No. 452 of 1965 (*Tarun Kumar Chatterjee v. State of West Bengal*) the State Government is the respondent No. 1; in Matter No. 343 of 1970 (*Gestetner Duplicators Private Ltd. v. Employees' State Insurance Corporation*) the State Government is the respondent No. 3; and in Matter No. 672 of 1976 (*Subrata Mukherjee v. State of West Bengal*) the State Government is the respondent No. 1. In none of these matters the State of West Bengal has opposed the extension of the Act to administrative staff employed outside the factory premises in the Head Office or any other Branch of Commercial Establishments but engaged in sale or distribution of factory products. In fact, if upon construction of the relevant provisions of the Statute such

extension is justified, we do not see how the State Government can oppose it.

25. In Matter No. 343 of 1970 (Cal) (*Gestetner Duplicators Private Ltd. v. Employees' State Insurance Corporation*) Mr. J. N. Ghose has appeared for the petitioners. His contention is that the Act contemplates two kinds of workers, namely, (1) workers in a factory, and (2) workers in establishments. The workers in a factory may come within the Act; but the workers in an establishment cannot get the benefit of the Act unless a notification is made under S. 1 (5). The definition of 'factory' is any premises or part of a premises where a manufacturing process is carried on with the aid of power or is ordinarily so carried. It is significant that in 1966 the definition of 'employee' in S. 2 (9) was amended in the manner hereinbefore mentioned; but the definition of 'factory' in S. 2 (12) was left untouched. This shows that Parliament did not intend to alter the connotation of the word 'factory'. And by the amendment of 1966 Parliament brought within the purview of the Act only those persons who were connected with the administration of factory (where the manufacturing process was going on) or any part, department or branch thereof or with the purchase of raw materials for or distribution or sale of the products of the factory. In other words, these persons must be engaged in administrative work under the control of the factory authorities.

26. In Matter No. 452 of 1965 (Cal) (*Tarun Kumar Chatterjee v. State of West Bengal*) Mr. P. Sanyal appeared for the petitioners. He has submitted to us that S. 38 of the Act refers to two types of employees, namely, employees in factories and employees in establishments. If we try to bring employees in establishments within the scope of the amended definition of S. 2 (9), the provisions of Section 1 (5) would have to be wholly ignored. The Court has to construe a statute as a whole and avoid inconsistencies. According to Mr. Sanyal the interpretation of S. 2 (9) which the State Insurance Corporation is pressing for would be inconsistent with the provisions of S. 1 (5).

27. There have been quite a few decisions of different High Courts including our own both before the amendment of 1966 and after the amendment. It is not necessary for us to be exhaustive; but we may usefully refer to some of these decisions.

28. Let us first glance at a few decisions before the amendment of 1966 came into force on the 28th January 1968, apart from

the ones we have already noted. In *F. M. A. No. 143 to 170 of 1959 (Cal)* (*Ramapati Chowdhury v. E. S. I. Corporation*) a Division Bench of our Court took the view that employees of Structural Engineers at the Head Office in Calcutta, the factory being in Howrah, engaged in departments dealing with accounts, costing, estimating, drawing, record or general departments were engaged in works preliminary or incidental to or connected with the work of the factory and were within the definition of 'employees' as given in Section 2 (9).

29. A Division Bench of the Punjab High Court in *Charan Singh and Sons v. E. S. I. Corporation* AIR 1963 Punj 422, dissented from the Madras High Court's judgment in *E. S. I. Corporation v. Ganpatiya*, AIR 1961 Mad 176, which we have noted above. The Punjab High Court held that a person working as Accountant would also be included in the number of persons necessary to make the premises a factory. The definition of 'factory', according to the Punjab High Court, clearly envisages the inclusion of persons other than those engaged on the actual manufacturing process and the work of accounting and work connected with the sale and distribution of the products of the factory are matters incidental or preliminary to or connected with the work of the factory. This was the case of an Electric Supply Company. The Punjab High Court in its judgment has also dealt with the line staff of the Company. Its view is that though the work of the line staff, that is, persons who apparently are kept somewhere in waiting and who go out from time to time when calls are received from consumers for the purposes of putting things right is almost entirely done outside the premises which constitute the factory but they still fall within the definition of 'employee' in S. 2 (9) (i).

30. Such persons being directly employed by the principal employer and their work being incidental to or connected with the work of the factory, are employees whether they work inside or outside the factory premises, in the light of the closing words "whether such work is done by the employee in the factory or establishment or elsewhere" in clause (i) of S. 2 (9).

31. In *Birla Cotton Spinning and Weaving Mills Ltd. v. E. S. I. Corporation*, AIR 1970 Delhi 167, the workers employed by a textile manufacturing company to work outside the factory but in close connection with the work carried on in the factory were held to be 'employees' within the meaning of Section 2 (9). This was also the decision of a

Division Bench. The Delhi High Court's view was that the work of employees in administrative offices of the company together with the manufacturing process constituted the work of production in which the Company was engaged. The Delhi High Court said that when the manufacturing process carried on in the factory would not in itself result in the production of goods without the help of employees in the administrative office, the work done in the office of the factory must be said to be connected with the work of the factory.

32. It is clear, therefore, that before the amendment there were conflicting decisions by different High Courts. The Bombay and Madras High Courts sought to give a restricted meaning to the word 'employee'; but the Calcutta, the Punjab and the Delhi High Courts were seeking to give it an extended meaning. It was doubtful whether administrative staff connected with purchase of raw materials or sale and distribution of factory products whether engaged in the factory premises or elsewhere could be covered by the definition of 'employee'. It is in this context that we have to examine the scope of the 1966 amendment.

33. After the amendment there has been fairly a large number of decisions and we may refer to a few of them. Let us first take the decisions of High Courts other than ours. Our attention has been drawn to the judgments of the Delhi High Court in (a) *Grand Iron Works v. E. S. I. Corporation*, (1970) 38 FJR 368 and (b) *Hindusthan Lever Ltd. v. E. S. I. Corporation*, (1973) 1 Lab LJ 259 : (1973 Lab IC 706); the Madras High Court in (a) *Hemalata Textile Mills v. E. S. I. Corporation*, (1975) 31 Fac LR 237 (Mad) and (b) *E. S. I. Corporation v. Prabhulal Brothers*, (1973) 1 Lab LJ 304 : (1974 Lab IC 701) (Mad); the Kerala High Court in *Regional Director, E. S. I. v. Ruby Rubber Works*, ILR (1974) 2 Ker 536; and the Andhra Pradesh High Court in *Hyderabad Asbestos Cement Products Ltd. v. E. S. I. Corporation* (FB), (1976) 32 Fac LR 255 : (1976 Lab IC 868).

34. In all these judgments more or less the same approaches have been made to the scope and effect of the 1966 amendment. We intend to refer particularly to the judgments of Division Bench of the Kerala High Court and the Full Bench Judgment of the Andhra Pradesh High Court. The Kerala High Court has made the following observations:

1. "In the light of the definition of Section 2 (9) we find no difficulty in holding that employees in the sales depots of the respon-

dents are employees within the meaning of the Act". (page 544).

2. "It is evident that the object of the Amendment Act 44 of 1966 was to bring within the scope of coverage a class of employees who would not otherwise be covered by that Act. That being the case, unless the definition is given its full meaning in the operative provisions such as Ss. 38, 39 and 40, the amendment would make no sense. The purpose of the amendment may otherwise be defeated and the inclusive part of the definition may be rendered otiose." (P. 546).

3. "The term 'in' in S. 38 was evidently not intended to indicate the nexus between the 'employee' and the 'factory' by mere location. It was not the physical presence in the factory premises or working in the factory premises that was postulated, but a rational connection between the factory and the employment. The scope of such rational connection must necessarily depend upon the definition of the term 'employee' and when that is enlarged to cover not only those engaged in or in connection with the work of the factory, but also those who are engaged in the work of the distribution or sale of the products of the factory necessarily the nexus indicated by the amended definition is to be reflected in the term 'in' under S. 38 of the Act. In other words, those working in sales depots are also to be found to be employees in factories in the light of the definition of the term 'employee' in S. 2 (9)." (page 547).

4. "Therefore, if by the definition, certain classes of employees such as those in sales depots of factories are defined as employees of factories, it is S. 1 (4) that is to be applied to them and not S. 1 (5). Hence there is no necessity of a notification under S. 1 (5) to extend the coverage of the Act to such classes of employees. We do not think that there is any difficulty in construing the provisions of the Act in this manner." (page 548).

35. The Division Bench of the Kerala High Court, therefore, is clearly of the view that persons working in the sales depots of a factory who are engaged in distribution or sale of the products of the factory are within the amended definition of S. 2 (9). In reaching this conclusion the Kerala High Court has considered also the provisions of S. 38, S. 1 (4) and S. 1 (5) of the Act.

36. The Andhra Pradesh High Court's Full Bench has made the following observations:—

1. "The question on which we have to express an opinion is whether the employees of the petitioner-Company in its Zonal Sales office at Vijayawada are covered by the

E. S. I. Act of 1948. In other words, the question is whether the employees of the Zonal Sales Office at Vijayawada are liable to be insured as per the provisions of Chapter IV of the E. S. I. Act" (Page 257 of 32 Fac LR): (at p. 870 of 1976 Lab IC).

2. "The main argument of Shri K. Srinivasa Murthy for the petitioner is based upon S. 38 of the Act and the definitions of 'employees' and 'factory' defined in the Act. (page 258) (of 32 Fac LR): (at p. 871 of 1976 Lab IC).

3. "After the amendment, any person employed for wages on any work connected with the distribution or sale of the products of the factory or establishment also becomes an 'employee'.

This takes us to the question whether the employees of the Sales Office at Vijayawada can be said to be employed in a factory or an establishment. As admittedly there is no notification under S. 1 (5) of the Act covering the Sales Office as an establishment coming under the purview of the Act, the only question is whether they are employees in a 'factory'. (Page 260) (of 32 Fac LR): (at p. 872 of 1976 Lab IC).

4. "Section 38 states that 'subject to the provisions of this Act, all employees in factories or establishments to which this Act applies shall be insured in the manner provided by this Act.' No doubt the words used viz. 'employees in factories' render some apparent substance to the argument of the Learned Counsel for the petitioner. But it cannot be ignored that S. 38 is made subject to the provisions of the Act. S. 2 containing the definition is also a provision of the Act. The words 'employees' and 'factory' occurring in S. 38 of the Act must be understood in the light of their definitions in S. 2 (9) and S. 2 (12) of the Act. Considerable stress was laid by the learned Counsel on the ground that the words used in S. 38 are not 'all employees of factories', but 'all employees in factories' and having regard to the definition of a 'factory', the Sales Personnel at Vijayawada Office who are working elsewhere other than in the premises of the factory, are excluded. Granting that the argument is plausible having regard to the language employed in S. 38, still the Court cannot ignore the amended definition of an 'employee' and the purpose behind it. We must construe S. 38 of the Act in a manner to give effect to the legislative intentment in amending S. 2 (9) of the Act. A Court must avoid any interpretation which would defeat the purpose of the amendment. The various provisions have to be construed harmoniously with a view to give effect to the legislative

intendment evidenced by the amended definition of S. 2 (9) of the Act." (Pages 262 to 263) (of 32 Fac LR) : (at pp. 874, 75 of 1976 Lab IC).

5. "..... We find no difficulty in holding that S. 38 of the Act should be understood to take in all persons employed in the Sales Office of the petitioner-company at Vijayawada. For, it cannot be disputed that they are persons employed for wages on a work connected with the distribution or sale of the products of the factory. They are employees in factories to which the Act applies and shall be insured in the manner provided by the Act. No doubt the word 'factory' defined in the Act states that 'factory' means any premises including the precincts etc. To construe the expression 'factory' in S. 38 of the Act as only meaning the premises or the precincts thereof would not give effect to the legislative intendment in amending the word 'employee' as defined in the Act. (Page 263) (of 32 Fac LR) : (at p. 875 of 1976 Lab IC).

6. "We, therefore, opine that the employees of the Sales Establishment at Vijayawada are employees in a factory within the meaning of S. 38 and therefore entitled to the benefits of Chapter IV of the Act. This conclusion we have come to on a consideration of the facts and the relevant provisions of the E. S. I. Act, unhampered by a consideration of any of the authorities cited before us." (Page 264) (of 32 Fac LR) : (at p. 875 of 1976 Lab IC).

37. The Full Bench of the Andhra Pradesh High Court, therefore, repelled more or less the same arguments which were advanced before us on behalf of the applicant and gave effect to the legislative intendment of the Amendment of 1966. The Andhra Pradesh High Court has held that the employees in the Sales Office situated away from the factory can also be 'employees' within the meaning of the Act.

38. Let us now refer to the decisions of our own Court after the amendment of 1966. Our attention has been drawn to the judgments of T. K. Basu, J. in Matter No. 738 of 1968 (Ramaprasad Chatterjee v. E. S. I. Corporation); S. C. Deb, J. in Matter No. 176 of 1970 (Castrol Ltd. v. E. S. I. Corporation); Sabyasachi Mukharji, J. in Matter No. 38 of 1969 (Saktiranjana Roy v. E. S. I. Corporation) (1974) 29 FLR 275 at 277; and the Division Bench consisting of my learned brother S. K. Datta, J. and myself in Appeal No. 119 of 1974 (Lakshman Das v. Employees State Insurance).

39. In all these decisions the amended definition has been given an extended mean-

ing. In the case before the Division Bench I have, with the concurrence of S. K. Datta, J., said:

"There seems to be no room for doubt that a person employed for wages would be an employee within the meaning of the said Act if he does any work connected with,

(a) the administration of a factory or establishment or any part, department or Branch thereof; or

(b) with the purchase of raw materials for a factory or establishment or any part, department or branch thereof; or

(c) the distribution or sale of products of a factory or establishment or any part, department or branch thereof."

40. From a review of the aforesaid decisions it is clear that the amended definition is an exhaustive one. It is a beneficial piece of legislation and it has to be given a meaning that would give benefit to those for whom it is intended. After the amendment the administrative staff engaged in purchase of raw materials or the distribution or sale of the products of a factory whether the work is done in the factory or elsewhere would be 'employees' within the Act. Section 38 of the Act does not appear to us to be an impediment. This section opens with the words "subject to the provisions of this Act". These words bring within their scope the amended definition of 'employee.' There is, therefore, no difficulty in covering employees who are not actually working in the factory premises provided that they do any type of work specified in S. 2 (9) as it now stands.

41. In this view of the matter the petitioner's employees in the registered office or head office at No. 16, Strand Road in Calcutta who are engaged in types of work referred to in S. 2 (9) of the Act are employees within the Act.

42. In the result, this application is dismissed. The rule is discharged. Interim orders, if any, are vacated.

43. There would be no order as to costs.

SABYASACHI MUKHARJI, J.:— I agree.

SALIL KUMAR DATTA, J.:— I agree.

Application dismissed.

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S. K. MUKHERJEA AND
SALIL KUMAR DATTA, JJ.

Union of India, Appellant v. M. L. Dalmiya & Co. Ltd., Respondent.

A. F. O. D. No. 249 of 1973, D/- 21-9-1976.

(A) Arbitration Act (1940), S. 13 — Jurisdiction of arbitrator — Award of interest pendente lite — Can be given if claim or dispute regarding interest is before the arbitrator.

Where the dispute referred to the arbitrator was in general terms and the actual items of dispute were crystallised by claims and counter-claims of parties and the issues were framed in consultation and agreement of the parties, the awarding of interest pendente lite by the arbitrator could not be challenged by one party, in view of the special procedure adopted, after consultation and agreement of both the parties, on the ground that it was not a question referred to the arbitration when no objection was taken before the arbitrator. (Para 25)

The letter of reference indicated that the disputes and claims between the Union of India and a contractor generally were referred to the arbitrator subject to the specific claims and disputes as might be made by the contractor as also the counter-claims if any to be made by the Government against the contractor "subsequently" in course of the arbitration proceedings. Statements were filed by both the parties and the issues in dispute for adjudication and award were framed in consultation with and agreed upon by the parties at the hearing and issues on counter-claims were also amended in consultation with and agreed upon by the parties. The claim for interest pendente lite was made before the arbitrator and no objection at any time was taken by the appellant (Union of India) in the course of arbitration proceeding. Issues were framed in the presence of parties.

Held: Interest pendente lite if any payable to the contractor was an item of reference to the arbitrator who accordingly had the jurisdiction to award interest from the date of reference. It was too late to suggest that the question of interest pendente lite was no item of dispute. AIR 1967 SC 1032 and AIR 1972 SC 1507, Rel. on. Case law discussed. (Para 25)

(B) Arbitration Act (1940), S. 30 — Award — Vagueness — Executory award**— Award not vague for being executory when only such award could be passed from the dispute referred.**

Where the arbitrator in a dispute between the Union of India and a contractor was required to fix rates of works without reference to measurements and in this state of affairs it was not possible for the arbitrator to award lump sums in respect of claims and counter-claims which had necessarily to be calculated on the basis of the rates so fixed by the arbitrator.

Held: that the award in the circumstances had to be executory on the choice of the parties and there was no vagueness and indefiniteness in the impugned award. (Para 28)

(C) Arbitration Act (1940), S. 13 — Corrections of clerical mistakes after passing the award — Patent errors — Permissibility.

Where the corrections made by the arbitrator were in respect of patent errors and did not amount to any change of substance in the award:

Held: such corrections were permissible and did not indicate non-application of mind. AIR 1955 Nag 126 and AIR 1962 SC 1123, Foll. (Para 30)

(D) Arbitration Act (1940), S. 30 — Award in respect of one item unsustainable — Invalid part of award severable — Award not entirely vitiated. AIR 1965 SC 214, Foll. (Para 31)

Cases Referred :	Chronological	Paras
AIR 1972 SC 1507		24, 25
AIR 1967 SC 188		21
AIR 1967 SC 1030		22, 24
AIR 1967 SC 1032		23, 25
AIR 1966 SC 275		20
AIR 1965 SC 214		31
AIR 1963 SC 90		19
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AIR 1955 SC 468		14
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D. K. Sen with P. K. Sen, for Appellant; A. C. Bhabra, S. Tibrewal and R. Ghose, for Respondent.

SALIL KUMAR DATTA, J.:— The respondent, M. L. Dalmiya & Co. Ltd., an existing company under the Companies Act, 1956 hereinafter referred to as the Company, was employed by the Union of India, the appellant before us, to construct the New Terminal Building at Dum Dum Air Port Phase 1 Superstructure in terms of contract No. 13/EE/63-64 entered into on May 14, 1963. The Company completed the work including additional works before August 14, 1970. In course of work various disputes and differences arose between the parties in respect of the said contract. The disputes between the parties were referred by the Chief Engineer (Eastern Zone) to the arbitration of M. S. Iyengar Superintending Engineer (Arbitration). The arbitrator after hearing, examining and considering the statements of the parties and oral and documentary evidence, published his award on September 25, 1972 for which extension of time was duly obtained. The award was purported to be corrected by the Arbitrator in respect of certain alleged clerical mistakes on December, 1972.

2. The award was filed in this Court and the appellant filed an application for setting aside the said award or portion of it and or for the award to be declared null and void or for remitting the said award before the Arbitrator if necessary. This application, on hearing the parties, was rejected by Salil K. Roy Chowdhury, J. by his judgment and order dated March 30, 1973 against which the present appeal has been filed by the Union of India.

3. Clause 25 of the Contract provided as follows:—

"Except where otherwise provided in the contract all questions and disputes relating to the meaning of the specifications, designs, drawings and instructions hereinbefore mentioned and as to the quality of workmanship or materials used on the work in any way arising out or relating to the contract, design, drawings, specifications, estimates, instructions orders or these conditions or otherwise concerning the works, or the execution or failure to execute the same whether arising during the progress of the work or after the completion or abandonment thereof shall be referred to the sole arbitration of the person appointed by the Additional Chief Engineer, Central P.W.D.

in charge of the work at the time of dispute if there be no Addl. Chief Engineer, the administrative head of the said Central P. W. D. at the time of such appointment.

Subject as aforesaid, the provisions of the Arbitration Act, 1940 or any statutory modification or re-enactment thereof and the rules made thereunder and for the time being in force shall apply to the arbitrator proceeding under this Clause".

4. The Arbitrator was appointed by the Chief Engineer (Eastern Zone) by the following letter—

No. 8/CADI/9/7CW(A)

Dated, the
May, 1970.

Subject: In the matter of Arbitration between M/s. M. L. Dalmiya & Co. Ltd., Calcutta Contractor and the Union of India regarding the work of Construction of Terminal Building for International Traffic at Dum Dum Phase I (Agreement No. 13/EE/64-64).

Whereas disputes have arisen between the abovenamed parties in respect of the above noted work; whereas disputes arising between the parties are required under Clause 25 of the agreement to be referred to the sole arbitration of the person to be appointed by the Additional Chief Engineer, CPWD and whereas the post of Additional Chief Engineer (Cal) has now been designated as Chief Engineer (E. Zone), therefore, in pursuance of the powers given to me under Cl. 25 of the agreement I. B. Manecksha, Chief Engineer (EZ) CPWD, Calcutta, hereby appoint Shri M. S. Iyengar Superintending Engineer (Arbitration) Ministry of Health & Family Planning and Works, Housing and Urban Development (Deptt. of Works, Housing & Urban Dev.), New Delhi, as an arbitrator to decide and to make his award regarding the claims/disputes given by the contractor on his being asked to do so and also regarding the counterclaims of the Government against the contractor as may follow subsequently, if any, subject always, however, to their admissibility under Cl. 25 of the aforesaid agreement. Disputes under the aforesaid agreement, already referred to the arbitrator previously, and decided by him in his award dated 26-8-1969, may be excluded from the present reference.

B. Manecksha
Chief Engineer (E. Z.)

5. The award of the arbitrator in extracts are as follows:—

In the matter of arbitration between:—
M/s. M. L. Dalmiya & Co. Ltd., Claimants
and The Union of India, Respondent.

In respect of the work of Construction of Terminal Building for International traffic at Dum Dum phase I Ag. No. 13/EE/63-64.

Whereas I, M. S. Iyengar, Superintending Engineer (Arbitration) in the Ministry of Works & Housing, Government of India, New Delhi, was appointed by the Chief Engineer (EZ), C. P. W. D., Calcutta under his letter No. 8/CADI/9/70-W(A), dated 26th May, 1970, as Arbitrator to decide and make award regarding those disputes only, between the above named parties which fall within the purview of Cl. 25 of the Agreement.

And whereas I took upon myself the burden of the said reference on 8-1-1971.

And whereas the issues under dispute for adjudication and award were framed in consultation with and agreed upon by the parties at the hearing held on 15-4-1971; and whereas issues Nos. 9 & 10 and Issues Nos. 1 & 7 were amended in consultation with and agreed upon by the parties during the hearings on 21-2-1972 and 17-3-1972 respectively and whereas counter-claims of the respondents were also added during the hearing held on 20-1-1972 and whereas the issues of the counter-claims were also amended in consultation with and agreed upon by the parties during the hearing held on 15-2-1972 and were stated in the summary recorded of the proceedings of the respective hearing are set forth below.

And whereas the time limit for making and publishing award by the Arbitrator has been enlarged upon 15th November, 1972 by the High Court at Calcutta vide its order dated 20-6-1972.

Now therefore after hearing, examining and considering the statements of both the parties and the oral and documentary evidence produced before me by the parties and having heard and duly weighed and considered all facts, documents and other evidence with due care, I, M. S. Iyengar, do hereby make and publish this, my award concerning the matters so referred to me as aforesaid, in the matter following that is to say:

The Arbitrator is to determine whether under the terms and conditions of the contract, the claims of the claimants (M/s. M. L. Dalmiya & Co. Ltd.) and the counter-claims of the respondents (Union of India) enumerated below are justified and if so the extent of relief they are entitled to and the amount, if any, payable/re-

coverable against these claims/counter-claims:

(For table see next page.)

6. It is clear from the award that after the Arbitrator had entered upon the reference, the parties filed their respective statements and counter statements and issues were framed thereon. Before the learned Judge as also before us, the award was attacked mainly on the following grounds i.e. (a) the arbitrator had no jurisdiction to award interest; (b) the award was vague, indefinite, and merely executory and thus incapable of being given effect to; (c) corrections were made in the award by the arbitrator after its publication; (d) the above are indications of non-application of mind which amounted to legal misconduct on the part of the arbitrator.

7. Elaborating his arguments, Mr. D. K. Sen, counsel for the Union of India, the appellant before us, submitted that the disputes are to be crystallised for reference to arbitration under provisions in the agreement. The claimants detained the disputes for an award and the jurisdiction of the arbitrator was confined to those disputes only and nothing beyond. If a dispute is entertained which is not covered by the reference, the arbitrator has travelled beyond his jurisdiction. Mr. Sen referred to the language of appointment of the arbitrator, which as, appearing from pp. 100 and 103 of the Paper Book was confined to (a) payment for quantities of the items executed beyond the agreement quantities at the prevailing market rate; (b) arbitrary recoveries made by the department; (c) extra expenditure involved for extra work beyond agreement. There were mention of other disputes which should be interpreted ejusdem generis, so that there was no whisper of a claim for interest in the disputes raised. The disputes between parties must be tabulated and specified prior to arbitration and such disputes could not be enlarged subsequently by statement of fact filed by the respondent and denied by the appellant. The arbitrator could only decide about interest if specifically referred to but not otherwise. Moreover the arbitrator unlike the court, had no power to award interest unless the question of interest may specifically be referred to him.

8. Mr. A. C. Bhabra, and later on, Mr. Tibrewal learned counsel for the respondents, submitted on the other hand that parties in the instant case chose a method of formulating the dispute. There was a general reference to arbitration without

Claims.	Award:
2. The claimants claim payment for various extra and substituted items of work executed by them under the contract at the rates as listed in annexure 'C' of their statement of facts or at such other rates as may be found correctly due to them.	This claim is partly justified. It is awarded that extra and substituted items be paid to the claimants at the rates shown in Appendix 'A' enclosed with the award. The said Appendix 'A' is made a part of this award.
14. The claimants claimed interest at 12% P. A. on the total amount of the award pendente lite and future till a decree by the competent court.	Interest pendente lite and future interest @ 6% P. A. on the amount of the award from 26.5.70 to the date of obtaining decree on the Arbitrator's award from the competent court or the date of actual payment is awarded in favour of the claimant, whichever is earlier.

1	2	3	4	5
73.	73	Extra labour for making light boxes as per design and placing them in position in R. C. C. Projected hood and canopy.	Rft.	Re. 1/- (Rupee one only).
75.	75	Making slit opening in shuttering board for placing M. S. hanger for fixing suspender for support of R. C. Duct & false ceiling frame work and reopening the same including making good the damages to shuttering board for further re-use.	Each	Rs. 1.80 (Rupee one and paise eighty only).
80.	80	Encasing of rain water pipe on both faces of R. C. Column (2 Nos. 3" dia front side and 1 No. 6" dia. pipe on hall side) with cement brick work (1:4) shaped to required size and 1.8 projection as per Architect's drawing plastered complete with cement plaster (1:3).	Each	Rs. 223/- (Rupees two hundred twenty three only).
81.	81	Cement brick work on front and back side of R. C. column on both sides of expansion joint shaped to required size and projection (slightly bigger) matching the brick work encasing R. W. Pipes on both faces of R. C. C column plastered complete all as per Architect's drawing.	Each	Rs. 235/- (Rupees two hundred thirty five only).
85.	85	Labour for making necessary alterations in timber frame for light boxes of different sizes supplied by the agencies and placing in positions : (a) Size of the Light Box 4'-8" x 4'-8"	Sft.	Rs. 2.65 (Rupees two and paise sixty five only).
		(b) -do- 28'-0" x 1'-6"	Sft.	Rs. 2.10 (Rupees two and paise ten only).
		(c) -do- 12'-8" x 1'-6"	Sft.	Rs. 2.40 (Rupees two and paise forty only).

any specification of disputes which thus could only be ascertained from the pleadings of the parties. There was never any averment in the statement filed by the appellant that there was no dispute for claim of interest. In any event, the claim for interest was there by implication and the arbitrator had always the implied authority to grant interest in favour of the parties whom he found entitled to any principal amount.

9. Learned counsel have referred to and relied on various authorities which we shall now consider. In Bhowanidas Ramgobind v. Harsukhdas Balkishandas, AIR 1924 Cal 524, a Division Bench of this Court consisting of Mookerjee and Rankin, JJ. held relying on some earlier decisions, that the arbitrators have authority to make a decree for such damages as might have been assessed by the Court.

10. In International Rly. Co. v. Niagara Parks Commission, AIR 1937 PC 214 (222) the Privy Council held that the arbitrators whose only duty was "to ascertain the actual value of certain property at a certain time", had no power to include interest in their assessment of value.

11. The Privy Council in Bengal Nagpur Rly. v. Ruttanji Ramji, AIR 1938 PC 67 held that in law the court could allow interest when there is agreement to pay interest or it is payable by usage or under provision of any law. In equity under proviso to S. 1 of the Interest Act, 1839 the circumstances must exist attracting equitable jurisdiction for award of interest and such power to award interest has been expressly saved by the said proviso.

12. In Re-Arbitration the Bengal Jute Mills v. Jewraj Heeralal, 46 Cal WN 957:

(AIR 1943 Cal 13), Gentle, J. held that when parties set out specifically what disputes have arisen and what relief is sought in consequence of the alleged default by one party, those are the only matters upon which the arbitrator is required to enquire and adjudicate. It was further held that when an arbitrator gives an award which includes matters not submitted to him and reliefs asked for, such award is void in toto.

13. In *Mathuradas Goverdhandas v. Khusiram Benarshilal*, (1949) 53 Cal WN 873 it was held that existence of a dispute is an essential condition for the jurisdiction of an arbitrator and if there is no dispute there can be no right to demand arbitration at all.

14. In *Thawar Das v. Union of India*, AIR 1955 SC 468, the Court observed that Interest Act, 1839 would apply where interest is not otherwise payable by law. The following among other conditions must be fulfilled before interest can be awarded under the Act.

(1) there must be a debt for a sum certain;

(2) it must be payable at a certain time or otherwise;

(3) these debts or sums must be payable by virtue of some written contract at a certain time;

(4) there must have been a demand in writing stating that interest will be demanded from the date of the demand.

If none of these elements are present, the arbitrator is not entitled in law to allow interest simply because he thought the demand was reasonable. Moreover the arbitrator not being a court no interest could be awarded by it on analogy of S. 34 of the C. P. C.

15. This decision as laying a broad and unqualified proposition was doubted in *Nachiappa v. Subramaniam* AIR 1960 SC 307 (para. 44). In *Satinder Singh v. Umrao Singh*, AIR 1961 SC 908, the Court recognised that the power of Court to award interest on equitable grounds or under any other provisions of law has been expressly saved by proviso to S. 1. The Supreme Court observed in *Mahabir Prasad v. Durga Datta*, AIR 1961 SC 990 that interest for a period prior to the commencement of suit is payable under an agreement or usage of trade or a statutory provision and also under the Interest Act where notice is given. Further interest is also awarded in some cases by Courts of equity.

16. Again in *Union of India v. Rallia Ram*, AIR 1963 SC 1685 it was held that under the Interest Act, the court may allow interest to the plaintiff if the amount claimed is a sum certain which is payable at certain time by virtue of a written instrument. The Act however contains a proviso that interest shall be payable in all cases in which it is now payable by law. The proviso applies to cases in which the court of equity exercises jurisdiction to allow interest.

17. This Court in *Union of India v. Bungo Steel Furniture Pvt. Ltd.*, AIR 1963 Cal 70 held that an umpire acting under the Arbitration agreement has authority to direct payment of interest on the principal sum adjudged from the date of the award up to the date of the decree to be passed by the Court. He had this power before the passing of the Arbitration Act, 1940 and he continues to retain the power after the passing of that Act and there is nothing in S. 29 of the Arbitration Act which takes away this power.

18. In *Chandris v. Isbrandtsen Moller Co. Inc.* (1951-1 KB 240); (1950-2 All ER 618), on the question of award of interest by the arbitrator, it was held that it was implied term of the submission that the arbitrator should decide the dispute according to the existing law of contract. The provisions of the Law Reform (Miscellaneous Provisions) Act, 1934, S. 3 (1) gave Court power to award interest on debt or damages. Though these provisions did not apply to an arbitrator, the power to award interest by the arbitrator was derived from the submission to him which impliedly gave him the power to decide "all matters in difference" according to existing law of contract exercising every right and affording discretionary remedy given to a court of law.

19. In *Waverly Jute Mills Co. Ltd. v. Raymon & Co. (India) (P.) Ltd.*, AIR 1963 SC 90 the court referred to the decisions in *National Fire & General Insurance Co. Ltd. v. Union of India*, AIR 1956 Cal 11 and *Pratabmull Rameshwar v. K. C. Sethia*, (1944) Ltd., AIR 1960 Cal 702. It was observed by the Supreme Court:

"In both these cases there was a valid submission on which the arbitrators proceeded to act. Before them the parties filed statements and therein they put forward a claim which was not actually covered by the reference and invited them to give their decision thereon. The party against whom the award had gone contended that the arbitrators had acted without jurisdiction in deciding that

claim. In overruling this contention the court held that it was open to the parties to enlarge the scope of a reference by inclusion of a fresh dispute, that they must be held to have done that when they filed their statements putting forward the claims not covered by the original agreement that these statements satisfied the requirements of S. 2 (a) of the Arbitration Act and that it was competent to the arbitrators to decide the dispute. The point to be noticed is that in both these cases there was no want of initial jurisdiction but a feeding of existing jurisdiction by an enlargement of the scope of the reference. That this does not involve any questions of jurisdiction in the arbitrators will be clear from the scheme of the Act. If an award deals with a matter not covered by the agreement it could either be modified under S. 15 (a) or remitted under S. 16 (1) (a). And where the matter is dealt with on the invitation of parties contained in the statement there can be no difficulty in holding that the arbitrators acted within jurisdiction."

20. In *Union of India v. Watkins Mayor & Co.*, AIR 1966 SC 275 the court reaffirmed the position in law to the effect that in regard to interest prior to the date of institution of the suit, interest may be awarded when there is an agreement for payment of interest at fixed rate or when interest is payable by the usage of trade having the force of law or under the provisions of any substantive law. Under Interest Act the Court may allow interest to the plaintiff if the amount claimed is a sum certain which is payable at a certain time by virtue of a written instrument. But where the amount claimed is compensation for unliquidated amount and not a sum certain, the Act has no application and no interest can be granted, the proviso applies to cases in which the court of equity exercises jurisdiction to allow interest in appropriate circumstances.

21. The Supreme Court in *Vithal Das v. Rup Chand*, AIR 1967 SC 188 reiterated the essentials for award of interest prior to suit. They are: (a) an agreement for payment of interest at fixed rate; (b) usage of trade having force of law contemplating payment of such interest; (c) a provision of substantive law like S. 80 Negotiable Instruments Act or S. 23 of Trusts Act; (d) if the sum claimed is certain and payable at a certain time, Court can also grant interest under the rule of equity.

22. In *Firm Madanlal Roshanlal v. Hukumchand Mills Ltd.*, AIR 1967 SC

1030 the Supreme Court noticed that in cases already referred to the court pointed out that observations in *Thawardas'* case were not intended to lay down such a broad and unqualified proposition. The said case is also silent on the question whether the arbitrator can award interest during the pendency of arbitration proceedings if the claim regarding interest is referred to arbitration. The Court further observed:

"In the present case, all the disputes in the suit were referred to the arbitrator for his decision. One of the disputes in the suit was whether the respondent was entitled to *pendente lite* interest. The arbitrator could decide the dispute and he could award *pendente lite* interest just as a court could do so under S. 34 of the C. P. C. Though, in terms S. 34 of the C. P. C. does not apply to arbitrations, it was an implied term of the reference in the suit that the arbitrator would decide the dispute according to law and would give such relief with regard to *pendente lite* interest as the Court could give if it decided the dispute. This power of the arbitrator was not fettered either by the arbitration agreement or by the Arbitration Act, 1940. The contention that in an arbitration in a suit the arbitrator had no power to award *pendente lite* interest must be rejected."

23. Again in *Union of India v. Bungo Steel Furniture Pvt. Ltd.*, AIR 1967 SC 1032, the Court noticed that *Thawardas'* case did not deal with the question whether the arbitrator can award interest subsequent to the passing of the award if the claim regarding interest was referred to arbitration. The court held that the arbitrator had the jurisdiction to grant interest on the amount of the award from the date of the award till the date of the decree; the reason being "that it is an implied term of reference that the arbitrator will decide the dispute according to existing law and give such relief with regard to interest as a court could give if it decided the dispute. Though in terms, S. 34 of the C. P. C. does not apply to arbitration proceedings the principle of that section will be applied by the arbitrator for awarding interest in cases where a court of law in a suit having jurisdiction of the subject-matter covered by S. 34 could grant a decree for interest."

24. In *State of Madhya Pradesh v. Saith and Skelton Pvt. Ltd.*, AIR 1972 SC 1507 the court observed—

"In the cases referred to above, it is seen that there was neither any agreement pleaded for payment of interest nor was any provision of law entitling the party to recover interest prior to the period of suit or arbitration proceedings referred to or relied upon. Under such circumstances it was held that the arbitrator or a court had no power to award interest prior to the date of the award ... From the decision in AIR 1967 SC 1030 it is clear that if all the disputes are referred for arbitration, the arbitrator has power to award interest pendente lite i.e. during the pendency of the arbitration proceedings".

25. In the case before us, the arbitrator was appointed by the Chief Engineer Eastern Zone by the letter we have quoted above. The letter recited that disputes had arisen between the parties and accordingly the arbitrator was appointed to decide and to make his award regarding the claims/disputes given by the contractor on his being asked to do so and also regarding the counter claims of the Government against the contractor as may follow subsequently. This letter clearly indicates that the disputes and claims generally were referred to the arbitrator subject to the specific claims and disputes as might be made by the contractor as also the counter claims if any to be made by the Government against the contractor "subsequently" in course of the arbitration proceedings. The arbitrator entered into reference on January 8, 1971. It appears from the award that statements were filed by both parties and the issues in dispute for adjudication and award were framed in consultations with and agreed upon by the parties at the hearing and issues on counter-claims were also amended in consultation with and agreed upon by the parties. It is therefore clear and obvious that the claim for interest pendente lite was made before the arbitrator and no objection at any time was taken by the appellant in the course of arbitration proceeding. In view of the special procedure adopted by the parties on the basis of the order of reference dated May 26, 1970 the question of award of pendente lite interest, it is obvious, was referred to the arbitrator and we have not been shown any contemporaneous evidence to indicate that any objection was taken thereto by the appellant. Issues were framed as stated by the arbitrator, in the presence of parties. It is accordingly too late in the day to suggest that the question of interest

pendente lite was no item of dispute. We accordingly held relying on the Bungo Steel Furniture's case AIR 1967 SC 1032 as also Saith & Skelton's case (AIR 1972 SC 1507) referred to above that interest pendente lite if any payable to the contractor was an item of reference to the arbitrator who accordingly had the jurisdiction to award interest from the date of reference.

26. The next contention against the award is that the award is non-executory, vague and indefinite and could not be given effect to. Reference was made to particular Items Nos. 73, 75, 80, 81 and 83. In particular payment as provided in Item 2 of the award for extra and substituted works at rates specified in App. 'A' could not be ascertained with reference to Items 73, 75 and 85 inasmuch as the measurements had neither been recorded nor could be assessed as the works had been completed. Further it was said Items 73 and 88 were identical and award had been made twice in respect of the same work.

27. About the last contention namely about Items 73 and 88 it has been contended that the objection in this form was not taken in the trial court nor in the memorandum of appeal. Even so, the error seems to be patent on the face of it and in absence of any explanation, there is no scope for avoiding or overlooking the same. We accordingly think that the award in Item 88 is not allowable and should be struck down.

28. As to Item 75 we do not find any vagueness, and if it was no longer possible to examine the number of slit openings in view of subsequent constructions, the record maintained by the respondent would have to be relied upon. The same consideration would be applicable for Items 80, 81 and 85 and it appears from the affidavit-in-opposition affirmed on February 20, 1973 by Ramantar Jhunjhunwala to the petition filed by the appellant challenging the award that a particular procedure was adopted for the purpose with consent of parties and disputes in respect of the rates of the claim were referred to the arbitrator. The arbitrator had followed the procedure so agreed upon and it was never brought to the notice of the arbitrator that the analysis of rates submitted by the contractor suffered from infirmities resulting in any mistake or error in the award. As to measurements of works it was also the duty of the appellant to keep proper ac-

count in respect thereof and if they failed to maintain such record, the contractor could not be deprived of their legal dues. Further the arbitrator was required to fix rates of works without reference to measurements and in this state of affairs, it was not possible for the arbitrator to award lump sums in respect of claims and counter-claims which must necessarily have to be calculated on basis of the rates so fixed by the arbitrator. The award in the circumstances had to be executory on the choice of the parties and accordingly there was no vagueness and indefiniteness in the impugned award.

29. The award was made and published on September 25, 1972 but thereafter on December 1, 1972 it is alleged on the ex parte application of the contractor, the award was corrected as follows:—

- | | |
|---------------------------------|--|
| (i) Appendix 'A' Serial No. 38 | For unit given as % Cft read unit " " % Cft. |
| (ii) Appendix 'A' Serial No. 62 | For unit given as sft read unit as rft. |

30. The appellant submitted that the corrections were impermissible in law and would indicate the non-application of mind on the part of the arbitrator. In *Chouthmal v. Ramchandra*, AIR 1955 Nag 126, it was held that once an arbitrator has given his decision, he becomes functus officio and he cannot add to or vary it in any way except to correct clerical mistakes or errors arising from any accidental slip or omission. In *Juggilal Kamalapat v. General Fibre Dealers Ltd.*, AIR 1962 SC 1123 it was held that generally speaking an arbitrator is functus officio after he has made the award but this only means that no power is left in the arbitrator to make any change of substance in the award that he has made except in certain circumstances provided in the law. The corrections made by the arbitrator here were in respect of patent errors and did not amount to any change of substance in the award and thus were permissible. We are also not prepared to accept that these corrections indicate non-application of mind on the part of the arbitrator as contended by Mr. Sen on behalf of the appellant.

31. We have seen that the award in respect of Item 88 is unsustainable. That, however, without more will not vitiate the award. In *Jivaribhai v. Chintamanrao*, AIR 1965 SC 214 the Court held that the award, to the extent it is beyond the arbitrator's jurisdiction, is invalid and if it is not possible to sever such invalid part from the other part of the award, the award must fail in its entirety. In

the case before us, the award, in respect of Item 88 is perfectly severable from the other part of the award. Accordingly though we are unable to sustain the award in respect of Item 88, it cannot be said that the entire award is thereby vitiated.

32. For all these reasons we are unable to accept the various contentions raised by the appellant. The award in respect of Item No. 88 is set aside and the order and decree passed by the learned Judge are varied to that extent. In the result, the appeal succeeds in part and only to the extent indicated above. Save as aforesaid, the order and the decree under appeal are affirmed. The appellant will pay half the costs of the appeal. Certified for two Counsel.

33. After hearing the submissions made by Mr. Tibrewal and Mr. P. K. Sen, we release the respondents from the undertaking they have given in respect of payment of Rs. 2,00,000/- made by the appellant Union of India to the respondents. The guarantee will accordingly stand discharged. All parties and the Bank of Madura will act on a signed copy of the minutes of Mr. B. M. Bagaria, Attorney for the respondents, undertaking to complete this order.

S. K. MUKHERJEE, J.:— I agree.

Appeal partly allowed.

AIR 1977 CALCUTTA 273

ANIL KUMAR SEN AND M. N. ROY, JJ.

State of West Bengal and another, Appellants v. Ajit Kumar Mukherjee, Respondent.

F. A. No. 87 of 1964, D/- 22-6-1976.

(A) Government of India Act (1935), S. 175 (3) — Contract with State Government by correspondence — Tender for supply of ghee accepted by Superintendent of Police who was duly authorised — Delivery of entire quantity contracted for made but payment of price delayed — Suit for compensation against State Government — Contract is valid and enforceable even if no formal document is executed. AIR 1973 Cal 325 and AIR 1963 SC 1685 and AIR 1972 SC 915, Rel. on. (Constitution of India, Art. 299).

(Paras 16 and 17)

(B) Civil P. C. (1908), S. 80 — Contents of notice — Suit against State Government for recovery of unpaid price of ghee supplied and for damages by way of inte-

CU/DU/B120/77/KSB

rest — Court is not justified in disallowing claim for damages by way of interest merely because notice under S. 80 does not set out quantum of damages or specific rate of interest.

Although the terms of S. 80 of the Civil P. C. are to be strictly complied with, that does not mean that the terms of the notice should be scrutinised in a pedantic manner. The notice must broadly make out the case which is proposed to be brought so that the Government may consider the position for itself. That object is served when the notice specifies the nature of the suit proposed to be filed, the facts on which the claim is founded and the precise reliefs asked for. (Para 18)

Where the notice under S. 80 precisely stated that the plaintiff amongst others would claim the relief of damages on the unpaid price of the goods for the period the price was withheld, the trial Judge would not be justified in rejecting the claim of the plaintiff in this respect on the ground that the rate of interest to be claimed or the actual quantum of damages by way of interest had not been specified in the notice. (Para 18)

(C) Civil P. C. (1908), Ss. 34 and 107 — Pendente lite interest — Award of — Trial Judge in exercise of his judicial discretion under S. 34 awarding pendente lite interest at 3% on principal amount adjudged payable to plaintiff as reasonable — Appellate Court would not interfere so as to enhance it to 6%. (Para 18)

(D) Civil P. C. (1908), S. 34 — Interest prior to suit — Suit for recovery of unpaid price of goods supplied — Court should award such interest as plaintiff has statutory right under S. 61, Sale of Goods Act. (Sale of Goods Act (1930), S. 61).

Where the plaintiff brings a suit for recovery of unpaid price of goods supplied and also claims interest on that amount from the date when the price became payable, such interest being payable under S. 61 of the Sale of Goods Act, the plaintiff had statutory right to claim such interest and the Court should award interest when it is so payable under the statute. The ordinary rule that such interest for the period prior to suit is not payable in the absence of a specific stipulation therefor does not apply when the right is conferred by the statute. (Para 18)

Cases Referred: Chronological Paras

AIR 1973 Cal 325	17
AIR 1972 SC 915	17
AIR 1963 SC 1685	17
AIR 1962 SC 779	12

AIR 1960 SC 1309

13, 15

AIR 1958 SC 274

13, 15

Chandidas Roychowdhury and S. N. Mukherjee, for Appellants; Shyama Charan Mitra and Anil Kumar Mukherjee, for Respondent.

M. N. ROY, J.:— This appeal is directed against the judgment and decree dated March 6, 1963 by the learned Subordinate Judge, 6th Court, Alipore, made in Money Suit No. 13 of 1958. The plaintiff respondent (hereinafter referred to as the plaintiff) at all material times and still is carrying on business under the name and style of Pearson Trading Company at 1/5, Raja Basanta Roy Road, Calcutta-26, as a contractor in food in the Police departments in West Bengal and several other mercantile concerns. Pursuant to an invitation of a tender for the supply of dietary articles, including cow and Bhaisa ghee by the Superintendent of Police, 24 Parganas, he on November 5, 1948 submitted a tender for such articles of cow and Bhaisa ghee at the following rates:

- (1) Buffalow ghee ... @ Rs. 235/-
- (2) Cows ghee ... @ Rs. 295/- (No. 1)
Guarantee % per cent.
- (3) Cows ghee ... @ Rs. 220/- per
maund (No. 2)

Such tender of the plaintiff was accepted by the said Superintendent of Police by his letter of November 18, 1948 for the month of November, 1948 and he was directed to supply 100 maunds of Bhaisa ghee as per his sample. It is also an admitted fact that pursuant to such acceptance and order, the plaintiff at first delivered 26 maunds 6 seers and 14 chataks of Bhaisa ghee in 59 containers on November 19, 1948 and thereafter, on November 24, 1948 he delivered another consignment of 75 maunds 20 seers of Bhaisa ghee in 171 containers. It is also not disputed that the supplies in question were approved and accepted and thereafter, the plaintiff on Dec. 4, 1948 placed his bill for Rs. 23,831.14 as 3 pies, as price of 130 tins containing 101 maunds 26 seers 14 chataks of Bhaisa ghee. Since there were some errors in calculation, the said bill was ultimately returned to the plaintiff for correction, who thereafter on December 8, 1948 presented a corrected bill for Rupees 23,892-14 as 3 pies for the goods supplied. It appears that by Memorandum No. R/543 dated December 21, 1948, the plaintiff was informed by the Superintendent of Police concerned that the supplies so made by him were adulterated and he was asked to take back the tins which were lying in

the store of the said defendant and to submit a fresh bill for the quantity of ghee actually consumed. Since there was delay in making the payments for such supply of ghee, the plaintiff on December 23, 1948 requested the Superintendent of Police concerned to send a cheque for the price of the goods so supplied. It also appears from the records that on receipt of the letter of December 21, 1948 from the Superintendent of Police concerned, the plaintiff by his letter of January 6, 1949 denied the charges of adulteration as was alleged. It would also appear that before the said letter of January 6, 1949, the plaintiff with his representatives had been to the Ration Store of the defendants on January 4, 1949 to take back the unconsumed tins lying at the said godown and at that time on proper examination of the tins it was found out to their utter surprise that they did not belong to them. Such detection was made when the plaintiff found that the secret marks "SB" which were given on the tins so supplied by him were conspicuously absent. By the said letter of January 6, 1949 the plaintiff also contended that the tins supplied by him have been replaced and that has placed him in such an awkward position that he could not take back those tins as per the directions as mentioned above. In the said letter the plaintiff also alleged that some underhand means have worked with the mala fide intention to harass him. It was also stated by the plaintiff in the said letter that the samples sent for test by the said defendants were not taken in his presence nor did they bear his official seals and signature and it was quite possible that samples were taken through oversight from the stocks supplied by other contractors. The plaintiff also made it clear in his letter under reference that he would have certainly submitted to the charges as levelled against him, if the procedure which was adopted in the month of December 1948 for taking samples in the case of Messrs. National Dairy, since such procedure was quite in order. From a reference to the said letter it also appears that the plaintiff made it clear that the supply of ghee from several tins which he had supplied, had actually been made and distributed to several Police Stations like Barrackpore and G. R. P. Sealdah and since those supplies have been called back for the purpose of delivering them to him, also caused a suspicion in his mind. The plaintiff, however, made it clear that for the act and action of the said defendants he

has suffered much and irreparable damages to his goodwill and in any view of the matter he requested for the payment of his bill at an early date. It has also been made clear that on failure of such payment, he would be compelled to charge the defendants interest @ 12½%.

2. It also appears from the records that thereafter, proceedings were initiated against the plaintiff and another person named Sri S. Banerjee and they were placed on trial under Ss. 420 and 227 of the I. P. C. Such proceedings of course ended in an acquittal of the plaintiff and the said co-accused on April 22, 1950, by the learned trying Magistrate. Thereafter, the Superintendent of Police, 24 Parganas (defendant No. 2) filed a fresh complaint on the self-same allegations before the Additional District Magistrate and the plaintiff was summoned to face the trial. He in his turn moved this Court for quashing the said criminal proceedings and by the judgment of December 14, 1950, this Court was pleased to quash the said proceedings. Then at the instance of the Superintendent of Police, 24 Parganas, notices were issued on the plaintiff through the Court of the Magistrate, First Class, Alipore, directing him to take back the consumed containers of ghee and after considering the show cause by the plaintiff, the said learned Magistrate directed that the unconsumed ghee produced by the Superintendent of Police, 24 Parganas be made over to the plaintiff.

3. Even thereafter, the said defendants, instead of making due payment of the price of ghee as supplied, harassed the plaintiff in different criminal proceedings, which also failed. On the failure of the said defendants to make necessary payment for the supply of ghee as mentioned hereinbefore, the plaintiff on December 17, 1951 filed Money Suit No. 13 of 1958, for recovery of the price of goods sold and supplied and for damages. In the plaint it has been contended that the plaintiff was entitled to get Rupees 23,892-14 as. 3 pies as price of the ghee in question and as the said defendants have delayed the payment, so he was also entitled to damages by way of interest to the extent of Rs. 9,457-10 as. 4 pies. Thus his total claim in the said suit was Rupees 33,350-8 as. 7 pies. The said suit was preceded by a notice under S. 80 of the C. P. C. dated October 6, 1951.

4. The said defendants in their written statement contended the suit to be not maintainable since there was no proper

service of notice under S. 80 of the C. P. C. They also denied the legality and validity of the same. The said defendants in their turn admitted that the plaintiff had supplied 100 maunds 26 sheers and 14 cha-taks of Bhaisa ghee as mentioned in the plaint but they contended that such supplies were neither examined nor approved or accepted by them. They have also alleged that some samples were sent to the Director of West Bengal Police Health Laboratory and it was detected that the ghee in question was highly adulterated and not according to the samples sent along with the tender. The said defendants have further contended that the plaintiff was bound to supply ghee according to the approved samples and he was duly asked to take back the unconsumed portion of the ghee. They further stated that they were not liable to pay the amount so claimed by the plaintiff and in any event he was not entitled to any interest as he did not claim any interest or damages in his notice under S. 80 of the C. P. C. It was further and also contended by the said defendants that there was no valid contract under S. 175 (3) of the Government of India Act, 1935 and the plaintiff was not entitled to claim anything as per contract.

5. On the pleadings as aforesaid, the following issues were framed for determination:—

(1) Did the plaintiff supply ghee to the defendants as alleged in the plaint?

(2) Was the ghee supplied adulterated? Did the defendants refuse to accept the ghee for good and sufficient cause?

(3) Are the defendants liable for any amount? If so, for what amount?

(4) Was the notice under S. 80, C. P. C., proper sufficient and legal?

(5) To what relief, if any, is the plaintiff entitled?

6. On consideration of the evidence as lead and available, the learned trial Court came to the conclusion that the plaintiff supplied the two consignments of Bhaisa ghee and there was no satisfactory evidence that the samples for the alleged tests were drawn properly from the supplies effected by him on November 19, 1948. It has also been held that the said defendants not only failed to establish that the ghee supplied by the plaintiff was adulterated but they also failed to establish that the unconsumed ghee was also adulterated and as such they had no right or authority to refuse to accept the ghee as supplied by the plaintiff. Apart

from the above, it was also found by the learned trial Court that the notice under S. 80 of the C. P. C. was due, proper and sufficient, although it has been held, in view of the plaintiff's failure to mention in the said notice Ext. B (4), the rate at which he would get damages and more particularly his failure to specify the damages, that he would not be entitled to claim damages by way of interest for the period mentioned in the plaint and as such decreed the suit by holding that the plaintiff's claim for damages by way of interest cannot be granted and he would be entitled to get interest on the principal sum of Rs. 23,892-14-3 pies @ 3 per cent, from the date of the institution of the suit till the date of decree. The suit was of course dismissed against defendant No. 2 viz., the Superintendent of Police, 24 Parganas, since no relief was claimed against him.

7. From such determination the defendants have preferred the present appeal and there has also been a cross-objection filed by the plaintiff on March 24, 1965, claiming interest at 6% per annum as interest on the principal sum for the period from November 24, 1948 to December 16, 1951 viz., for an amount of Rs. 4,728-13-2 p. and thereby giving up his claim for the balance of 6% and further claiming interest on the principal sum for the period from December 17, 1951 to March 6, 1963 i.e. from the date of institution of the suit upto the date of decree at the rate of 6% per annum.

8. Mr. Roychowdhury, appearing for the appellants contended before us that (i) on the basis of the materials on record, it should have been held that the ghee supplied by the plaintiff was adulterated and as such there was enough justification for the defendant appellants to refuse to accept the consignment of ghee and correspondingly not to make any payment for any portion or at least for the unconsumed portion and as such (ii) the defendant appellants were not liable to make any payment either on account of the price of the goods sold and delivered or on account of interest as charged for and claimed.

(9-10. After discussion of the evidence the judgment proceeds as follows:—)

11. So, on the basis of the available evidence as mentioned hereinbefore, we do not find any justification in holding that the findings arrived at by the learned trial Judge were incorrect or are required to be interfered with or set aside.

In view of the above, the first contention raised by Mr. Roychowdhury fails and as such we hold that the defendant appellants had no justification to refuse to make any payment or any portion of the same or at least for the unconsumed portion and as such it must be held that the defendant appellants are liable to pay for the price of the goods, ghee in the instant case, duly sold and supplied by the plaintiff. We are further of the view that the defendants have failed to establish that the ghee as supplied by the plaintiff was adulterated.

12. On the second point urged on behalf of the appellants, particulars whereof have been mentioned hereinbefore, Mr. Roychowdhury, in half seriousness repeated that in view of the provisions in S. 175 (3) of the Government of India Act 1935, there was no valid contract in the instant case. However, in view of the admitted fact that the plaintiff was requested by the Defendant No. 2 to supply ghee, which was duly complied with and there has been no dispute that the supplies were meant for the use of the police personnel and there existed a lawful relationship between the parties to the contract, in terms of the decision of the Supreme Court in the case of *State of West Bengal v. B. K. Mondal & Sons*, reported in AIR 1962 SC 779 and the more so when the defendants have failed to prove that the unconsumed ghee was adulterated, in agreement with the learned Court below, we also hold that the plaintiff cannot be held guilty of any laches as alleged if the defendants have not thought it fit to consume the stock of ghee lying with them and all the more so, when after acceptance of the ghee, they have used a portion of the same and furthermore, when there is evidence showing that after consumption of such ghee any member of the Police force fell ill and when there is also no evidence to establish that the unconsumed portion of the ghee was adulterated. In view of the above, we also uphold the determination of the learned trial Court that the claim for compensation as made by the plaintiff and at the rate as mentioned was justified. It may be mentioned that at no point of time any dispute was raised regarding the rate at which the supply was made.

13. In the notice under S. 80 of the C. P. C., (Ext. B (4)), admittedly the plaintiff has not claimed interest or damages and as such Mr. Roychowdhury repeated the arguments as were made before the

learned trial Court that as such, the plaintiff was not entitled to claim interest or damages prior to the institution of the suit i.e. December 17, 1951. Such argument was sought to be made on the ground and the basis that the terms of S. 80 being express and explicit, apart from being mandatory, the plaintiff, because of his failure to plead and claim interest or damages therein, was not entitled to maintain his claim on that account. Two judgments of the Supreme Court reported in AIR 1960 SC 1309, (*State of Madras v. C. P. Agencies*) and AIR 1958 SC 274, (*Dhian Singh Sobha Singh v. Union of India*), were relied on respectively by the defendant appellants and the plaintiff. Although in the notice Ext. B (4) neither any rate at which damages would be claimed nor the amount of damages has been mentioned, yet the plaintiff, in his plaint has claimed interest @ Rs. 12½% from November 24, 1948 to December, 1951 i.e. for an amount of Rs. 9,457-10-4 p. In the notice in question Ext. B (4), the plaintiff has on the other hand just mentioned that he would claim damages for improperly and illegally delaying the payment of his claim of Rs. 23,892-14-3 p. and on consideration of the decisions as mentioned hereinbefore, the learned trial Court has come to the conclusion that the plaintiff would not be entitled to claim damages by way of interest for the period as mentioned in the plaint. The validity and sufficiency of the said notice Ext. B (4) has not been denied and disputed at any stage, including the proceedings in this appeal. For the determination of the point as indicated hereinbefore, the cross-objection of the plaintiff would be of relevant consideration.

14. As mentioned hereinbefore, the plaintiff has reduced his claim for interest and damages to 6% from 12½% as originally claimed. Mr. Mitter appearing for the plaintiff has submitted that such reduction has been made because due to the delay in having the payment, his client has been placed in great financial hardship. The plaintiff has of course claimed further interest at that rate on the principal sum for the period from December 17, 1951 to March 6, 1963 i.e. from the date of the institution of the suit till the date of the decree.

15. After referring to the notice under S. 80 of the C. P. C., Ext. B (4), it was submitted by Mr. Mitter that the provisions regarding the pleading and damages in the said notice have been misconstrued

by the learned Court below and in any event the findings that the plaintiff was not entitled to claim damages by way of interest for the period mentioned in the plaint and on the reasonings as mentioned in the impugned judgment and decree are unsustainable. He further submitted that the learned Court below having found the said notice Ext. B (4) to be due, proper and sufficient, should not have made the judgment and decree in the manner he has done and furthermore in making the said determination, the learned trial Court failed to appreciate the import and effect of the case of *State of Madras v. C. P. Agencies*, (AIR 1960 SC 1309) (supra) and that of *Dhian Singh Sobha Singh v. Union of India*, (AIR 1958 SC 274) (supra) and in any event, having regard to the materials on record and the principles of law involved and more particularly because of the fact that the plaintiff was prevented from having the benefits of his money for a considerable time due to the neglect, laches and improper conduct of the defendants, interest at least @ 6% per annum on the principal sum should have been allowed in terms of the claim from November 24, 1948 to December 13, 1951. Mr. Mitter further submitted that since the contract in the instant case was not severable and admittedly the defendants had duly accepted the supply of ghee, so the property passed to the buyer viz., the defendants and they having accepted and consumed a part or portion of such ghee, cannot now take the defence of adulteration and the more so when such charge has not been proved. In support of his contentions, Mr. Mitter first relied on S. 13 (2) of the Sale of Goods Act, 1930 and then to S. 61 (2) of the same, and submitted further that since there was no contract to the contrary viz., interest @ 6%, the learned trial Court should have awarded interest at the said rate of 6% from November 1948 i.e. when the supply was effected to December 1951 i.e. when the suit was decreed, even though such pleading was not available in the notice in Ext. B (4). Mr. Mitter also relied on the case of *Dhian Singh Sobha Singh v. Union of India*, (supra) for the proposition that although the terms of S. 80 are to be strictly complied with, it does not mean that the terms of the notice should be scrutinized in a pedantic manner or in a manner completely divorced from commonsense and submitted that such view has in fact and also been maintained in the case of *the State of Madras v. C. P. Agencies* (supra). In fact, Mr. Mitter sub-

mitted that since the intention of the plaintiff could be well gathered from the notice Ext. B (4) viz., about his intention to claim interest and damages on the principal amount, so even in spite of paucity of pleadings for such claim of interest and damages, the learned trial Court should have also granted interest and damages at the rate and for the period as claimed.

16. On a consideration of the determinations as mentioned hereinbefore read with the pleadings of the parties and the evidence as lead, we are of the view that the plaintiff, in fact and in effect, intended to claim interest and damages on the principal amount and the defendants had also no difficulty in understanding the same and as such the plaintiff would be entitled to maintain his claim for interest and damage, particularly when such intention is manifest from the correspondence. The plaintiffs' failure to mention or plead specifically the said fact in the notice Ext. B (4) would not be fatal in the facts and circumstances of the case.

17. It has been held by a Bench decision of this Court in the case of *Kanchanganga Co. Ltd. v. State of West Bengal*, AIR 1973 Cal 325, while dealing with a contract with the State or the Union under Art. 299 of the Constitution of India, that when contract by correspondence has resulted in offer and acceptance and the parties have acted on it, the contract is enforceable. Furthermore, when a party has taken benefit under the agreement, it cannot be allowed to take up a new position. Such view also finds support from the determination in the case of *Union of India v. A. L. Rallia Ram*, AIR 1963 SC 1685, where, dealing with S. 175 (3) of the Government of India Act, 1935, it has been observed that:

"S. 175 (3) does not in terms require that a formal document executed on behalf of the Dominion of India, and the other contracting party, alone is effective. In the absence of any direction by the Governor General under S. 175 (3) of the Government of India Act prescribing the manner, a valid contract may result from correspondence if the requisite conditions are fulfilled. It is true that S. 175 (3) uses the expression "executed" but that does not by itself contemplate execution of a formal contract by the contracting parties. A tender for purchase of goods in pursuance of an invitation issued by or on behalf of the Governor General of India and acceptance in writing which is expressed to be made in the name of the

Governor General and is executed on his behalf by a person authorised in that behalf would conform to the requirements of S. 175 (3)."

The above view also gets support from another determination of the Supreme Court in the case of Union of India v. N. K. Private Ltd., AIR 1972 SC 915. In that case while dealing with a contract under Art. 299 of the Constitution of India, it has been observed that:

"It is now settled by this Court that though the words 'expressed' and 'executed' in Art. 299 (1) might suggest that it should be by a deed or by a formal written contract, a binding contract by tender and acceptance can also come into existence if the acceptance is by a person duly authorised in this behalf by the President of India. A contract whether by a formal deed or otherwise by persons not authorised by the President cannot be binding and is absolutely void."

Thus from the above it is also clear that Mr. Mitter has ample justification in his contentions that the arguments on S. 175 (3) of the Government of India Act, 1935, as were sought to be urged by Mr. Roychowdhury, although not very seriously, are of little or no substance, since the correspondence disclosed, proved the due execution of the contract and there is no evidence that D. W. 1 was not authorised to accept the tender or to enter into the contract.

18. Coming back now to the cross objection, it appears that the plaintiff claimed interest on the amount claimed by him as the unpaid price of the goods supplied to the defendant-appellant from 24th November 1948 till December 17, 1951 i. e. the date of institution of the suit at 12½% per annum and also interest pendente lite. The learned Subordinate Judge disallowed the former claim merely on the ground that the plaintiff in his S. 80 notice had not specified the rate at which he would claim interest on the price of goods withheld nor did he specify the quantum of damages he would demand on that account. The learned Subordinate Judge allowed interest pendente lite at 3%. In this cross-objection the plaintiff is not reasserting his claim of interest for the period prior to the suit though he has reduced his claim to 6% per annum and he is also claiming the interest pendente lite as decreed by the learned Subordinate Judge to be enhanced to 6% from 3%. So far as the latter claim is concerned it appears to us that the learned Subordinate Judge has in his judicial exercise of dis-

cretion under S. 34 of the C. P. C. had held that awarding interest at 3% on the principal amount adjudged payable to the plaintiffs as reasonable and we find no reason either to differ from him in his assessment nor to hold that such assessment is not reasonable or fair. Hence the second part of the plaintiff's claim in the cross-objection must be overruled. So far however the first part of the claim is concerned, we are of the view that the learned Subordinate Judge was clearly in the error in altogether rejecting plaintiff's claim of interest on the unpaid price of the goods supplied to the defendants from the date such price became payable to the date of the suit. Mr. Mitter has rightly pointed out that such interest being payable under S. 61 of the Sale of Goods Act, the plaintiff had statutory right to claim such interest and the Court should award interest when it is so payable under the statute. The ordinary rule that such interest for the period prior to suit is not payable in the absence of a specific stipulation therefor does not apply when the right is conferred by the statute. Learned Subordinate Judge also had not relied on that principle for disallowing the said claim. He seems to think that unless the total quantum of damage by way of interest or the specific rate of interest to be claimed is set out in the notice under S. 80 of the C. P. C. the plaintiff is not entitled to sustain a claim in this respect. There he was wrong as the notice under S. 80 of the C. P. C. clearly asserted that the plaintiff claims damages for improperly and illegally delaying the payment of the price due on the goods supplied. On the decisions of the Supreme Court referred to hereinbefore it is now well settled that although the terms of S. 80 of the C. P. C. are to be strictly complied with, that does not mean that the terms of the notice should be scrutinised in a pedantic manner. The notice must broadly make out the case which is proposed to be brought so that the Government may consider the position for itself. That object is served when the notice specifies the nature of the suit proposed to be filed, the facts on which the claim is founded and the precise reliefs asked for. The learned Subordinate Judge himself has upheld the notice under S. 80 of the Civil P. C. and still he had rejected the claim of the plaintiff in this respect on the ground that rate of interest to be claimed or the actual quantum of damages by way of interest had not been specified in the notice. We do not think that was at

all necessary. It had precisely been stated in the notice that the plaintiff amongst others would claim the relief of damages on the unpaid price of the goods from the period the price was withheld. Hence this part of the cross-objection must succeed and the judgment and decree of the learned Judge dismissing the plaintiff's claim of interest prior to the suit must and is hereby set aside. Interest of justice would be best served if interest at 3% as has been allowed pendente lite and found by us to be reasonable be allowed for the period from 8th December 1948 (the date when the corrected bill was submitted by the plaintiff) till the date of the institution of the suit.

19. On the conclusions as above, the appeal fails and is dismissed. The cross-objections succeeds and is allowed in part. The decree as passed by the Court below is modified to this extent viz., that the interest which has been decreed at three per cent per annum would be from 8th December 1948 till the date of decree. The decretal amount shall be payable within three months. The plaintiff respondent (cross-objector) would be entitled to proportionate costs. Hearing fee being assessed at 3 g. ms.

ANIL KUMAR SEN, J.:— I agree.
Decree modified.

AIR 1977 CALCUTTA 280

RAMENDRA MOHAN DATTA, J.

Satyanarayan Jhunjunwala, Petitioner v. Punjab National Bank Ltd., Respondent.

Matter No. Nil of 1976, dated 24-2-1976.

Bankers' Books Evidence Act (1891), S. 6
— Power of Court to Order a Bank to supply certified copy of entries in a bank account — Circumstances under which such power may be used.

In the instant case, the defendant made an application under the Bankers' Books Evidence Act, 1891, for an order upon certain bank to supply a certified copy of the entries in respect of the account of one of its customers, for a particular period so that the same might be utilised as a piece of evidence in the trial of the suit which was continuing before the Court.

Held that the application by defendant seeking production of third party's document could not be allowed when all the witnesses had been examined and as such

the plaintiff would not get any opportunity to cross-examine any of the defendant's witnesses on the document. In the ends of justice a third party's document ought not to be allowed to be produced unless very special circumstances are shown. AIR 1938 Bom 33 (SB), Ref.

(Para 7)

Cases Referred: Chronological Paras
AIR 1938 Bom 33 (SB) 6

ORDER:— This is an application under the Bankers' Books Evidence Act, 1891, for an order upon the Punjab National Bank Ltd., Lilloah Branch at Howrah to supply a certified copy of the entries in respect of the account of Messrs. Thakuradas Sureka of 172, J. N. Mukherjee Road, Howrah, for a particular period so that the same might be utilised as a piece of evidence in the trial of this suit which is continuing before this Court now.

2. Messrs. Thakuradas Sureka is a firm but neither this firm nor any of the partners hereof are parties to this proceeding. In course of this proceeding on or about 12th January, 1976 a similar application was moved ex parte for the production of the very same statement of account of this firm of Thakuradas Sureka and for the very same period as is being asked for now from the above bank. The said application was rejected by this Court because it asked for the production of the certified copy of the statement of account of a constituent who was neither a party to this proceeding nor any of its partners having been called as witnesses in this case.

3. Since then further evidence has been taken. The defendants have called a witness by the name of Mahabir Prosad Keshan who happens to be a clerk of the joint receivers appointed over the said firm of Thakuradas Sureka. The said witness produced a copy of the statement of the bank but the same could not be tendered in evidence because the witness had no knowledge in respect thereto nor was the said document a certified copy of the bank. It is now contended that the certified copy should be caused to be produced by making an order in this fresh application so that the said statement of account might be tendered in evidence.

4. The present application has been moved after the examination of the main witnesses both on behalf of the plaintiff and on behalf of the defendants had already been concluded. Even the examinations of the defendants Nos. 2 and 3 are also over. Accordingly, I directed the

applicant to serve a copy of the petition to all the parties concerned including upon the partners of Thakurdas Sureka. It appears that Ratanlal Sureka a partner of Thakurdas Sureka has refused to accept service because the receiver is already in possession of the firm and on the plea that without the instructions of the learned receivers he could not accept such service. Be that as it may, I heard the petitioner's counsel as also the plaintiff's counsel.

5. Mr. Sen appearing on behalf of the plaintiff strongly objects to any order being passed in this application on several grounds. First, it is contended that on principle a third party's banking account should not be caused to be produced in without calling such a party in the witness box. Secondly, that at this stage if such a document is allowed to be produced and tendered in evidence his client would suffer serious prejudice because he would not be in a position to cross-examine any of the defendants or the witnesses called on behalf of the defendants on this document and thirdly, that the document is quite irrelevant for the purpose of this case.

6. Mr. Sen has referred to me the case of Central Bank of India Ltd. v. P. D. Shamdasan, reported in AIR 1938 Bom 33 (SB) in which Beaumont C. J. observed at page 36 as follows:—

"There is no doubt truth in the contention that it may be difficult, or even impossible for the complainant to prove his case without inspection of the Bank's books, but the Court has to have regard to other aspects of the matter. The Legislature has endowed the Courts with wide powers of ordering production of documents necessary for the determination of matters before the Court, and for directing inspection of those documents but it must always be borne in mind that an order directing a person to produce or give inspection of his books in a dispute to which he is not a party involves a serious inroad upon his normal rights as a citizen and the Courts have always set their faces against giving anything in the nature of a roving or fishing commission to inspect documents. The Court does not allow a man to say. 'I make such and such a charge against my opponent, and now if you will let me look into his books I will see whether I can find some evidence to support it.' If the Courts were to make orders for inspection of books merely on an allegation that certain facts are true, the practice would be open to

very serious abuse, and the Court might easily become something of a menace to a mercantile community. It would be open to an unscrupulous person to make a false charge, possibly against a business rival, and then get inspection of that business rival's books."

7. To my mind, at this stage this application ought not to be allowed because the witnesses have all been examined and the plaintiff will not get any opportunity to cross-examine any of the defendant's witnesses on this document. Furthermore, the more fundamental objection is that this is a third party's document and in the ends of justice the same ought not to be allowed to be produced by this process unless very special circumstances would be shown in the petition as grounds thereof. No such special circumstances having been made out in the petition, the petitioner is not entitled to any order.

8. The application is also barred by the principles of *res judicata* in view of the same being considered at an earlier stage and dismissed by this Court on 12th February, 1976 last.

9. Lastly, to my mind, the said document, if produced, would not in any way help in deciding this case. It is in evidence before me by the witness called from the bank that the cheque for Rupees 1,78,400/- drawn by Thakurdas has been credited to the second payee's account and the said cheque being already in the records of this case, the said statement of account cannot throw any extra light on the topic. How it could be credited by the bank when the balance in credit was not sufficient to cover it cannot be relevant. Under those circumstances, it would matter little for the court to know what was the balance amount lying in the account of Thakurdas Sureka on such date by causing the statement of account to be produced.

10. Under those circumstances, the application is bound to be and is dismissed with costs. Certified for counsel.

Application dismissed.

AIR 1977 CALCUTTA 281

R. BHATTACHARYA AND

A. K. JANAH, JJ.

Jagat Bandhu Shaw and others, Appellants v. Ram Nagina Pandey, Respondent.

L. P. A. No. 228 of 1974, r/- 7-4-1977.

DU/EU/B418/77/CWM

(A) Civil P. C. (1908), S. 144 (1) and O. 9, R. 13 — Words “reversed” and “the Court of first instance” in S. 144 (1) — Interpretation of — Setting aside of ex parte decree by trial Court — It is reversal of decree.

For proper application of S. 144 the word “reverse” should be given its meaning in the wider sense and in that view of the matter, it will mean setting aside of the order of the decree by the Court which passed it and also by the Court of higher forum either in appeal or in revision. The meaning of the word is not in any way restricted in the section. (Para 4)

The Court of first instance referred to in S. 144 means the initial court where the suit was originally started, that is to say, the trial court. It should be remembered that the trial court can set aside a decree passed by it under O. 9, R. 13 and there may be occasions for the trial court to reverse or recall an order or decree passed by it for proper decision and for ends of justice. An order or a decree again may be set aside in an appeal or a revision. There are thus cases of reversal of a decree or an order by trial court or by the court of higher forum and as such the legislature thought it fit to avoid doubt to say specifically in S. 144 that in cases of reversal of a decree or an order, the party concerned may file an application for restitution, if occasion arises, in the Court of the first instance, namely, the Court where the proceeding originated. AIR 1931 Cal 14, Dist.; AIR 1949 Pat 133 (FB), Rel. on. (Para 5)

(B) Civil P. C. (1908), Ss. 151 and 144

— Suit for ejectment — Ex parte decree — Possession obtained in execution — Decree set aside and application for restitution under S. 144 — Recovery of possession, held, could not be stayed merely on the ground that the plaintiffs believed that they had a good case to succeed and to get a decree for eviction — As the decree was not in existence, the plaintiff could not retain possession — If a fresh decree would be obtained, the plaintiff would be entitled to get possession on the basis of the said decree. AIR 1916 Cal 710, Rel. on. (Para 6)

Cases Referred: Chronological Paras
AIR 1949 Pat 133 (FB) 5
AIR 1931 Cal 14: 34 Cal WN 707 4
AIR 1916 Cal 710: 20 Cal WN 667 6

R. K. Banerjee and Bhaskar Ghose, for Appellants; Barun Kumar Roy Chowdhury, for Respondent.

R. BHATTACHARYA, J.:— The plaintiffs who are the appellants before us

filed a suit for eviction of the respondent-defendant under the provisions of the West Bengal Premises Tenancy Act, 1956. At first the suit was decreed ex parte. Subsequently, the defendant Ram Nagina Pandey filed an application under O. 9, R. 13 of the C. P. C. and the same was ultimately allowed. As a result the ex parte decree was set aside and the ejectment suit was restored to file. That order for restoration of the suit was maintained by this Court on a revisional application filed by the plaintiffs against that decision. Before the ex parte decree was set aside, the plaintiffs had obtained possession of the suit premises by evicting the defendant in execution of the said ex parte decree. After the ex parte decree had been set aside, the defendant respondent filed an application in the trial court under S. 144 of the C. P. C., 1908 for getting back the possession of the suit property. The application was contested by the plaintiffs, but ultimately the trial court gave the relief to the defendant as prayed for. Against that order for restoration of possession to the defendant, an appeal was taken to this Court and the said appeal was disposed of by our learned brother Chittatosh Mookerjee, J. on 23-4-1974. The order for restoration of possession was maintained. Against that decision of Mookerjee, J., the present Letters Patent Appeal has been preferred by the plaintiffs.

2. Mr. Banerjee, the learned Advocate appearing on behalf of the appellants has canvassed that the learned trial court could not have passed any order for restoration of possession under S. 144 of the C. P. C. It has been submitted that as the ex parte decree was set aside by the same court which passed it, it is not a case of reversal of the decree as contemplated in Section 144 of the C. P. C. It has been contended that unless an order or a decree is reversed or varied in appeal by the higher forum, no order could be passed under S. 144 of the C. P. C. Mr. Roy Chowdhury, the learned Advocate for the respondent has, however, opposed the contentions.

3. For consideration of the arguments of Mr. Banerjee S. 144 of the C. P. C. is quoted below:—

“(1) Where and in so far as a decree or an order is varied or reversed, the Court of first instance shall, on the application of any party entitled to any benefit by way of restitution or otherwise, cause such restitution to be made as will, so far as may be, place the parties in the posi-

tion which they would have occupied but for such decree or order or such part thereof as has been varied or reversed; and, for this purpose, the Court may make any orders, including order for the refund of costs and for the payment of interest, damages, compensation and mesne profits, which are properly consequential on such variation or reversal.

(2) No suit shall be instituted for the purpose of obtaining any restitution or other relief which could be obtained by application under sub-s. (1).

4. According to the provisions of S. 144 of the C. P. C. when a decree or an order is "varied or reversed", the Court of first instance shall, upon an application, cause such restitution to be made as will place the parties in the position which they would have occupied but for such decree or order or such part thereof as has been varied or reversed. The question, therefore, is, as submitted by Mr. Banerjee, whether the setting aside of the ex parte decree by the trial court is an instance of reversal of the decree. It is nobody's case, however, that the instant case is one where the decree was varied. Our attention has been drawn to a decision of this Court in the case of Gopal Paroi v. Swarna Bewa reported in 34 Cal WN 707: (AIR 1931 Cal 14). There it was stated that if a decree is set aside either by a proceeding in the suit itself or if it is set aside in another suit altogether or if without being set aside by such a decree it is superseded, these are matters which are not within the words of that S. 144 of the C. P. C. It has been stated that "varied or reversed" has a quite definite meaning for lawyers in this country but what that definite meaning for lawyers is has not been stated. In that case the plaintiff purchased certain holding in execution of a rent decree. The tenants whose holding had been purchased brought a suit to set aside the decree and the sale. The trial court dismissed the suit. In the first appeal the suit was decreed and the tenants got recovery of possession on the basis of an application under S. 144, C. P. C. in the original Rent Court. The purchaser of the holding, however, took a second appeal against the decision in the first appeal and ultimately the High Court in the second appeal reversed the decision of the lower appellate court. Then the purchaser applied for getting back possession from the tenants under S. 144 of the Civil P. C. in the original trial court where the tenant filed the suit but he got no relief

as the application was time barred. The plaintiff, therefore, filed another suit for declaration of his title and for recovery of khas possession. In connexion with that suit a Second Appeal was preferred by the plaintiff and in that second appeal the judgment was delivered as reported in 34 Cal WN 707: (AIR 1931 Cal 14). We find that the facts in that case are quite different from those appearing before us in the instant appeal. That was not a case where a decree was set aside by the same court which passed it. The facts of that case did not raise any question whether any application under S. 144 of the C. P. C. was applicable in a case where a decree was set aside under O. 9, R. 13. No decision on this point was necessary. In that case ultimately it was held that the plaintiffs' suit under consideration in the judgment referred to by us was not maintainable in view of sub-s. (2) of S. 144. The statements made regarding the implications of the word "reverse" are practically obiter dicta. In the C. P. C. the word "reverse" has not been defined and no special meaning for the purpose of S. 144 has been given. The word is to be taken in its ordinary meaning as would be found compatible with the provision of law. The ordinary meaning of the word "reverse" is "to undo or make void". According to the Oxford Dictionary the word means amongst other things 'revoke' or 'annul' (decree attainder etc.). The word "revoke" according to the same Dictionary means 'rescind', 'withdraw', 'cancel' (decree, promise etc.). The word "reverse" according to Websters Seventh New Collegiate Dictionary means amongst other things "set aside". Giving our best consideration we cannot accept the contention of Mr. Banerjee that the word "reversed" appearing in S. 144 of the Civil P. C. would mean 'set aside' by the appellate court alone. For proper application of S. 144 the word "reverse" should be given its meaning in the wider sense and in that view of the matter, it will mean setting aside of the order of the decree by the Court which passed it and also by the Court of higher forum either in appeal or in revision. The meaning of the word is not in any way restricted in the section.

5. It has been argued by Mr. Banerjee that from the language used in S. 144 of the C. P. C. particularly in view of the words "the Court of first instance", the reversal of the decree or the order referred to in S. 144 must be by the Court of appeal and not by the Court of the first

instance. The submission of Mr. Banerjee is that when there is the provision for the Court of first instance meaning the Court of the initial stage of the suit for passing the order for restitution on an application, it implies that the reversal of the decree or the order must be by a Court of appeal at a later stage subsequent to the order or decree in question of the trial court. On the grammatical analysis of the sentence in S. 144 and on the plain meaning of the simple words appearing in that section, it cannot be found that there is any reason for such implication as suggested by Mr. Banerjee without importing something on imagination. The Court of first instance referred to in S. 144 means the initial Court where the suit was originally started, that is to say, the trial court. It should be remembered that the trial court can set aside a decree passed by it under O. 9, R. 13 of the C. P. C. and there may be occasions for the trial court to reverse or recall an order or decree passed by it for proper decision and for ends of justice. An order or a decree again may be set aside in an appeal or a revision. There are thus cases of reversal of a decree or an order by trial court or by the court of higher forum and as such the legislature thought it fit to avoid doubt to say specifically in S. 144 of the C. P. C. that in cases of reversal of a decree or an order, the party concerned may file an application for restitution, if occasion arises, in the Court of the first instance, namely, the Court where the proceeding originated. We find no restricted meaning of the word "reversed" referred to in S. 144. It is unthinkable that while enacting S. 144, the legislature intended that the defendant would not be given restitution as contemplated therein when a decree or an order is varied or reversed by the trial court though relief could be given if a decree or an order is varied or reversed by the appellate court. The Full Bench decision of the Patna High Court in the case of Maqbool v. Khodaija Begum reported in AIR 1949 Pat 133 (FB) took a similar view. The word "reversed" is used in the section in general and wider connotation. This intention is clear from the Sec. 144 of the Civil Procedure Code (as amended in) 1976 when after 'varied or reversed' has been added "in any appeal, revision or other proceeding" to remove any ambiguity or doubt. The words "or other proceeding" now mentioned in the amended Code include proceedings under O. 9, R. 13 of the C. P. C. The point now

urged by Mr. Banerjee was, however, not taken in the trial court and in the appeal before Mookerjee, J. In view of our discussions above, we do not accept the interpretation advanced by Mr. Banerjee.

6. Lastly an attempt was made by Mr. Banerjee that the recovery of possession may be stayed till the disposal of the suit by the trial court to avoid multiplicity of proceedings because the plaintiffs believe that they have a good case to succeed and to get a decree for eviction. This is no ground for stay. As the decree for which the plaintiffs obtained possession of the suit premises is not in existence, the plaintiffs cannot retain possession and if a fresh decree is obtained the plaintiffs will be entitled to get possession on the basis of the said decree. The illegal possession of the plaintiff after the previous decree has been set aside cannot be made legal if a new and subsequent decree is passed. In this connexion we may refer to the case of Abdul Rahman v. Sarafat Ali, 20 Cal WN 667: (AIR 1916 Cal 710). There on the basis of an ex parte decree certain property was sold in execution thereof. The trial court set aside the ex parte decree on the prayer of the defendant and consequently the sale was set aside. The matter was taken to the High Court and it was submitted that on retrial the plaintiffs obtained a decree and as such the sale could not be held invalid but be deemed to be validated by the passing of a fresh decree. That contention was rejected.

7. In the present case the plaintiffs have obtained possession which they cannot retain after the order passed by the trial court under S. 144 of the C. P. C. The defendant has been kept out of possession for a long period. The right of the defendant must be vindicated. The plaintiffs shall not be allowed to render the order for restitution passed by the trial court ineffective. For ends of justice we feel that the final hearing and the disposing of the suit should be stayed, if the suit has not been already disposed of in the meantime, until the defendant gets back possession on the basis of the order for restitution according to law.

8. The appeal is dismissed without cost as indicated above.

A. K. JANAH, J.:— I agree.

Appeal dismissed.

AIR 1977 CALCUTTA 285

R. BHATTACHARYA, J.

State of West Bengal etc., Petitioners v. Mir Fakir Mohammad etc., Respondents.

Second Appeals Nos. 1658 of 1965 and 1603 of 1966, D/- 4-4-1977.

Civil P. C. Amendment Act (1976), Sections 38 and 97 (2) (n) — Word "admitted" — Meaning — Appeals accepted by the High Court for hearing will not be affected — Application under Cl. 15 of Letters Patent filed before Amendment Act — No Memorandum of Appeal as required under R. 2 of Chap. VIII of Appellate Side Rules filed — Granting of certificate under Cl. 15 is barred by S. 100-A. (Civil P. C. (1908), S. 100-A (as inserted by C. P. Code Amendment Act, 1976) — (Letters Patent (Cal.), Cl. 15) — (Calcutta High Court Appellate Side Rules, Chap. VIII, R. 2).

The Reference to the "appeal admitted before the commencement of S. 38 of the Civil P. C. Amendment Act" as mentioned in Cl. (n) of sub-s. (2) of S. 97 thereof means appeals already accepted by the High Court to be heard. Where applications under Cl. 15 of the Letters Patent (Cal.) filed before the Amendment Act came into force, but without a Memorandum of appeal as required by R. 2 of Chap. VIII of Appellate Side Rules although a long time has passed beyond the period of limitation prescribed by the Rules before the commencement of S. 33 of the Amendment Act of 1976, the granting of certificate under Cl. 15 of the Letters Patent is useless and it is barred by S. 100-A of the C. P. C.

(Paras 6 and 7)

Lala Hemanta Kumar and Govinda Chandra Pal, for Petitioners in S. A. Nos. 1658 of 1965 and 1603 of 1966; Panchanan Pal, for Opposite Parties in S. A. No. 1658 of 1965; S. C. Das Gupta and Rebati Nath Sarkar, for Opposite Parties in S. A. No. 1603 of 1966.

JUDGMENT:— These two applications under Cl. 15 of the Letters Patent, one filed in connexion with the Second Appeal No. 1658 of 1965 and another relating to Second Appeal No. 1603 of 1966 have been heard together as the same question of law about the maintainability of these two applications are involved therein and this order shall govern both the matters.

2. The Appeal No. 1658 was allowed on 21-7-1976* and the Appeal No. 1603

was dismissed on 5th July, 1976. The plaintiff-respondent in Appeal No. 1658 filed the application for leave to appeal under Cl. 15 of the Letters Patent on 3-11-1976 and the appellant of the other appeal filed an application under Cl. 15 on 21-9-1976. For the sake of convenience both the matters were heard together. Mr. Panchanan Pal, the learned Advocate for the appellant, who is the opposite party in the application, filed in connexion with the Second Appeal No. 1658 and Mr. S. C. Das Gupta, the learned Advocate appearing on behalf of the respondent-opposite party in the other application raised a preliminary objection as to the maintainability of the application under Cl. 15 of the Letters Patent in view of the introduction of the amendment of the Civil P. C. by the Amending Act of 1976. Their contention is that after the amendment of the Civil P. C. by the Amending Act of 1976, there can be no appeal against the decision of a judgment of the High Court sitting singly disposing of a second appeal and as such the present applications under Cl. 15 of the Letters Patent are not maintainable and in any view no certificate or leave can be granted for an appeal against the decision made in the second appeal. Mr. Hemanta Kumar Lala has challenged this contention and his main argument is that before the amendment of the Civil P. C. of 1976 came into being, the two appeals were disposed of and, therefore, the petitioners have a right to prefer an appeal against the decision for which purpose the present applications have been filed. It has been contended further by Mr. Lala that as the applications were filed before the amendment of the Civil P. C. has come into force, the applications are maintainable and should not be rejected.

3. Admittedly, the applications had been filed before the amendment of the Civil P. C. came into force. The opposite parties to these applications rely upon S. 100-A of the Civil P. C. introduced by the Amending Act read with Ss. 38 and 97 (2) (n) of the C. P. C. Amendment Act of 1976. Section 38 of the Amendment Act of 1976 inserts the new S. 100-A of the Principal Act and it runs as follows:—

38. Insertion of new S. 100-A.—After S. 100 of the Principal Act, the following section shall be inserted:—

"100-A. No further appeal in certain cases. Notwithstanding anything contained in any Letters Patent for any High Court or in any other instrument having the force of law or in any other for the

* Reported in AIR 1977 Cal 29.

time being in force, where any appeal from an appellate decree or order is heard and decided by a single Judge of a High Court, no further appeal shall lie from the judgment, decision or order of such single Judge in such appeal or from any decree passed in such appeal."

Clause (n) of sub-s. (2) of S. 97 speaks about repeal and savings and I quote the relevant portion of sub-s. (2) of S. 97 of the Amendment Act of 1976 with Cl. (n) as under:—

"2. Notwithstanding that the provisions of these Acts have come into force or the repeal under sub-s. (1) has taken effect and without prejudice to the generality of the provisions of the S. 6 of the General Clauses Act, 1897 (10 of 1897)—

(n) Section 100-A as inserted in the Principal Act by S. 38 of this Act, shall not apply to or affect any appeal against the decision of a single Judge of a High Court under any Letters Patent which had been admitted before the commencement of the said S. 38; and every such admitted appeal shall be disposed of as if the said S. 38 had not come into force."

4. After the introduction of S. 100-A of the Code, no further appeal shall lie from the judgment, decision or order of a single Judge in the second appeal notwithstanding anything contained in any Letters Patent for any High Court or in any other instrument having the force of law or in any other law for the time being in force. Therefore, on account of this new section, there shall be no appeal under the provisions of the Letters Patent as indicated in the section. But in view of S. 97 (2) (n) of the C. P. C. Amendment Act of 1976 if any appeal is admitted under the Letters Patent before the coming into force of S. 100-A inserted by the Amendment Act of 1976, such appeal, however, in spite of S. 100-A coming into force shall be disposed of as if the S. 38 introducing S. 100-A of the Amendment Act has not come into force. Admittedly the present applications were filed under the Letters Patent before the coming into force of S. 100-A of the Code. It cannot be, however, argued that the instant applications under Cl. 15 of the Letters Patent should be summarily rejected simply because S. 100-A has already come into force although no orders have been passed upon those applications. An application under Cl. 15 if filed even a day prior to the coming into force of S. 100-A of the Code, cannot be rejected summarily. If the application has already complied with other provisions of

law for admission of the appeal certainly the Court will consider whether it is a fit case for granting leave or certificate as prayed for. There may be various reasons for the Court not to pass an order upon the application filed prior to the introduction of S. 100-A but for those reasons the applicant cannot suffer if the applicant has already complied with other provisions of law and procedure for admission of the appeal before the S. 100-A came into force.

5. Mr. Lala has argued that as soon as the application under Clause 15 of the Letters Patent is filed, the date of such filing should be recorded as the date of admission referred to in Cl. (n) of sub-s. (2) of S. 97 of the C. P. C. Amendment Act of 1976. In this connexion my attention has been drawn to Chap. VIII, R. 3 in the Rules of the High Court at Calcutta, Appellate Side framed in connexion with appeals under Cl. 15 of the Letters Patent. Rule 3 of Chap. VIII of Part II says that the memorandum of appeal shall be drawn up according to the provisions of O. XLI, R. 1 of the C. P. C. and shall be certified by an Advocate of the Court but it need not be accompanied by a copy of judgment appealed from. The authorised officer to whom the memorandum of appeal is presented shall have to endorse thereon the date of presentation and send the same to the Stamp Reporter who shall satisfy himself that there is a declaration by the Judge who passed the judgment that the case is a fit one for appeal and that it is in order and within time. Admittedly again there is no procedure in our High Court for admission of an appeal under the Letters Patent as in a case under O. 41, R. 11 of the C. P. C. According to R. 2 of Chap. VIII of the Rules of our High Court on the Appellate Side every appeal to the High Court under Section or clause (as generally called) 15 of the Letters Patent from a judgment of a Division Bench or a Judge sitting singly of the Appellate Side of High Court shall be presented to the Deputy Registrar or such other officer as the Registrar may appoint within sixty days from the date of the judgment appealed from unless the Court in its discretion on good cause shown shall grant further time.

6. Now the question arises as to what would be the date of admission of an appeal under Cl. 15 of the Letters Patent because in Cl. (n) of sub-s. (2) of S. 97 of the Amendment Act, 1976 it is stated that if an appeal is already admitted before

the commencement of S. 38, that is to say, before the coming into force of Section 100-A of the Code, it will be disposed of. Otherwise after the commencement of the S. 38 of the Amendment Act no fresh appeal will lie. It has therefore, to be ascertained what the meaning of the word "admitted" appearing in Cl. (n) of sub-s. (2) of S. 97 of the Amendment Act is. It cannot be heard to say that the litigant can file an appeal against the decision of a Judge under Cl. 15 of the Letters Patent as a matter of right. The law is clear that unless the Judge considers a case fit for an appeal, the litigant cannot as a matter of right or in due course prefer an appeal. The practice of our Court is that a party aggrieved may pray for a certificate for leave to appeal under Cl. 15 of the Letters Patent orally at the time when the judgment is delivered in the open court or if it is not orally prayed at the time of delivery of judgment, an application in writing is filed for the said purpose subsequently. The appellate side Rules already mentioned clearly say that within the stipulated time the aggrieved party has got to file a memorandum of appeal without any copy of the judgment complained against before an authorised officer of the High Court and if a certificate is granted under Cl. 15 of the Letters Patent by the Judge concerned then that certificate has got to be endorsed upon memorandum of appeal. If the memorandum of appeal already presented within time complies with the Rules prescribed by the High Court and if there is the certificate of the Judge concerned that it is a fit case for appeal and the same is endorsed and it is otherwise found in order, the appeal is deemed to be accepted by the Court. The condition precedent is, therefore, a certificate to be granted under Cl. 15 of the Letters Patent and further the filing of the memorandum of appeal as prescribed by the Rules of the High Court. There is no other procedure for admission of the appeal. The word "admit" according to Oxford Dictionary is "let in, allow entrance of, accept as valid etc." According to Chambers's Twentieth Century Dictionary the word "admit" means "to allow to enter, to let in, to acknowledge etc." On reading the relevant provisions already mentioned and considering the popular and dictionary meaning of the word "admit", I have no doubt to hold that the reference to the appeal admitted before the commencement of S. 38 as mentioned in Cl. (n) of sub-s. (2) of S. 97 of

the C. P. C. Amendment Act of 1976 means appeals already accepted by the High Court to be heard as already indicated.

7. In the present case before us although applications under Cl. 15 of the Letters Patent were filed before the commencement of the S. 38 of the Amendment Act of 1976, no memoranda of appeal have been filed by the petitioners at all not to speak within time prescribed under R. 2 of Chap. VIII of the High Court Appellate Side Rules. It may be that at the time of delivery of judgment, the aggrieved party may pray orally for leave to appeal under Clause 15 of the Letters Patent and that may be allowed. But in spite of the leave being granted, there may be cases where the party concerned does not file any memorandum of appeal at all. In that case certainly it cannot be stated that the granting of prayer under Cl. 15 of the Letters Patent amounts to an admission of an appeal without the existence or the filing of the memorandum of appeal. There can be no question of any admission of appeal or an appeal being admitted. It may also be that a memorandum of appeal is filed within the time prescribed by the Rules and subsequent to the delivery of judgment an application in writing is filed under Cl. 15 of the Letters Patent. For various reasons the Court might not have passed orders upon the application at an early date, but when ultimately the certificate is granted the memorandum of appeal already filed and found in order may be taken as admitted. In the case before us when no memorandum of appeal is at all filed although a long time has passed beyond the period of limitation prescribed by the Rules before the commencement of S. 38 of the Amendment Act of 1976, the granting of certificate under Cl. 15 of the Letters Patent is useless and it is barred by S. 100-A of the C. P. C.

8. In the result, the applications are rejected but without any cost.

9. On the prayer of the petitioners, let there be stay of operations of the judgments and decrees for a month from today. Return the certified copies of the judgments and decrees of the Second Appeals, if filed, to the learned Advocates of the petitioners.

Applications rejected.

AIR 1977 CALCUTTA 288**N. C. MUKHERJI AND B. C. RAY, JJ.**Sarbeswar Panda and others, Petitioners
v. Bibhabasu Panda, Opposite Party.

C. R. No. 80 of 1971, D/- 17-2-1976.

Civil P. C. (1908), O. 20, R. 18 (2) — Suit for partition — Defendants-co-sharers not contesting suit — Preliminary decree passed without declaration of their rights and shares — Application for separation of their share by defendants; not maintainable, unless preliminary decree is modified on review or on appeal declaring their shares.

Under Rule 18 (2) of Order 20 the Court though may pass a preliminary decree declaring the rights of the several parties in the suit property in a partition suit but generally the court declares the rights of the plaintiff and of those defendants who contest in the suit and desire their rights to be so declared. Where the rights and share of the defendants are not declared in the preliminary decree, the Commissioner is not competent to partition and make separate allotment of the share in respect of the property-in-suit in their favour unless the said preliminary decree is modified declaring their right and share either on appeal or on review of the said preliminary decree. AIR 1966 All 601, Foll. (Para 8)
Cases Referred: Chronological Paras
AIR 1966 All 601 8

G. S. Khettry, for Petitioners; Chiruddin Kha, for Opposite Party.

B. C. RAY, J.:— This revisional application under S. 115, C. P. C. is directed against the order No. 105 passed on December 3, 1970 in Title Suit No. 53 of 1962 and it arises out of an application by the defendants Nos. 4, 5, 7 and 9 praying for directing the Commissioner for partition and separate allotment of their 1/4th share in respect of the suit property.

2. The opposite parties Nos. 1 to 4 as plaintiffs instituted the above suit for partition of their 4/5th share by metes and bounds out of 1/4th share of Rameswar Panda alleging inter alia that the suit property originally belonged to one Tara Prosad Panda, a Hindu governed by Mitakshara School of Hindu Law who died leaving four sons namely Moheswar, Sarbeswar, Rameswar and Satyeswar each having 1/4th share in the suit property. In the said suit all the other co-sharers have been impleaded as defendants Nos. 1 to 14 and the State of West

Bengal has been impleaded as defendant No. 15. The defendant No. 15 alone contested the said suit on filing a written statement and the other defendants did not contest the said suit. The suit was dismissed by trial Court. Against the said judgment and decree the plaintiffs opposite parties 1 to 4 preferred Title Appeal No. 335 of 1963 which was allowed on contest with cost against the respondent No. 15, the State of West Bengal and ex parte against the other defendants and a preliminary decree declaring the plaintiff's 4/5th share out of 1/4th share of Rameswar in the suit property was passed.

3. Thereafter, on the application of the plaintiffs a Commissioner has been appointed for effecting partition of the suit property by metes and bounds according to the preliminary decree. The Commissioner, it appears, has submitted his report.

4. In the meantime an application has been filed in the said suit by the defendants 4, 5, 7 and 9 who did not contest the suit till the passing of the preliminary decree for a direction upon the Commissioner for partition and separate allotment of their share in respect of the suit property by metes and bounds.

5. On December 3, 1970, the learned Subordinate Judge, Midnapore, by order No. 105 held that the rights and share of the said defendants had not been declared in the preliminary decree and as such they were prevented from agitating the matter by way of an ordinary petition as the present one was at such subsequent stage of the suit. The application was, therefore, rejected.

6. It is against this order this revisional application has been moved and the instant Rule has been obtained. There has been an order for stay of all further proceedings of the said suit pending the disposal of the Rule.

7. Mr. Bhupendra Kumar Panda, appearing on behalf of the petitioners, submits that the impugned order is wholly illegal and without jurisdiction in as much as in a partition suit every defendant may be treated as a plaintiff and the rejection of the application will unnecessarily drive the petitioners to file another suit for partition and separate allotment of their share. He also contended that the share of the petitioners being admitted as evident from paras. 3 and 5 of the plaint the learned Subordinate Judge ought to have allowed the same even though the share of the petitioners has

not been declared in the preliminary decree. To the said submission Mr. Himadri Shankar Majumder, learned Advocate for the opposite parties joined issue.

8. It appears that the petitioners who are defendants 4, 5, 7 and 9 in the suit did not contest the suit till the passing of the preliminary decree and their rights and share in the suit property has not been declared in the preliminary decree. Under the provisions of O. 20, R. 18, sub-r. (2) the Court though may pass a preliminary decree declaring the rights of the several parties in the suit property in a partition suit but generally the court declares the rights of the plaintiff and of those defendants who contest in the suit and desire their rights to be so declared. The rights and share of the defendants petitioners being not declared in the preliminary decree, the Commissioner is not competent to partition and make separate allotment of the share in respect of the property-in-suit in favour of the petitioners unless the said preliminary decree is modified declaring the right and share of the petitioners either on appeal or on review of the said preliminary decree. This question came up for consideration in the case reported in AIR 1966 All 601, Bittan Devi v. Rudra Sen Bajpai and it has been held:

"The courts of law cannot go behind the decree and have to take further steps on the basis of the decree already passed. Consequently, if the preliminary decree passed in the partition suit does not contain any declaration as to the rights of the defendants, their application for partition or separation of their share shall not be maintainable till they have the preliminary decree suitably modified, but once the preliminary decree contains a declaration as to the defendant's share, they can, even after the passing of the preliminary decree, take steps for the separation of their shares."

9. For the reasons aforesaid there is no merit in the contentions raised on behalf of the petitioners. The Rule is, therefore, discharged. The interim order is vacated. In the circumstances there will be no order as to costs.

N. C. MUKHERJI, J.:— I agree.

Rule discharged.

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ANIL KUMAR SEN AND M. N. ROY, JJ.

Sm. Sankaribala Dutta, Appellant v. Sm. Asita Barani Dasi and others, Respondents.

A. F. O. D. No. 614 of 1969, D/- 20-8-1976.*

(A) Hindu Succession Act (1956), S. 14 — Hindu Widow's Remarriage Act (1856), S. 2 — Partition of husband's estate — Widow allotted property as her share in absolute right — Subsequent remarriage or unchastity of widow — Effect.

Where in the partition of her husband's estate the widow was allotted property as her share of inheritance in absolute right under the 1956 Act she cannot forfeit her right, title and interest in the said property by subsequent remarriage or unchastity as the 1956 Act does not provide for such forfeiture and even under S. 2 of 1856 Act she cannot be divested of her absolute interest in the said property by subsequent remarriage as S. 2 applies only to limited interests referred to therein which the widow may have in her deceased husband's property and not to interest inherited by the widow absolutely under the 1956 Act. AIR 1957 Mad 534, AIR 1968 Raj 139, AIR 1971 Bom 413, ILR (1965) Cut 398 and (1879) 7 Ind App 115 (PC) Rel. on. (Paras 5, 9, 11)

(B) Hindu Widow's Remarriage Act (1856), S. 2 — Hindu Adoptions and Maintenance Act (1956), Ss. 22 and 21 (iii) — Hindu Succession Act (1956), S. 14 (2) — Gift of property by deceased husband to widow in life estate in lieu of maintenance — Remarriage or unchastity if can forfeit grant — (Hindu Law — Widow — Maintenance).

Where the deceased husband of the widow by a registered deed executed in his lifetime gifted certain properties to her in life estate to be enjoyed by her after his death in lieu of maintenance without any power of alienation, the question whether the widow would forfeit the grant by remarriage or unchastity would depend on the terms of the grant and since there was nothing in the terms thereof for such forfeiture the widow would not forfeit the properties otherwise in law because though under the gift the widow got only a life estate S. 2 of 1856 Act had no application as the life estate

*(Against decree of K. N. Bakshi, Sub J., Birbhum, D/- 22-8-1968).

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was not acquired by her in any of the three ways set out therein and though under S. 14 (2), Hindu Succession Act the life interest remained as such and did not become an absolute estate it would last the normal life of the widow. AIR 1935 PC 180 and (1910) ILR 34 Bom 278, Rel. on.
(Paras 2, 12, 13, 14, 15, 16)

Cases Referred: Chronological Paras

AIR 1971 Bom 413	11
AIR 1968 Raj 139	5, 11
ILR (1965) Cut 398	11
AIR 1957 Mad 534	10
AIR 1953 Mad 977	5, 10
AIR 1935 PC 180: 62 Ind App 250	15
(1910) ILR 34 Bom 278	15
(1879) 7 Ind App 115: ILR 5 Cal 776 (PC)	11

Amulya Kumar Mukherjee, for Appellant; Samarendra Kumar Dutta (for Nos. 1-2) and Pramatha Nath Palit, for Respondents.

SEN, J.:— This appeal from original decree arises out of a suit for declaration of title, recovery of possession and mesne profits. The said suit being Title Suit No. 65 of 1966 having been dismissed by the learned Subordinate Judge, Birbhum, by the judgment and decree dated August 22, 1968, the plaintiff No. 2, Sankari Bala has preferred the present appeal.

2. The suit was originally instituted by the appellant and her mother Rash Bilasini Chandra and the latter having died pending the suit and her right, title and interest having devolved on plaintiff No. 2, the appellant, she herself proceeded with the suit. Their case shortly was that Rash Bilasini was the first wife of Nafar Chandra Chandra and plaintiff No. 2 Sankari Bala is the daughter of Nafar by Rash Bilasini, the first wife. The only son born of Rash Bilasini having died at the age of 5 or 6 years, Nafar married for the second time the defendant No. 1 Asita Barani Chandra when Nafar could have no more son by the plaintiff No. 1 Rash Bilasini. After his marriage with defendant No. 1, Asita Barani, Nafar executed a registered deed of maintenance granting a life estate to defendant No. 1 in respect of certain properties which are set out in Sch. "A" to the plaint. The defendant No. 1 has no power of alienation in respect of the properties so gifted to her in life estate in lieu of maintenance. Nafar died intestate on 12th Kartick, 1369 B. S. corresponding to October 29, 1962. He had, however, no issue by defendant No. 1 surviving him and on his death the properties left by him were inherited by his

daughter plaintiff No. 2 in 8 annas and the surviving widows Rash Bilasini, plaintiff No. 1 and Asita Barani, defendant No. 1 in 4 annas each. A partition was effected between the parties on February 14, 1963, in respect of the properties left behind by Nafar and the properties set out in Sch. B to the plaint were allotted to defendant No. 1 Asita Barani on such partition. According to the plaintiffs, the defendant No. 1 Asita Barani remarried one Dulal Bagdi, defendant No. 2 who happened to be a servant of Nafar, in the latter part of the year 1371 B. S. On such re-marriage defendant No. 1 had a son by the said Dulal Bagdi, defendant No. 2 and since such remarriage they have been living as husband and wife at the house of defendant No. 2 a few furlongs away from the residential house of Nafar. The plaintiffs claimed that by such remarriage the defendant No. 1 Asita Barani forfeited all her right, title and interest in the properties of both the Schedules "A" and "B" and such properties therefore, reverted to the plaintiffs, the surviving heirs and legal representatives of Nafar. It was further pleaded that after her remarriage, defendant No. 1 executed a deed of gift in favour of defendant No. 2 in respect of some of the "B" Schedule properties and between defendants 1 and 2 several transfers were made to defendants 3 to 7 in respect of one or more of the properties of the B Schedule. Such transfers, it was claimed, were neither lawful nor bona fide and the transferees acquired no right to those properties as the transferor was divested of such properties prior to such transfers. Accordingly, the plaintiffs prayed for declaration of their title in respect of the properties of both the Schedules and recovery of possession thereof by evicting the defendants therefrom. They further prayed for a decree for mesne profits as against the defendants.

3. The suit was contested principally by defendants 1 and 2 who filed a joint written statement. They took a bold defence that though they were living together and had a son because of illicit relation between them, they were never married, far less in the manner stated by the plaintiffs in the plaint. Their case on the other hand, was that the plaintiff No. 2 Sankari Bala and her husband Nemai Dutta who are well to do could not accept the position that Asita Barani should inherit any property from her husband. An attempt was made to coerce the defendant No. 1 Asita Barani to concede acceptance of life interest only which she resisted and that

led to the partition on February 14, 1963. But even after the partition the plaintiff No. 2 and her sons tortured Asita Barani while she was living in her husband's residential home in the demarcated portion allotted to her by the partition. She was tortured, so much so, that she had to leave her husband's home. At first she took shelter in the house of one Nisith Dutta when she became apprehensive of her life but the said Nisith, who later appeared to be a man of the camp of the plaintiffs, betrayed her and misappropriated her movable properties. At that stage she left the shelter of Nisith and came to live with defendant No. 2 at first at Suri and then at his house. As for the gift in favour of defendant No. 2 is concerned, it was pleaded that it was effected in order to fulfil the pious desire of the deceased Nafar who being satisfied with the service rendered by defendant No. 2 had desired that his heirs and legal representatives would give some properties to him. In the written statement it was claimed that defendant No. 1 could not have forfeited her rights to the properties in either of the two Schedules and the transfers effected to the other different defendants were claimed to be lawful and bona fide.

4. Defendant No. 7 filed a separate written statement supporting the case of the contesting defendants Nos. 1 and 2.

5. On the pleadings as aforesaid, parties went to trial and evidence both oral and documentary was adduced by the parties. So far as the B Schedule properties are concerned, the learned Judge held that plaintiff's claim in respect thereof must necessarily fail inasmuch as Asita Barani having got the said properties by partition of her share in the husband's estate inherited by her in the rights of an absolute owner under the provisions of Hindu Succession Act, 1956, she cannot forfeit her right, title and interest in the said property even if she had subsequently remarried defendant No. 2 as alleged by the plaintiffs. On the authority of the two decisions in the cases of Lakshmi Ammal v. Thangavel Assari, AIR 1953 Mad 977 and Bhuri Bai v. Champi Bai, AIR 1968 Raj 139 he overruled the plaintiffs' claim that defendant No. 1 would forfeit her inheritance on the provisions of S. 2 of Hindu Widow's Remarriage Act, 1856; it was held that the said provision could have its application only to an inheritance limited to life interest. So far as 'A' Schedule properties are concerned, the learned Judge took the view that in

case of proof of subsequent remarriage as alleged by the plaintiffs, the defendant No. 1 might forfeit her right, title and interest therein. On careful consideration of the evidence on record, the learned Judge, however, rejected the case of the plaintiffs that Asita Barani had remarried Dulal Bagdi as alleged by them. It was, therefore, held that the remarriage as alleged not having been established it cannot be said that Asita Barani forfeited her right, title and interest in the 'A' Schedule properties. The learned Judge further held that subsequent unchastity being no ground for divesting and it being nobody's case that defendant No. 1 became unchaste when the succession opened or before it, subsequent unchastity though admitted would not divest her of the properties of either of the two Schedules. On the findings as aforesaid the learned Judge in the trial court dismissed the suit and hence the appeal.

6. The appeal is being contested by defendants 1 and 2 who are respondents 1 and 2 in this appeal.

7. Mr. Mukherji appearing on behalf of the appellant has challenged the findings of the learned Judge to the effect that defendant No. 1's remarriage with defendant No. 2 had not been established. Relying strongly on the evidence on the point, Mr. Mukherji has contended that this court should set aside the said finding and find for itself that such remarriage has been well established. Mr. Mukherjee has further contended that the defendant No. 1 must be held to have forfeited her right, title and interest in the properties of either of the two Schedules because of such remarriage. Alternatively, Mr. Mukherji has contended before us that on the admitted unchastity, defendant No. 1 must be held to have forfeited her right, title and interest under the maintenance grant in respect of 'A' Schedule properties. According to him, the learned Judge is wrong in holding otherwise overlooking the legal position that under the Hindu Law a widow is entitled to maintenance from the husband's estate only so long she remains chaste.

8. All the points thus raised by Mr. Mukherji have been contested by Mr. Dutta, the learned advocate appearing on behalf of the defendants 1 and 2, respondents 1 and 2 in this appeal. Mr. Dutta on the other hand has strongly contended that all the findings of the learned Judge are not only well supported by the evidence on record but all his conclusions on the point of law are absolutely correct.

9. We have carefully considered the rival contentions before us. In our opinion, the learned Judge in the trial court is perfectly right in his conclusion that the plaintiffs' suit in respect of 'B' Schedule properties must fail in any event. Neither remarriage of defendant No. 1 with defendant No. 2 as claimed by the plaintiffs nor her admitted subsequent living with the said defendant in unchastity would divest her of the said property in law. Admittedly, Nafar died in the year 1962 after the Hindu Succession Act, 1956, had come into effect. Nafar having died intestate defendant No. 1, Asita Barani inherited $\frac{1}{4}$ th share in the estate of her deceased husband in absolute rights under the provisions of that Act. The said Act does not provide for forfeiture or divesting of an estate so inherited by the widow either on remarriage or on account of subsequent unchastity. Reliance is no doubt placed on the provisions of S. 2 of Hindu Widow's Remarriage Act, 1856, by Mr. Mukherji on behalf of the appellant. Mr. Dutta appearing on behalf of the respondents on the other hand has contended that the said provision must be deemed to have been repealed on the provisions of Hindu Adoptions and Maintenance Act, 1956. In our opinion, however, whether repealed or not S. 2 of the Hindu Widow's Remarriage Act, 1856, does not help the appellant in any manner. It provides as follows:—

"All rights and interests which any widow may have in her deceased husband's property by way of maintenance or by inheritance to her husband or his lineal successors, or by virtue of any will or testamentary disposition conferring upon her, without express permission to remarry, only a limited interest in such property with no power of alienating the same shall upon her remarriage cease and determine as if she had then died; and the next heirs of her deceased husband or other person entitled to the property on her death shall thereupon succeed to the same."

Section 5 on the other hand provides that except as provided in Ss. 2 to 4 a widow on remarriage shall not forfeit any other property or right to which she is otherwise entitled notwithstanding her remarriage.

10. The above provision came up for interpretation before the Madras High Court in the case of Thangavelu Asari v. Laxmi Amal, AIR 1957 Mad 534 (the decision of the Appeal Court affirming the

decision relied on by the learned Judge in the trial court reported in AIR 1953 Mad 977). It was there held—

"There is a clear indication in the provisions of the section that any property to which the widow may become entitled absolutely will not be forfeited on her remarriage. It is only when the widow is in enjoyment of rights and interests of a limited amplitude that this section applies. The words 'shall upon her remarriage cease and determine as if she had then died' can have significance only when the widow's rights are of limited nature and duration. Otherwise merely by the notional death of the widow the next heirs of the husband would not become entitled to succeed, whereas if she was in enjoyment only of a limited interest such persons would succeed under the general law."

11. We are in respectful agreement with the aforesaid interpretation of S. 2 of the Hindu Widow's Remarriage Act, 1856. We fully agree with the learned Judges of the Madras High Court that read in the context the clause "conferring upon her only a limited interest in such property" qualifies the rights and interests which the widow may have in the deceased husband's property in either of the three manners specified in the provision so that an interest which the widow inherits absolutely under the provision of the Hindu Succession Act, does not come within the purview of S. 2 of the Hindu Widow's Remarriage Act, 1856. This view appears to be the consistent view taken by the other High Courts. Reference may be made to the case of Bhuri Bai v. Champi Bai, AIR 1968 Raj 139 (relied on by the learned Judge in the trial court) and also to the decisions in the cases of P. N. Salunke v. Sindhu, AIR 1971 Bom 413 and Ballabha Pani v. Jasodhara Pani, ILR (1965) Cut 398. That being the position we must uphold the view of the learned Judge that even if defendant No. 1 had remarried defendant No. 2 such remarriage would not divest her of the "B" Schedule properties which she inherited from her late husband in the interest of an absolute owner. Nor would she forfeit that property on her admitted subsequent unchastity as it is now well settled that such subsequent unchastity does not lead to divesting of an interest which had earlier validly vested in her (See Moniram v. Keri Kalitani, (1879) 7 Ind App 115 (PC)). The learned Judge was therefore right in his conclusion that the plaintiffs' claim to

'B' Schedule properties must fail in any event and we affirm the said conclusion.

12. So far as the "A" Schedule properties are concerned, admittedly those were the subject-matter of a grant by the husband Nafar during his lifetime. The grant is dated March 26, 1945. It is Exhibit F for the defendants and Ext. 5 for the plaintiffs. It is a gift in life estate. The material extract therefrom may usefully be set out hereunder:

"Whereas you are my second wife as I have married you recently and no children are born of your womb at present, yet as human life is floating and none can say what will happen when and thinking whether you will be able to live in amity with my first wife in future who is at present alive and that after my death if you may find it difficult to get food and raiment I make a gift to you in your life estate the property owned and possessed by me. On payment of rent and cess etc. to the landlord you shall enjoy the same till your lifetime and you shall not do any act harmful to it or to make any encumbrance, gift, sale, mortgage, etc., in respect thereof. If it be done then it will be wholly void and invalid and disallowed in court. If I remain alive after your death then I shall become the absolute owner of the property mentioned in the Schedule or if there be any of my heirs alive then he will in law become the absolute owner thereof. None of the heirs of your father's family shall become the owner or possessor thereof. If no son born of my loins be alive then any heir of myself or my father's line shall be the absolute and full owner of the property mentioned in the Schedule. To this effect in sound health, good faith, without request from others out of my own accord I execute this Deed of Gift for life estate in the property."

13. The Court below took the view that if remarriage as alleged by the plaintiffs be proved, defendant No. 1 may forfeit this grant but not on account of subsequent unchastity as admitted by her. Though the learned Judge thinks that because of remarriage, the grantee under the above gift would forfeit her life estate, he has not given any reasons for such a view. We are, however, unable to accept such a view. It being a gift in favour of defendant No. 1, whether she would forfeit the grant in the event of her remarriage or because of her subsequent unchastity would entirely depend upon the terms thereof. If the grant is not so

forfeited on its terms, she does not forfeit the properties otherwise in law. Though under the gift she got only a life estate, S. 2 of the Hindu Widow's Remarriage Act, 1856, would have no application, inasmuch as, such a life estate was not acquired by her in any of the three ways set out therein. Under S. 14 (2) of the Hindu Succession Act, 1956, this life interest remains as such and does not become an absolute estate but nonetheless it lasts the normal life of the grantee. Nor Mr. Mukherji could draw our attention to any statutory provision by which the defendant No. 1 can be said to forfeit the properties so gifted to her in life estate in the event of her remarriage or becoming unchaste.

14. Let us now consider the gift itself to see if thereunder defendant No. 1 would forfeit the properties in the event of her remarriage or becoming unchaste. We have set out the relevant terms of the gift hereinbefore. There is no express condition set out in the gift itself that in the event of the grantee remarrying or becoming unchaste, she would forfeit her life estate. Nor such a condition can be read as implied in the gift. On the facts and circumstances of the case, it is well established that the donor at a ripe old age married the donee who was quite young in her life. Having married such an young girl and apprehending his death he was providing for the lady a means for her livelihood obviously for her natural life. It must be presumed that the donor was quite aware that in law the donee on being a widow could remarry but even then he was not making any provision in the grant that in the event of such remarriage or on her becoming unchaste she would forfeit the grant. On the other hand, having married a young girl at an old age and on a reasonable apprehension that she would be left a widow incapable to support herself he gave her a life estate which is to last her natural life. Reversion is provided only on her death. When such was the grant it would be difficult to read in it a limitation as contended for by Mr. Mukherji.

15. Mr. Mukherji next contended that the gift was meant for widow's maintenance and when a widow forfeits her maintenance from the husband's estate under the Hindu Law by remarrying or by becoming unchaste, defendant No. 1 must be deemed to have forfeited 'A' schedule properties on her remarrying defendant No. 2 or even on her own admission when she is living an unchaste life with the said

defendant No. 2. We are unable to accept such a contention. The right of a Hindu widow to maintenance out of husband's estate is conditional upon her leading a life of chastity and she may forfeit such maintenance on her remarriage under the provision of S. 2 of the Hindu Widow's Remarriage Act, 1856 or S. 22 read with S. 21 (iii) of Hindu Adoption and Maintenance Act, 1956. But the interest by way of life estate created by a grant as now under consideration must be distinguished from the widow's right to receive maintenance from the estate of the deceased husband, in as much as, in case of a grant of the present nature a vested estate in the property is created by the deed — the limit whereof is entirely dependent on the grant itself so that if in the grant there is no clause for forfeiture on the grantee's remarriage or on the grantee's ceasing to live a chaste life she cannot be said to forfeit her rights in the event of her remarriage or her living an unchaste life. The right of a Hindu Widow to maintenance out of the husband's estates on the other hand is of an indefinite character which does not create any vested estate and which again is subject to the limitation in law referred to hereinbefore. This position follows from the decision of the Privy Council in the case of *Laxmi-chand v. Mt. Anandi*, 62 Ind App 250: (AIR 1935 PC 180). A contention similar to the one put forward by Mr. Mukherji before us was overruled by the Bombay High Court in the case of *Parami v. Mahadevi*. (1910) ILR 34 Bom 278. There, a Hindu widow was entitled to maintenance at the rate of Rs. 24/- a year under her husband's will. The widow led an unchaste life after the death of her husband. When she sued to recover the maintenance under the will the same was resisted on the ground that because of unchastity she must be deemed to have forfeited her right to get the maintenance. Such a contention as a defence to the suit was overruled by the Bombay High Court. In rejecting the defence contention that the testator in making the grant of Rs. 24/- per year must be presumed to have intended that the allowance should be given subject to the condition of chastity on which the right of a Hindu widow to maintenance depends, it was observed:

"Further though the annuity is granted by the will as maintenance that word cannot be understood as imposing any condition or restriction so as to cut down or extinguish the right to Rs. 24/- a year given by the will. Where an implication

is to be made, it must be certain and necessary; the rule that a will of a Hindu must be construed with due regard to Hindu habits and notions applies only where there is ambiguity. Caution must be used in applying that rule and it must be adopted only where a suggested construction of doubtful language leads to manifest absurdity or hardship. Here there is neither. The mere fact that the word 'maintenance' is used cannot affect the unconditional terms of the bequest."

16. In the grant now under consideration by us there is no use even of the word maintenance though the life estate was created to provide for food and raiment in favour of the grantee and that for her natural life. Therefore, in our opinion, the learned Judge was not right in his view that in the event of proof of remarriage defendant No. 1 would forfeit her life estate under the grant Ext. 5 or Ext. F. On this finding of ours the suit must fail as a whole, inasmuch as, the defendant No. 1 would not forfeit the properties set out in either of the schedules in the event of her remarriage as alleged by the plaintiffs being proved or on her admitted subsequent unchastity. Since, however, the other issue as to whether the defendant No. 1 had remarried defendant No. 2 or not had been thoroughly argued before us by both the parties with reference to evidence on the issue, we consider it necessary to decide how far the finding of the learned Judge in this respect against the plaintiffs can be upheld.

17. The issue as to whether defendant No. 1 Ashita Barani had married defendant No. 2, Dulal Bagdi or not has been answered against the plaintiffs by the learned Judge in the trial court. On a very careful consideration of the evidence on record he has come to the conclusion that no such marriage between defendant No. 1 and Dulal Bagdi had been proved. On the contrary, he has accepted the defence case that Asita Barani had been leading an immoral life living with Dulal as a concubine. We ourselves have reassessed the entire evidence on the issue and we find no reason to differ from the conclusion arrived at by the learned Judge. (After considering the plaintiffs' evidence on the issue as to whether defendant No. 1 had remarried defendant No. 2 their Lordships proceeded.)

18-21. As against this, the learned Judge in the trial court has accepted the bold testimony of defendants 1 and 2 who admit to be living an immoral life. The

learned Judge has seen the demeanour of these two witnesses and had been very much impressed thereby. We have read their evidence carefully and we find that their evidence is corroborated materially by attending facts and circumstances made out from other evidence found by us to be more reliable. In this view, we affirm the findings of the learned Judge to the effect that Asita had not been married to Dulal as alleged by the plaintiffs. Such marriage not having been proved there could be no divesting of the properties set out in Sch. "A" because of such remarriage. We have already found that subsequent unchastity does not divest a widow of properties which once vested in her except when the terms of the grant provide for such divesting and hence defendant No. 1 could not be said to be divested of "A" Schedule properties because of her admitted unchastity. Moreover it is not the case of the plaintiffs that defendant No. 1 was divested of the properties of either of the two Schedules because of unchastity. Hence the plaintiffs are not entitled to recover possession of the suit properties as claimed by them.

22. On the conclusions as above, this appeal fails. Subject to a declaration of the plaintiffs' right, title and interest as reversioners to the Sch. 'A' properties on the death of Asita Barani, their claim as made in the suit must fail and the judgment and decree of the court below is affirmed. In the circumstances, however, we direct that the parties do bear their costs throughout.

ROY, J.:— I agree,

Appeal dismissed.

AIR 1977 CALCUTTA 295

SPECIAL BENCH

SANKAR PRASAD MITRA, C. J.,
SABYASACHI MUKHARJI AND
SALIL KUMAR DATTA, JJ.

Raich Ali Khan, Petitioner v. Hazi Sadek Ali Sk. and others, Respondents.

C. R. No. 3046 of 1975, D/- 8-6-1977

(A) W. B. Land Reforms Act (10 of 1956), S. 21 (3) (as inserted by W. B. Act 33 of 1974) — Retrospective operation — Provision as amended applies to pending proceedings — (1975) 2 Cal LJ 504, Overruled.

Assuming that a substantive right has been taken away by the newly inserted

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sub-s. (3) of S. 21, the provisions apply to pending proceedings before any Civil or Criminal Court. (Para 15)

By necessary implication, sub-s. (3) of S. 21 has been made to apply to pending proceedings. This conclusion is reached on the basis of the plain, ordinary and grammatical meaning of the word "arises" and of the expression "in course of any proceedings before any Civil or Criminal Court". (1975) 2 Cal LJ 447, Approved; (1975) 2 Cal LJ 504, Overruled. (Para 14)

(B) Interpretation of Statutes — Retrospective operation — Substantive rights affected — Provision would be retrospective if such construction arises by necessary implication. AIR 1960 SC 936, Maxwell on Interpretation of Statutes, 12th Ed., p. 215 and Craies on Statute Law, 3rd Ed., p. 324, Foll. (Para 11)

Cases Referred: Chronological Paras
(1975) 2 Cal LJ 447 8
(1975) 2 Cal LJ 504 8
(1975) C. R. Nos. 3165-66 of 1975 (Cal) 1
AIR 1960 SC 936 13
(1892) 3 Ch 402 : 61 LJ Ch 580 12

B. C. Mitter, Miss Aruna Mukherjee, for Petitioner; Ramapati Roy, for Respondents.

SANKAR PRASAD MITRA, C. J.:— In C. R. 3165-66 of 1975 (Noor Mohammad Sk. v. Sushil Kumar Mistry) a Division Bench of this Court has referred to a Special Division Bench under R. 1 of Chap. II of the Appellate Side Rules the following question:

Whether the provisions of sub-s. (3) of S. 21 of the West Bengal Land Reforms Act, 1955 as amended apply to pending proceeding before any civil or criminal court?

The Division Bench made this Reference on the 10th December, 1976. The present Reference has been made on the same question on the 22nd February, 1977 by Mr. Justice R. Bhattacharya in view of the Reference already made by the Division Bench as aforesaid.

2. It appears that Hazi Sadek Ali Sk. filed a suit in June 1971 in the court of the Second Munsif at Baruipur in the District of 24-Parganas, inter alia, for a declaration of title and recovery of possession of land in suit. The petitioner before us filed a written statement contending that he was a bargadar under the plaintiff.

3. While the suit was pending before the learned Munsif sub-s. (3) of S. 21 was added by S. 7 of the West Bengal Land Reforms (Amendment) Act, 1974 (West

Bengal Act XXXIII of 1974). The sub-section came into force on the 21st June, 1974. It is as follows:—

"If any question as to whether a person is or is not a bargadar arises in course of any proceedings; before any Civil or Criminal Court, the Court shall refer it to the officer or authority mentioned in sub-s. (1) of S. 18 for decision."

4. In view of this amendment the petitioner Raich Ali Khan made an application to the learned Munsif for referring the question as to whether he was a bargadar to the officer or authority mentioned in sub-s. (1) of S. 18 of the West Bengal Land Reforms Act, 1955.

5. The learned Munsif by his order No. 97 made on the 22nd July, 1975 dismissed the application of Raich Ali Khan holding, inter alia, that sub-s. (3) of S. 21 had no application to the suit.

6. Raich Ali Khan thereupon made a revisional application to this Court under S. 115 of the Civil P. C. on the 25th August, 1975 which came up for hearing before Mr. Justice R. Bhattacharya on 22nd February, 1977. Mr. Justice R. Bhattacharya, as we have already noted, had referred the matter to a larger Bench.

7. We have had the benefit of considering the judgment delivered by Mr. Justice Bhattacharya as well as by my learned brother Mr. Justice S. K. Datta presiding over a Division Bench consisting of himself and Mr. Justice H. N. Sen in Noor Mohammad Sk.'s case.

8. On the point under reference there are two reported judgments of this Court. There is a judgment of Mr. Justice Chittatosh Mookherjee in *Chapala Bala Adhikary v. Monoranjan Das* reported in 1975 (2) Cal LJ 447. There is also a Division Bench Judgment of Mr. Justice S. K. Bhattacharyya with Mr. Justice Arun Kumar Janah in *Birendra Nath Gayen v. Kali Ch. Mandal* reported in 1975 (2) Cal LJ 504.

9. Mr. Justice Chittatosh Mookherjee has proceeded on the basis that the amendments made by sub-s. (3) of S. 21 relate to procedure and as such it would affect pending proceeding. The Division Bench, however, has taken a contrary view. According to the Division Bench, a substantive right has been affected and the amended provision cannot impeach a pending proceeding.

10. It seems to us on the facts and in the circumstances of this case that it is unnecessary to decide whether the right affected is a substantive or procedural

right. We will assume that a substantive right has been taken away. It has been urged on behalf of the respondent-opposite parties that they had the right to institute a suit under S. 9 of the Civil P. C. and had further right of preferring an appeal against the judgment delivered in the suit in accordance with the provisions of the Code. All these rights, according to the learned Counsel, are substantive rights which have been taken away.

11. As regards substantive rights, the law is well settled. In Maxwell "On The Interpretation of Statutes", 12th Edition at p. 215, it is stated—

"It is a fundamental rule of English law that no statute shall be construed to have a retrospective operation unless such a construction appears very clearly in the terms of the Act, or arises by necessary and distinct implication."

12. In Craies on "Statute Law", 3rd Edition at p. 324 reliance is placed on the observations of Lord Justice Lindley in *Lauri v. Renad*, 1892 (3) Ch 402 at p. 421. Lindley, L. J. observed:

"It is a fundamental rule of English law that no statute shall be construed so as to have a retrospective operation unless its language is such as plainly to require such a construction and the same rule involves another and subordinate rule to the effect that a statute is not to be construed so as to have a greater retrospective operation than its language renders necessary."

13. The Supreme Court in *Mahadeolal Kanodia v. Administrator General of West Bengal*, AIR 1960 SC 936 at p. 939 had made the position abundantly clear. The Supreme Court has said:

"The principles that have to be applied for interpretation of statutory provisions of this nature are well established. The first of this is that statutory provisions creating substantive rights or taking away substantive rights are ordinarily prospective; they are retrospective only if by express words or necessary implication the Legislature has made them retrospective; and the retrospective operation will be limited only to the extent to which it has been so made by express words or necessary implication... .."

14. The problem before us, therefore, is whether by express words or necessary implication, sub-s. (3) of S. 21 of the West Bengal Land Reforms Act, 1955 can be said to have affected pending proceedings. The language used appears to us, to be

plain and explicit. It does not present any difficulty. The word "arises" and the expression "in course of any proceedings before any Civil or Criminal Court" made the position abundantly clear. Whenever in course of any proceedings in a Civil or Criminal Court the question arises as to whether a person is or is not a bargadar, that question has to be referred to the officer mentioned in sub-s. (1) of S. 18 for decision. By necessary implication, in our opinion, sub-s. (3) of S. 21 has been made to apply to pending proceedings. We have reached this conclusion on the basis of the plain, ordinary and grammatical meaning of the word "arises" and of the expression "in course of any proceedings before any Civil or Criminal Court."

15. We hold, therefore, that the provisions of sub-s. (3) of S. 21 of the West Bengal Land Reforms Act, 1955 as amended apply to pending proceedings before any Civil or Criminal Court. The Reference is answered accordingly.

16. The order of the learned Munsif being order No. 97 dated the 22nd July, 1975 is set aside and the Rule is made absolute. The learned Munsif will proceed according to law in the light of the observations made by us in this judgment. There will be no order as to costs.

SABYASACHI MUKHARJI, J.:— I agree.

S. K. DATTA, J.:— I agree.
Order accordingly.

AIR 1977 CALCUTTA 297

A. K. JANAH AND
SUDHAMOY BASU, JJ.

Pannalal Biswas, Appellant v. Dilip Kumar Mondal and others, Respondents.

Second Appeal No. 1369 of 1973, D/- 6-6-1977.

(A) Evidence Act (1872), S. 111 — Good faith — Burden of proof — Impugned deed executed by plaintiff soon after he attained majority in favour of his maternal uncle (defendant) who was acting de facto guardian during minority — No specific denial of plaint allegation about fiduciary relationship of parties — Burden of proving good faith lies on defendant.

A minor who is under the influence of his de facto guardian during his minority cannot be expected to come out of that influence merely on attaining majority or within a short time thereafter. Where

there is a question of good faith of a transaction between the parties one of whom stands to the other in a position of active confidence, the burden of proving the good faith of the transaction is on the party who is in a position of active confidence (Para 6)

Held: Having regard to the relationship between the parties and the attending facts and circumstances, it was for the defence to satisfy the Court that the plaintiff executed the document in good faith knowing the contents thereof. The plaintiff was not aware of the contents of the Deed in question, when the same was executed by him although at that time he had attained the age of majority.

(Para 7)

(B) Transfer of Property Act (1882), Ss. 13 and 19 — Deed — Construction — Whether a deed is a deed inter vivos or a part of it, is a deed inter vivos and another part a will — (i) Succession Act (1925), S. 2 (h) — (ii) Deed — Construction).

By Cl. 4 in a deed, the widow and the sons of the first party have been given absolute interest on the death of the first party. Similarly, by Cl. 5 the sons of the second party have been given absolute interest on the death of the second party. Clause 6 provides that if the first party dies without getting married, those sons of the second party who will be alive then, will get the entire 16 annas of the property mentioned in the schedule in equal shares in absolute right. In the proviso, Cls. 4, 5 and 6 have been specifically mentioned and it provides that the settlement made in favour of the persons in Cls. 4, 5 and 6 will take effect in absolute right only after the death of the first, second and the third party, and until then those persons will have a mere right of residence. The first three clauses confer certain rights upon the second and third in praesenti:

Held: The proviso controls Cls. 4, 5 and 6 and no right under the said clauses accrued to the persons mentioned therein until the death of all the three parties. Moreover, it would appear from the reading of the aforesaid three clauses along with the proviso that the extent of the share or interest which the sons of second party will get cannot be ascertained until the death of the first party-executant. The said provisions therefore can come into effect only after the death of all the three parties including the executant, therefore, this part of the document namely, Cls. 4, 5 and 6 read with the proviso operates as a Will. (Para 10)

Cases Referred:	Chronological	Paras
AIR 1962 Assam 106		10
AIR 1935 Cal 671: 62 Cal LJ 99		6
AIR 1922 Cal 203: 34 Cal LJ 529		6
(1900) ILR 22 All 162		10

Samir Kumar Mukherjee and Nirmal Kumar Manna, for Appellant; R. P. Bagchi and Miss Nandita Ghose, for Respondents.

JANAH, J.:— This Second Appeal is by the plaintiff and it arises out of a suit for declaration of the plaintiff's title to the properties described in the schedule to the plaint. The plaintiff's case in short is as follows:—

One Upendra Nath Biswas, the father of the plaintiff and defendants Nos. 3 and 4, was the owner of the disputed premises No. 22, Madan Paul Lane, Bhowanipore. Upendra died in 1340 B.S. leaving his widow Sinddhubala, a son, the plaintiff and two daughters, defendants Nos. 3 and 4. Sinddhubala is now dead. The plaintiff was a minor at the time of his father's death. Sinddhubala brought her brother, Prafulla Kumar Mondal to help her in the management and protection of the property on behalf of the minors after Sinddhubala lost her husband. Prafulla used to manage the property of the plaintiff. After the death of Sinddhubala, Prafulla was in sole charge of the family affairs of the plaintiff. Prafulla died sometime in the month of Bhadra, 1373 B.S. leaving the defendants Nos. 1, 2, 5 and 6 who are his heirs. In August, 1967 the defendant No. 2 gave out that the defendants have become the owners of the disputed property and the plaintiff thus became suspicious of the conduct of the defendant No. 2. Thereafter the plaintiff instructed one of the relatives to make a search in the Registration Office at Alipur and on 6-9-1967 he got a certified copy of the Deed of Settlement purported to have been executed by him in favour of Prafulla and one Khodanmani Dasi on 9-10-1945. The plaintiff was surprised to come to know the contents of the Deed that in order to give effect the last wish of the plaintiff's deceased father he created the Deed of Settlement. It was alleged that sometime in 1945 when the plaintiff was still a minor he sold some paternal property for the purpose of raising money in order to meet the marriage expenses of his sister the defendant No. 4. Taking advantage of the minority of the plaintiff Prafulla the maternal uncle obtained the Deed of Settlement. It was a fraudulent document obtained by mis-representation.

It was further alleged that the said maternal uncle Prafulla was really a trustee for the plaintiff and as a trustee and guardian he used to manage the property and used to live in the plaintiff's family with the leave and licence of the latter. The plaintiff never intended to execute the Deed of Settlement which was never acted upon. On these allegations the plaintiff filed the suit for a declaration that the Deed of Settlement dated 9th October, 1945 is void and the defendants Nos. 1, 2, 5 and 6 had acquired no right, title and interest in the disputed property by virtue of the said Deed. The plaintiff also prayed for declaration of his title to the disputed property.

2. The suit was contested by the defendants Nos. 1, 2, 5 and 6. They filed a joint written statement alleging that the suit is barred by limitation. It was denied that the plaintiff was a minor at the time when the Deed of Settlement was executed. According to the defendants Upendra Nath Biswas brought his brother-in-law Prafulla when he was 6/7 years old. Prafulla was brought by Upendra as his son. Prafulla contributed a considerable sum of money towards the purchase price of the disputed property and for the marriage of his sister. He used to maintain the family of the plaintiff and to look after the litigation of the said property. Having regard to the services rendered by Prafulla the plaintiff's father during his lifetime expressed his intention for making some permanent settlement for Prafulla and his sister Khodanmani in respect of the property. The plaintiff's father died prematurely and he could not give effect to his last will but he left instruction for fulfilling his last desire. It was alleged that in pursuance of the last wish of Upendra the plaintiff executed the Deed of Settlement out of his will at a time when he was a major. It was alleged that the plaintiff was all along aware of the Deed since its registration. It was denied that the plaintiff continued in possession of the disputed property in spite of Deed of Settlement. It was alleged that the plaintiff not having asked for recovery of possession the suit is hit by S. 34 of the Specific Relief Act.

3. The trial court found that the possession of the disputed property is with the plaintiff and, therefore he was not required to pray for recovery of possession. Upon that view the trial court held that the suit was not hit by S. 34 of the Specific Relief Act. After considering the evidence adduced in the case the trial

court came to the conclusion that the plaintiff was not a minor on 9th October, 1945 when he executed the impugned Deed of Settlement. The trial court further found that the plaintiff did not intend to execute the Deed of Settlement and that he was not aware of the contents of the said document. The trial court, therefore, held that the document was not binding upon him. On the question whether Prafulla contributed any money towards the running of the plaintiff's household the trial court found that the money earned by Prafulla from the shop which belonged to Upendra did not represent his income but it was the income from Upendra's shop. The trial court further held upon an interpretation of the disputed Deed of Settlement, Exhibit A that it was a Will and the plaintiff by instituting the suit had revoked the will. The trial court accordingly passed a decree in favour of the plaintiff. Against the decree of the trial court an appeal was taken to the lower appellate court by the defendants Nos. 1, 2, 5 and 6. The lower appellate court affirmed the finding of the trial court that the plaintiff was not a minor at the date of execution of the Deed of Settlement but differed with the other findings of the trial court. The lower appellate court found that the execution of the Deed of Settlement was not merely the plaintiff's physical act of execution but it was his mental act. The lower appellate court also took the view that the Deed of Settlement was a document *inter vivos* and it was not a Will. The lower appellate court accordingly allowed the appeal and dismissed the suit. Against the said decision of the lower appellate court the present second appeal has been filed by the plaintiff.

4. Mr. Mukherjee, learned Advocate, appearing in support of the appeal, tried to assail the finding of the courts below that the plaintiff was not a minor at the time of execution of the Deed of Settlement. He contended that the said finding of the courts below was based, amongst other, on Ext. H which is the Admission Register of Bhowanipur Sishu Vidyalay which showed that the plaintiff was aged 6 years 5 months on 28-7-1930. Mr. Mukherjee contended that this School Register was inadmissible in evidence and the courts below having based their decision of the said evidence the said finding cannot stand. We are unable to accept this contention of Mr. Mukherjee, inasmuch as, apart from Ext. H the courts below took into consideration other evidence in

the case. Even if we leave Ext. H out of consideration those evidence on which the trial court and the lower appellate court based their decision the conclusion would follow that the plaintiff was above the age of 18 years at the date of execution of the Deed of Settlement. We must therefore proceed on the basis that the plaintiff executed the document after he had attained majority.

5. The objection which was raised on behalf of the defendants that the suit was barred by S. 34 of the Specific Relief Act inasmuch as the plaintiff did not ask for recovery of possession was not agitated before the lower appellate court. The trial court has recorded the finding on that issue in favour of the plaintiff and it has found that the possession of the disputed premises is with the plaintiff. That finding has not been reversed by the lower appellate court. That point must, therefore, be found in favour of the plaintiff.

6. The next contention which was urged on behalf of the appellant is that the lower appellate court erred in law in proceeding to decide the case upon the footing that it was for the plaintiff to establish that the Deed of Settlement was vitiated on account of fraud and undue influence. It has been contended that having regard to the relationship between the parties and having regard to the attending facts and circumstances the court of appeal below ought to have proceeded on the basis that it was for the defendant to satisfy the court that the impugned Deed was executed by the plaintiff with due understanding of the contents of the documents and it was executed in good faith. On this point the trial court has found that there is no evidence on record that the document was executed by the plaintiff with full knowledge of the contents thereof. It has further found that the plaintiff did not intend to execute the Deed in question. The lower appellate court has, on the other hand, found that the execution of the Deed was not merely the plaintiff's physical act of execution but it was also his mental act. This conclusion has been arrived at from the fact that the lower appellate court found some discrepancy between the pleading and in the plaintiff's evidence as to the time when and how the plaintiff came to know about the impugned Deed of Settlement since the time of execution. In our view, this conclusion of the lower appellate court was not justified. Section 111 of the Evidence Act provides that where

there is a question as to the good faith of transaction between parties one of whom stands to other in a position of active confidence, the burden of proving the good faith of the transaction is on the party who is in a position of active confidence. In this case there is ample evidence on record to show that Prafulla was acting as the de facto guardian of the plaintiff. No doubt that at the date of the disputed document the plaintiff was aged about 21 years, but the fact remains that the document was executed soon after the plaintiff attained majority. A minor who is under the influence of his de facto guardian during his minority cannot be expected to come out of that influence merely on attaining majority or within a very short time thereafter. Moreover, there are other attending facts and circumstances which go to indicate that the plaintiff relied upon the advice and guidance of Prafulla in such matters. In his Tagore Law Lecture Sir Frederick Pollock while dealing with fiduciary relation, stated as follows:—

"Different considerations arise when we come to the kind of fraud which is said to be presumed from the circumstances and condition of the parties. It is really a compound, in varying proportions, of fraud and moral coercion. With direct and positive coercion as a cause of avoiding contract we are not concerned. Moreover it is of extremely rare occurrence in modern times. It occurs only too frequently in judicial experience that a person in whom confidence is reposed by another, or who holds a real or apparent authority over that other, makes use of such confidence or authority for the purpose of obtaining advantage over that other which, but for such confidence or authority, he could not have obtained. In such case it is seldom, if ever, possible to prove specific acts of deception, or of exercise of authority amounting to moral coercion. Yet the risk of abuse is obviously great. The law therefore reverses its usual rule of evidence in dealing between man and man. Commonly we do not presume, without specific indications, that there is anything contrary to good faith in transactions which on the face of them are regular When one party habitually looks up to the other and is guided by him, he can no longer be supposed capable without special precautions of exercising that independent judgment which is requisite for his consent to be free Therefore it is not enough for the law to say

that gifts and beneficial agreements obtained by the abuse of authority or confidence, by Undue Influence as it is technically termed are avoidable. It also throws the burden of proof on the party taking the benefit. Instead of requiring the party seeking restitution to prove that the transaction was unrighteous, and his consent not free, it requires the parties resisting it to show that the consent was really free, and that all due precautions were used to secure independent judgment."

In *Satish Chandra Ghosh v. Kalidasi Dasi*, 34 Cal LJ 529: (AIR 1922 Cal 203) it was held by a Division Bench of this court that there is a grave risk of failure of justice, if the general principles regarding independent and competent advice in the matter of execution of a document by a person in favour of another standing in a fiduciary character are moulded into inelastic formulas or crystallised into inflexible rules and treated as of universal application regardless of the special facts and surrounding circumstances of the case which requires adjudication. Where there is a question of good faith of a transaction between the parties one of whom stands to the other in a position of active confidence, the burden of proving the good faith of the transaction is on the party who is in a position of active confidence. It was further observed that every variance between pleading and proof is not fatal; the court must carefully consider whether the objection is of form or of substance. The rule that the allegations and the proof must correspond is intended to serve a double purpose, namely, first to appraise the defendant distinctly and specifically of the case he is called upon to answer so that he may properly make his defence and may not be taken by surprise; and secondly, to preserve an accurate record of the cause of action as a protection against a second proceeding founded upon the same allegations. The same view was expressed by another Division Bench of this Court in the case of *Benoy Krishna Sadhukhan v. Santi Charan Sadhukhan*, 62 Cal LJ 99: (AIR 1935 Cal 671). In the plaint as amended there is positive averment about the fiduciary relation between Prafulla and the plaintiff but there is no specific denial by the defendants in their written statement.

7. The defence case, on the other hand, is that the Deed of Settlement was executed by the plaintiff in deference to the

last wishes of his father, Upendra. Upendra died on July 8, 1936. The disputed document was executed on October 9, 1945. If the document is executed to give effect to the last wishes of Upendra there is no reason why the execution thereof was delayed for ever 9 years. In such circumstances it is only reasonable to expect that the document would have been executed during the lifetime of the plaintiff's mother, Sinddhubala who died on 5th January, 1941. It was argued on behalf of the respondents that as the plaintiff was a minor when his father died he could not have executed the Deed of Settlement. But the plaintiff's mother was living at that time and she was the de jure guardian of the plaintiff. The plaintiff could have executed the document through his natural guardian mother. The Deed of Settlement was executed at a time when the necessity arose for procuring money for the plaintiff's sister's marriage. That was certainly not the appropriate time when such a document should normally have been executed. The lower appellate court has put a great deal of emphasis on the fact that the plaintiff in his evidence had stated that except the Sale Deed Ext. D-1 he had not executed any other document. This statement of the plaintiff, in our view, has to be read in the context of the plaintiff's case and also the statement he had made earlier in his deposition, namely, that his mama made all arrangements regarding the marriage of his sister and that his mama advised him to sell the Turf Road property for the marriage expenses of his sister. It appears from the Sale Deed, Ext. D-1, and the Deed of transfer, Ext. A that both the documents were written by one Harinayana Bhattacharyya. In the Deed of Settlement, the plaintiff was identified by Ardhendu Bhusan Majumdar who is one of the purchasers under the Deed of Sale. In the Deed of Sale the plaintiff was identified by Prafulla Kumar Mondal the maternal uncle of the plaintiff Ardhendu Bhusan Majumdar is also one of the witnesses in the Deed of Settlement the same set of persons are involved in the two documents. The two documents were presented for registration on the same day and at the same time. Then as regards the motive for the execution of the Deed of Settlement namely, that it was executed to give effect to the last wishes of Upendra, we get a different version from the evidence of Manorama, who has stated in her evidence that Panna executed a Deed so that all of us could live

together. To the same effect is the evidence of Sm. Kironbala Mondal, the mother of Prafulla. This witness was asked whether she knew anything about the execution of a document by the plaintiff so that the defendants could have some interest in the disputed property. In answer to Q. 44 she stated that the document was executed not for the purpose of giving some interest to the defendants but so that the house might not be sold. It also appears from the evidence that soon after the execution of the Sale Deed a house was constructed in Tollygunge by Prafulla. P. W. 3 Manorama, wife of Prafulla has given an explanation that the said house was constructed with the loan taken from Binapani, sister of Prafulla. Binapani was alive, but she was not examined. The plaintiff's evidence on the other hand is that the entire amount of Rs. 12,500/- received from the sale of Turf Road property was made over to Prafulla. Having regard to the relationship between the parties and the attending facts and circumstances we are of the opinion that it was for the defence to satisfy the court that the plaintiff executed the document in good faith knowing the contents thereof. This part of the case was lost sight of by the lower appellate court. We, therefore, hold that the plaintiff was not aware of the contents of the Deed of Settlement, Ext. A when the same was executed by him although at that time he had attained the age of majority.

8. Some argument was advanced before us on S. 81 and S. 88 of the Indian Trusts Act. It was contended on behalf of the appellant that even if the plaintiff was aware of the contents of the Deed of Settlement Prafulla or his heirs in whose favour it was executed must hold the property for the benefit of the plaintiff in view of the provisions of Ss. 81 and 88 of the Trusts Act. In view of our findings recorded above that the plaintiff was not aware of the contents of Ext. A, the Deed of Settlement, it is not necessary for us to go into this aspect of the case.

9. The only other point which requires consideration is whether the disputed document, Ext. A, operates as a Deed of Settlement or it is a Will. The trial court has taken the view that the document operates as a Will. But the lower appellate court has taken a different view and has held that it is a Deed of Settlement. Before we proceed to discuss whether the said document operates

as a Will or as a Deed of Settlement it would be convenient to refer to the relevant clauses of the said document. In the said document the plaintiff is described as the first party, Prafulla Kumar Mondal is described as the second party and Khodonmoni Dasi is described as the third party. After stating the relationship between the parties the document contains certain recitals giving reasons for the execution of the document. It then proceeds to mention the conditions on which the settlement is executed. Clause (1) gives a right of residence to the second and the third party jointly with the first party in the property described in the schedule without conferring upon them any right to transfer. The second clause requires the first and the second parties to maintain the property and to pay the taxes therefor. The third clause deprives the first party of his right to transfer the property during the lifetime of the second and the third party. Clauses. 4, 5 and 6 of the said documents which are very material for our present purpose are as follows:—

"4. I the first party have not yet married. If in future I marry and I have children then my wife and my sons will get on my death half share of the property described in the schedule in absolute right, with the right to make gift, sale or transfer.

5. On the death of the second party his sons will get half share of the property mentioned in the schedule in absolute right, with the right to make gift, sale or transfer.

6. If I the first party die without getting married then on my death those sons of the second party who will then be alive will get in equal shares the entire 16 annas of the property mentioned in the schedule in absolute right, with the right to make gift, sale or transfer." The document further contains a proviso to the aforesaid Cls. 4, 5 and 6. It reads as follows:—

"Be it mentioned that it is only after the death of the first, second and the third party that the wife and the sons of the first party and the sons of the second party will get the property mentioned in the schedule in absolute right, in terms of the provisions contained in Cls. 4, 5 and 6; but so long as any one of the first, second and the third party will be alive none of the aforesaid persons will get the property mentioned in the schedule in absolute right, they will have only a right to reside jointly."

10. It is to be noticed that by Cl. 4 the widow and the sons of the first party have been given absolute interest on the death of the first party. Similarly, by Cl. 5 the sons of the second party have been given the absolute interest on the death of the second party. Clause 6 provides that if the first party dies without getting married, those sons of the second party who will be alive then will get the entire 16 annas of the property mentioned in the schedule in equal shares in absolute right. From these provisions it was argued by Mr. Bagchi on behalf of the respondents that the interest created in favour of the sons of Prafulla was vested interest under S. 19 of the T. P. Act. It was further contended that it extended to the whole of the remaining interest of the transferor namely, the plaintiff, in favour of the sons who might have been born. It was a valid transfer under S. 13 of the T. P. Act and the Donees or the Settles acquired a vested right and they took it in absolute right. Mr. Mukherjee on the other hand, has argued that although Cls. 4, 5 and 6 speak of absolute interest the proviso makes it clear that unless and until the first, second and the third parties were all dead the persons mentioned in Cls. 4, 5 and 6 will have no absolute interest in the property but they will have a mere right of residence. It will be seen that in the proviso Cls. 4, 5 and 6 have been specifically mentioned and it provides that the settlement made in favour of the persons in Cls. 4, 5 and 6 will take effect in absolute right only after the death of the first, second and the third party, and until then those persons will have a mere right of residence. The proviso therefore controls Cls. 4, 5 and 6 or in other words, the said clauses do not come into operation until the death of all the first, second and the third parties. It was argued on behalf of the respondent that the first, second and third clauses would indicate that the document is a Deed of Settlement and it cannot be a Will because certain rights were conferred upon the second and the third party in praesenti. No doubt the first three clauses confer such right on the persons mentioned therein. The question which then arises is whether the entire document is a Deed inter vivos or a part of it is a Deed inter vivos, and another part a Will. The distinction between a Will and a Deed inter vivos is illustrated by Jarman on Wills where he says "if a man by Deed, limits lands to the use of himself for life with remainder to the use of A in fee, the

effect upon the usufructuary enjoyment is precisely the same as if he should, by his will, make an immediate devise of such lands to A in fee; and yet the case fully illustrates the distinction in question; for in former instance, A immediately on the execution of the Deed becomes entitled to a remainder in fee, though it is not to take effect in possession until the decease of the settlor, while in the latter, he would take no interest whatever until the decease of the Testator should have called the instrument into operation." (Vide Jarman on Will 8th Edition, Chap. II, p. 26). To the same effect is the view which has been expressed by K. Shelley Bonnerjee in his Tagore Law Lecture 1901 on the interpretation of Deeds, Wills and States in British India. In *Chandmul v. Lachhminarain*, (1900) ILR 22 All 162, it was held by a Division Bench of the Allahabad High Court that a part of a document may be a Will notwithstanding that the same document may contain other provisions which was meant to be carried into effect during the lifetime of the executant of that document. Mr. Bagchi on behalf of the respondents contended that no reason was given in the said decision for the conclusion arrived at and from the facts as stated in the report the nature of the document is not clear and so the said decision should have no application in the present case. It is true that the reasons for the decision have not been mentioned. But it seems that no reason was given because the matter arose out of a reference under S. 17 of the Ajmere Courts' Regulations. But their Lordships in support of the decision referred to two English cases and also the passage in Jarman on Wills noted hereinbefore. A similar question arose before the Assam High Court in *Tajoram Nath v. Banerwar Nath*, AIR 1962 Assam 106. A Division Bench of the Assam High Court held that there can be no objection in law if one part of an instrument is operative as a Will and another part of the same instrument operates as a document inter vivos giving possession and management of certain properties. In the present case as we have already seen Cls. 1, 2 and 3 make certain provisions with regard to Prafulla and Khodonmoni. Cls. 4, 5 and 6 although mention that the persons mentioned therein would get in absolute right yet by virtue of the proviso the said persons are not to get in absolute right until the death of the first, second and the third party. The proviso therefore controls Cls. 4, 5 and 6 and no right under

the said clauses accrues to the persons mentioned therein until the death of all the three parties. Moreover it would appear from a reading of the aforesaid three clauses along with the proviso that the extent of the share or interest which the sons of Prafulla will get cannot be ascertained until the death of the plaintiff. The said provisions therefore can come into effect only after the death of all the three parties including the plaintiff. In our view, therefore, this part of the document namely, Cls. 4, 5 and 6 read with the proviso operates as a Will. A Will by its very nature is revocable and the plaintiff by institution of the present suit has revoked the Will.

11. For the reasons mentioned above, this appeal is allowed. The judgment and decree of the lower appellate court are set aside and those of the trial court are restored.

12. In the circumstances of the case, we however make no order as to costs.

SUDHAMOY BASU, J.:— I agree.

Appeal allowed.

AIR 1977 CALCUTTA 303

R. BHATTACHARYA AND

A. K. JANAH, JJ.

M/s. Rolls Print and Company (Pvt.) Ltd., Appellant v. B. M. Singh and Son, Respondent.

F. A. No. 3 of 1968, D/- 13-5-1977.

(A) Civil P. C. (1908), O. 41, R. 1 — New case in appeal — Suit for ejectment on ground of plaintiff's requirement for building and rebuilding and for accommodation of its office and godowns — In connection with additional issues framed in appeal, plaintiff's witnesses stating that some space for car parking was necessary in connexion with the business — It cannot be held that any new case has been brought out at appellate stage.

(Para 10)

(B) Civil P. C. (1908), S. 11 — Res judicata and estoppel — Bar of suit held not applicable.

Where the previous suit for ejectment of tenant on ground of personal use and occupation of plaintiff and for default in payment of rent was dismissed for want of prosecution and not on merits a subsequent comprehensive suit for eviction on several grounds including those in the previous suit between the same parties is

FU/FU/B984/77/KSB

maintainable and not barred by res judicata or estoppel. (Para 12)

(C) West Bengal Premises Tenancy Act (12 of 1956), S. 13 (3-A) — As amended in 1969 — Suit for ejectment of tenant filed in 1965 decreed — Sub-section (3-A) introduced in 1969 when appeal was pending — Plaintiff amended his plaint by filing petition in 1975 and additional issue framed — Held that 1975 may be taken as the year of institution of suit for pleadings mentioning grounds under Cls. (f) and (ff) of S. 13 (1) — This procedure avoids multiplicity of proceedings and litigative waste without impairing proper justice — Suit not hit by S. 13 (3-A) — AIR 1975 SC 1146, Foll. (Para 15)

(D) T. P. Act (1882), S. 106 — Notice to quit — Period of notice — Lease for manufacturing purposes — What is — Burden of proof.

In a suit for ejectment it is for the defendant pleading invalidity of notice to quit to prove that the lease or tenancy of immovable property was for manufacturing purposes. It may be that during the continuance of the tenancy taken for purposes other than manufacturing one the tenant might have started manufacturing business subsequently but that will not entitle him to get six months' notice to quit the suit premises expiring with the end of a year of tenancy. (Para 16)

Simply putting gum on the cigarette paper purchased from market and cutting the said paper into strips and then packing the same again cannot be called manufacture of cigarette paper. This is not a manufacturing process as contemplated in S. 106 of the T. P. Act. (1976) 3 Cal HC (N) 112 and AIR 1968 SC 922, Rel. on.

(Paras 17, 18)

Cases Referred: Chronological Paras
(1976) 3 Cal HC (N) 112 17
AIR 1975 SC 1146: (1975) 1 SCC 166

AIR 1968 SC 922

AIR 1959 SC 1289

6, 15

17

14

B. C. Dutt and Ambica Charan Bhat-tacharjee, for Appellant; N. C. Chakraborty, Dhruva Kumar Mukherjee and Sudipto Moitra, for Respondent.

R. BHATTACHARYA, J.:— This appeal arises out of the decree passed by the City Civil Court, Calcutta in Ejectment Suit No. 1661 of 1965 in favour of the plaintiff B. M. Singh & Son, a firm registered under the Indian Partnership Act having its office at No. 1, Crooked Lane, Calcutta (hereinafter referred to as the firm). The defendant is Rolls Print Co.

(P.) Ltd., a limited company under the Companies Act (hereinafter described as the Company). The plaintiff is the owner of the premises No. 1, Crooked Lane, Calcutta of which the suit premises we are concerned with is a part.

2. The plaintiff filed several suits against different tenants occupying the premises No. 1, Crooked Lane, Calcutta. With regard to the present suit the plaintiff's allegation is that the defendant was a monthly tenant under the firm in respect of the suit premises at a rental of Rs. 102/- payable according to English Calendar month. The plaintiff, according to the allegation made in the plaint, requires the premises for the purpose of building and rebuilding, for use and occupation and also for accommodation of its business. The plaintiff determined the tenancy by a notice calling upon the defendant to vacate the suit premises on the expiry of the last day of July, 1965. In spite of the notice duly served upon the defendant, it did not comply with the same and hence the present suit was filed.

3. The defendant filed a written statement. It was alleged that the suit was hit by S. 69 of the Indian Partnership Act, that the notice to quit was illegal, insufficient and void, that the plaintiff did not require the suit premises for building or rebuilding purposes or for their own requirement and occupation as alleged, that the plaintiff's accommodation at its disposal was more than sufficient and that the defendant had their machineries installed in the suit premises and had been running manufacturing business there.

4. The learned court below tried several suits against different tenants in respect of the premises No. 1, Crooked Lane, Calcutta analogously. Different issues were framed in different suits. Coming to our suit we find that the learned trial court found that the plaintiff required the suit premises reasonably for building and rebuilding purposes as alleged in the plaint and for its own use and occupation. It was also held that the suit was not hit by provision of S. 69 of the Indian Partnership Act. It was further held that the notice to quit duly served upon the defendant was legal and sufficient. On these findings a decree was passed.

5. We have heard Mr. B. C. Dutt, the learned Advocate appearing on behalf of the defendant-appellant and Mr. Nani Coomarr Chakraborty for the plaintiff-respondent.

6. Mr. Dutt advanced before us several contentions in support of the appeal

to attack the findings of the trial court on the question of the plaintiff's reasonable requirement for building and rebuilding of the suit premises and for its own occupation. Mr. Dutt's contention is that the learned court below failed to appreciate the evidence on record and that the further evidence that has been adduced in this appeal in connexion with additional issues framed on the basis of the decision of B. Banerji's case (AIR 1975 SC 1146) by the Supreme Court goes against the plaintiff on the question whether the plaintiff has any other reasonable and suitable accommodation and disproves the case of the plaintiff. It may be stated that in this appeal the respondent-plaintiff filed an application for amendment of the plaint in view of the decision given in B. Banerji's case by the Supreme Court. Additional written statement was put in and additional issues were framed to ascertain in addition whether the plaintiff has any other accommodation besides the suit premises for the requirement of the plaintiff and if there can be building and rebuilding without evicting the defendant. Another issue was framed to see if the suit was hit by sub-s. (3-A) of S. 13 of the West Bengal Premises Tenancy Act. Witnesses were examined of both the parties on this additional issue. Several witnesses were examined in the trial court both by the plaintiff and the defendant. P. W. 1 was a Control Clerk of First National City Bank, Calcutta. He has proved certificates of fund lying to the credit of Bhubaneswar Singh, Jagadishwar Singh, Benay Krishna Singh and Nageswar Singh in the Bank. P. W. 2 is an Assistant in the City Architect's Office of the Corporation of Calcutta. He has proved the sanctioned plan obtained by the plaintiff for the purpose of building in the suit premises. This has been marked Ext. 6. This witness was not cross-examined by the defendant in Suit No. 1661. This witness has also proved Ext. 6 (a) a plan of existing construction and basements and the said plan was also sanctioned. P. W. 3 is a Consulting Engineer and an Architect and Valuer. He is in the A. list of the Panel of Valuers of the Calcutta High Court. He prepared the plan and estimate for the building appearing in Ext. 6. He has also proved the estimate for the building marked Ext. 7. He also subsequently prepared a revised estimate which has been marked Ext. 7 (a). This was on the basis of the sanctioned plan. From this witness we get that the present building would be over

50-60 years old and that he prepared the plan according to the requirement of the plaintiff. P. W. 4 is a clerk of a Barrister who was once appointed Receiver in respect of the suit premises along with other properties. This witness did not give any evidence regarding requirement of the plaintiff. P. W. 5 is the Manager of the plaintiff firm. His evidence is that the firm is a registered partnership firm and he has proved memo of registration of the firm marked Ext. 9. He has also proved that the suit property was purchased by the firm. The sale deed has been marked Ext. 10. In the sale deed we also get the names of the partners of the firm as purchasers. This witness A. P. Bhatia has asserted that the firm requires the suit premises for erecting a new building after demolishing the existing structures. From his evidence we also get that the plaintiff's office is at premises No. 1, Crooked Lane and that after rebuilding the plaintiff will occupy the building for office and godown purposes. The witness has further stated that the plaintiff has means to defray the costs of the new building. The evidence further is that the partners of the firm pay income-tax exceeding 4½ lacs of rupees. Some income-tax papers have been marked Exts. 11 to 11 (C). Some income-tax receipts have been marked Exts. 12 to 12 (j). P. W. 5 has stated in evidence that the defendant has no manufacturing business in the suit premises. He has said that at the inception of the tenancy the defendant used the suit premises as an office room. This witness has been cross-examined at length. He has denied the suggestion that the proposal for the new building has been made in such a way as to evict the tenants. The suggestion was that the plan was prepared fraudulently and without any basis of requirement, but the said suggestion has been denied. Being cross-examined from the side of the defendant, the witness has stated that the company has no manufacturing business in the suit premises. It is to be noted that the witness was not cross-examined by the learned Advocate appearing on behalf of the defendant on his statement that at the inception of the tenancy, the company used the premises as an office room. No suggestion was made in respect of this statement. The witness has denied the suggestion that the present accommodation available to the plaintiff is more than sufficient for the purpose of the firm. He has also denied the suggestion that the plaintiff wanted to enhance the rent. We get from P. W. 5 that the

firm received notice from the Corporation of Calcutta for demolition of certain portions of the present building and repairing certain portions and that notice was marked Ext. 14. This notice is not relevant for the purpose of determination of the issue raised in this suit. It is not the case of the plaintiff that they have got to demolish any part of the suit premises in this case due to the notice for demolition issued by the Corporation. The case of the plaintiff definitely is that for reasonable requirement and accommodation it has got to construct a new building in place of the old one.

7. D. W. 1 is a defendant in another ejectment suit. He has stated that the building is very strong and that the plaintiff has set up a false plea of requirement after demolition of the building. In cross-examination he has stated that the building is very old. He has said nothing else of any importance. D. W. 2 is a defendant of another suit heard analogously. He has denied that the plaintiff will demolish the building and erect a new building. D. W. 3 is the defendant in Ejectment Suit No. 1093 heard along with the suit. He has simply stated that it is not a fact that the plaintiff will build a new house after demolishing the present structure. His evidence is that the funds shown by the plaintiff in this suit are meant for investment in the business, that is to say, he does not admit that the plaintiff has sufficient means for the purpose of making construction of the new building. He wants to say that the funds shown by the plaintiff would be utilised for the business investment. D. W. 4 is a defendant in one of the suits heard analogously. He denies that the plaintiff will demolish the present structure and will erect a new building. D. W. 5 is Sarju Singh. He speaks about the servants' quarter at premises No. 1, Crooked Lane. He says that the said quarters are in good condition and not liable to collapse and that the roof of the room is not leaky. D. W. 6 is the defendant in Ejectment Suit No. 2069 heard analogously. His evidence is that the plaintiff will not build any new building after demolishing the present structure. Of course he has received a demolition notice from the Corporation and he does not know whether the building is 80 years old. The defendant of Ejectment Suit No. 2070 has been examined as D. W. 7. He occupies one room in the servants' quarter at premises No. 1, Crooked Lane. He says that the room is

not liable to fall down although he has received a demolition notice from the Corporation. Let us now come to D. W. 8. He is an office Assistant of the defendant company. He says that the tenancy of Rs. 102/- of the suit premises was taken for manufacturing purpose and that the company carries on business of gumming, slitting and packing cigarette paper. He has stated that the defendant manufactures the cigarette paper and for this purpose the company has machineries driven by electric power. The witness has made an attempt to say that the tenancy of Rs. 102/- consists of 3 rooms and one shed on the ground floor. This story is a new one. It has not been pleaded in the written statement although in the plaint it was clearly stated that the defendant was a tenant in respect of one room described in the schedule. This is unacceptable. He has stated that the plaintiff has got 40/50 bighas of land at Kamarhati B. T. Road where the plaintiff firm has a factory. We also get from him that the factory has been extended. The witness has stated that the plaintiff has got sufficient accommodation for office staff, partners and others. The witness does not believe that the plaintiff would erect a new building after demolition of the existing structures at premises No. 1, Crooked Lane, Calcutta. The witness has further stated that the funds shown by the plaintiff will be invested in its business and not in construction of a new building. This witness does not know when this tenancy was created. He is in service of the defendant only for 6 years. He has admitted further that it is his surmise that the plaintiff would invest the funds shown in their business. The witness has further stated that the company does not manufacture cigarette papers which they purchase from elsewhere.

8. It may be mentioned that the defendant had another tenancy at 1, Crooked Lane and the plaintiff filed another suit against the defendant in respect of that tenancy as well. That suit along with several others were heard analogously and all the suits were decreed. The defendant appealed against the decree passed in the other suit but ultimately the defendant delivered possession of the suit property in that suit during the pendency of the appeal and the said Appeal No. F. A. 2 of 1968 was dismissed. As all the tenants except another delivered possession of the suit property to the respondent-plaintiff, the defendant filed a petition for local investigation by a competent

person to report if at the present moment when the plaintiff has got possession of the major portion of the house, the plaintiff still requires the suit premises in occupation of the defendant in this case for building and rebuilding and if for such building the defendant is to be evicted. A surveyor and valuer was appointed Commissioner for the purpose and he submitted report in favour of the plaintiff. Then the plaintiff examined him in this Court on the additional issues framed. At first F. A. 2 and this appeal were to be heard analogously but as F. A. 2 of 1968 was dismissed this appeal is heard alone.

9. Besides the evidence recorded in the trial court as already discussed, the plaintiff has adduced further evidence in this case on the additional issues already mentioned. The defendant has also adduced some other evidence. Nageswar Singh, one of the partners of the plaintiff firm has examined himself. The witness has stated that the firm has no other accommodation which may satisfy its requirement for space. The premises No. 30, Basanta Roy Road belongs to the firm where Jagadishwar, Bhubaneswar and Benay Krishna, the partners are residing and in premises No. 204, Sarat Bose Road the witness himself is residing. The witness has further stated that the plot No. 117, B. T. Road does not belong to the firm but its owner is Beni Ltd., a different concern. The witness has also stated that the proposed construction for the requirement of the plaintiff cannot be made without the tenants being evicted. The witness has stated that it would be false to suggest that the firm has any other accommodation in Calcutta or elsewhere by which the firm can satisfy the requirement for space. It has been suggested to this witness during cross-examination that the premises at 30, Raja Basanta Roy Road and 204, Sarat Bose Road constitute sufficient accommodation for the residential quarter of the partners of the firm as well as office accommodation. The witness has stated that these premises are only residential accommodation and that there is no office in those premises. It is also suggested that the new building can be constructed after demolishing the existing building part by part. But the answer is that it cannot be done. It has been suggested further that without disturbing the occupation of the defendant, new construction can be done. Again the suggestion has been denied. The next witness examined on the side of the plaintiff-respondent is Sukumar Dey, a

Chartered Surveyor and Valuer. On receipt of an order from this Court the witness inspected and surveyed the premises No. 1, Crooked Lane. He had submitted a report. This witness got a plan prepared under his supervision. That report has been marked H. C. Ext. No. 1. He has stated that the said report is correct. He inspected the suit premises on 9th July, 1976. At that time only two tenants were found. One was Marquas Garage and the other was the defendant company. This witness has seen the proposed plan of the building relied upon by the plaintiff. He got the sanctioned plan given to him. According to him on scrutiny of the plan sanctioned by the Corporation, the building construction work cannot be carried out in the premises without evicting the tenants. This expert witness has been examined practically for the purpose of saying whether the construction of the plaintiff's proposed building can be done without the premises being vacated by the tenants and his definite evidence is that on scrutiny of the sanctioned plan the construction work of the new building cannot be carried out in the premises without evicting the tenants. On this point, however, the witness was not cross-examined at all. The defendant, however, examined in this appeal an employee of the company. He is an Administrative Officer. This witness has been examined-in-Chief on the question whether the plaintiff requires this space for car parking or whether it has got any godown in the suit premises. The witness says that the plaintiff has a factory at B. T. Road. During cross-examination the witness has stated that Beni Limited is the owner of the factory at B. T. Road. The witness was also cross-examined regarding space for car parking.

10. Mr. Dutt has argued that in connexion with the additional issues framed in this Court, the plaintiff's witness stated that some space was necessary for car parking. It has been submitted that this requirement for car parking is something new not spoken about in the trial court. I cannot accept this proposition because the original case of the plaintiff that it requires the suit premises for building and rebuilding and for accommodation for its office and godown remains. In connexion with the business, space for car parking is necessary and in that connexion space about car parking was referred to. I cannot hold that any new case has been brought at the appellate stage or that the

story of reasonable requirement set up by the plaintiff in the pleading has been given a go-bye. On consideration of the evidence on record, there can be no doubt that the plaintiff reasonably requires the suit premises for building and rebuilding and also for use and occupation and for accommodation for its business purposes including office accommodation and for the use of godown. The plaintiff is not in possession of any reasonably suitable accommodation and its requirement will not be satisfied by partial eviction of the defendant. This reasonable requirement of the plaintiff is bona fide.

11. In connexion with the reasonable requirement it has been urged from the side of the appellant that the disputed property was not purchased by the firm, but by Jagadishwar Singh, Bhubaneswar Singh, Nageswar Singh and Benay Krishna Singh in their personal capacity and, therefore, when the firm does not own the suit property, there cannot be any valid case for reasonable requirement of the suit premises by the firm. The relevant sale deed is Ext. 10 executed by the vendors in favour of Jagadishwar Singh and three others as already mentioned. In this deed it is stated that the vendees are Hindu Traders carrying on business in partnership under the name and style of B. M. Singh & Son at No. 1, Crooked Lane in the town of Calcutta. This indenture is dated 29th of Mar. 1963. From the recitals of the document and also from the description of the vendees there can be no doubt that the property in question was purchased by the partners on behalf of the firm. It should also be noted that although in the plaint the plaintiff asserted that the firm was the owner of the suit premises, the company in the written statement did not dispute or challenge the said assertion. Besides P. W. 5, the Manager of the firm stated that the plaintiff-firm purchased the suit property by a sale deed marked Ext. 10. The witness has not been cross-examined on that point and moreover no evidence was adduced from the side of the defendant to challenge that statement. The contention raised by Mr. Dutt is, therefore, unacceptable.

12. It has been next contended by Mr. Dutt that in view of the dismissal of Ejectment Suit No. 844 of 1964 previously brought by the plaintiff against the defendant on ground of reasonable requirement of the suit premises for the use and occupation of the plaintiff and default in payment of rent, the present suit on the

same ground and on the same cause of action is not maintainable and also barred by the principles of res judicata. Ext. D is the certified copy of the plaint of the Ejectment Suit No. 844 of 1964. It appears that the plaintiff filed an ejectment suit against the defendant in the City Civil Court at Calcutta on the ground that the plaintiff-firm required the premises for their own use and occupation and that the defendant was a defaulter in payment of rent from the month of July, 1963. Exhibit E is the certified copy of the order dated 16-6-1965 showing that the suit was dismissed for non-prosecution as the learned Advocate appearing on behalf of the plaintiff had no instruction to proceed with the suit. First of all it is seen that in the previous suit the grounds for eviction were that the plaintiff required the suit premises for their own use and occupation and that the defendant was a defaulter in payment of rent. It also appears that the plaintiff did not proceed with that suit and as such the suit was dismissed. In the present suit, however, the plaintiff-firm has stated that it requires the suit premises for the purpose of building and rebuilding and for their own use and occupation and for accommodation of their business. In the previous suit the tenancy was terminated with the expiry of the last day of December, 1964. It appears, however, that after the dismissal of the previous suit the firm recognising the defendant company, a tenant as before again determined the tenancy by notice with the expiry of the last day of July, 1965. In the present suit the company has asserted in the written statement that its tenancy has not been determined and that its tenancy has been continuing as before as the notice to quit is illegal and insufficient. In a case like this the cause of action is continuing as the plaintiff requires the suit premises for its own use and occupation. Moreover in the present suit there is the further additional ground for building and rebuilding which was not the ground of eviction in the previous suit. It is no wonder that the plaintiff-firm wanted to bring a more comprehensive suit for eviction on several grounds including the one for building and rebuilding and that was the reason why the plaintiff did not proceed with the previous suit. We also get that in the previous suit there was no decision on merits of the plaintiff's case. In the present suit the cause of action is different. On these grounds we cannot hold that the present suit is hit by the

principles of *res judicata* or estoppel. The suit is maintainable.

13. It has been next argued by Mr. Dutt, the learned Advocate appearing on behalf of the appellant that on account of the promulgation of the Urban Land (Ceiling and Regulation) Act, 1976 the plaintiff-firm cannot make use of the entire land covered by premises No. 1, Crooked Lane, Calcutta because according to him there is excess of vacant land which the plaintiff cannot retain. It has been argued further that due to the prescribed ceiling of land under the said Act the plan of the building on which the plaintiff must rely cannot be allowed to be made use of. The Urban Land Bill of 1976 was introduced in the Lok Sabha on 28-1-1976. The bill with some amendments was passed on 5-2-1976 and the President gave his assent on 17-2-1976. This objection was not taken in the additional written statement filed before this Court. This point has been taken up just before the hearing of the appeal. It appears from the provisions of the Act that there is prescribed authority to consider about the ceiling and also the claim made by the owners of the lands and that authority will decide what would be the ceilings in particular cases and how far the claims of the proprietors of the land can be allowed. In this appeal, in my view, there is no such scope for ascertaining the ceilings or the claims as prescribed by the said Act. That is a matter to be considered by the authority prescribed by the Act and also the appellate authorities prescribed therein. In this appeal we are to see whether there is a bona fide and reasonable requirement of the suit premises by the plaintiff-firm for building and re-building and for use and occupation as stated in the plaint. If it is proved that the requirement of the suit premises as alleged by the plaintiff is genuine and bona fide and reasonable in view of the facts and circumstances, there can be no valid reason to dismiss the plaintiff's suit. There is no doubt that in the present case the plaintiff requires the suit premises and that the building proposed to be constructed cannot be made unless the defendant is evicted. There is no evidence either before us adduced by the defendant that there is any vacant space to be attracted by the Urban Land (Ceiling and Regulation) Act, 1976 prejudicially to the interest of the plaintiff-firm. A petition was filed in this respect on 2-9-1976 before hearing and it has been objected to by the respondent challenging the allega-

tions. We cannot, therefore, accept Mr. Dutt's contention.

14. Mr. Dutt's next point is that the suit is not maintainable as there has been no legal partnership business according to law. He wants to argue that the partnership is bad in law because there was a minor taken as a partner and according to the provisions of Partnership Act a minor cannot be a partner. It has been further argued that the suit is hit by S. 69 of the Partnership Act. Let us now consider the evidence on record. The certified copy of the extract from the Register of Firms has been marked Ext. 9. In the columns for the names and addresses of the partners and the date of joining or changes therein we get that Bhubaneswar Singh representing the joint family consisting of himself and his brother Nageswar Singh and his minor son residing at P-30, Raja Basanta Roy Road, Calcutta was described as a partner and Jagadishwar Singh residing at 42, Sikdarpara Street, Calcutta was mentioned as another partner. The Registrar gave his signature on 16-8-1955 which presumably appears to be the date of registration. We further get from this exhibit that in July, 1961 there was a notice of changes in the constitution and in the column for names of the partners we get Jagadishwar Singh, Bhubaneswar Singh, Nageswar Singh and Benay Krishna Singh. It is quite clear that although Bhubaneswar Singh originally represented the joint family consisting of himself and his brother Nageswar and his minor son, the name of the said minor son of his was not mentioned as partner but after the change in the constitution of the partnership in July, 1961 Benay Krishna Singh has been mentioned as a partner. Admittedly he was the minor son of Bhubaneswar referred to already. That Benay Krishna Singh was the son of Bhubaneswar Singh will appear in Ext. 10. In Ext. 9 we further get that in Sept., 1962 there was a notice of attaining majority and electing to become a partner by Benay Krishna who was originally described as minor son. In the column meant for recording of changes of constitution we find the remark made by the Registrar that Benay Krishna was admitted to the benefits of Partnership from 1-6-1961. On consideration of the evidence on record there can be no doubt that originally Bhubaneswar Singh representing the joint family consisting of himself, his brother Nageswar and his minor son entered into a partnership busi-

ness with Jagadishwar Singh. Bhubaneswar certainly could as Karta or representing his joint family as in this case enter into a valid partnership with another person Jagadishwar Singh. This is not a case of joint family business or any alleged family partnership business referred to in S. 5 of the Indian Partnership Act. In this connexion the case of Commissioner of Income-tax, West Bengal v. Kalubabu Lalchand reported in AIR 1959 SC 1289 may be referred to. In para. 10 of the said judgment we get:—

"It is now well settled that a Hindu undivided family cannot as such enter into a contract of partnership with another person or persons. The Karta of the Hindu undivided family, however, may and frequently does enter into partnership with outsider on behalf of and for the benefit of his joint family, but when he does so, the other members of the family did not vis a vis the outsiders, become partners in the firm".

In the present case Bhubaneswar representing the joint family entered into partnership with Jagadishwar Singh. The minor son of Bhubaneswar was not a partner. Subsequently in July, 1961 there was change in the constitution of the partnership and Jagadishwar Singh, Bhubaneswar Singh and Nageswar Singh became partners and Benay Krishna Singh, a minor was admitted to the benefit of the partnership. This benefit given to the minor was quite legal. Later on in September, 1962 Benay Krishna Singh gave notice that he had attained majority and that he had elected to become a partner. This was accepted and as such he also became a partner along with Jagadishwar Singh, Bhubaneswar Singh and Nageswar Singh. In the year 1963 the suit property was purchased by all these four partners, namely, Jagadishwar Singh, Bhubaneswar Singh, Nageswar Singh and Benay Krishna Singh as partners of B. M. Singh and Son. There has been erroneous printing of Ext. 9 included in the Paper Book. In the columns for the names and addresses of the partners a full stop was omitted after the words "his minor son" meaning the minor son of Bhubaneswar and in fact and admittedly Jagadishwar was not minor son of Bhubaneswar. In view of what I have already discussed there can be no doubt that there has been legal registration of the partnership and that there was no occasion for any minor being admitted as partner. We find no ground to hold that the present

case is hit by S. 69 of the Indian Partnership Act

15. With regard to the question whether the suit is barred by sub-s. (3-A) of S. 13 of the West Bengal Premises Tenancy Act, the fact is that the plaintiff purchased the suit property in Mar., 1963. The suit was filed in Sept., 1965. Sub-s. (3-A) of S. 13 was introduced in 1969 when this appeal was pending. In view of the decision of the Supreme Court in the case of B. Banerji v. Anita reported in (1975) 1 SCC 166 : (AIR 1975 SC 1146), the plaintiff-respondent amended the plaint by a petition filed in August, 1975. A written statement was filed and after the striking of additional issues, the parties led evidence. In these circumstances in view of the decision in B. Banerji's case the technical difficulty is overcome after the amendment petition on the ground that 1975 may be taken as the year of institution of the suit for pleadings mentioning grounds under Cls. (f) and (ff) of S. 13 (1) of the West Bengal Premises Tenancy Act. This procedure avoids multiplicity of proceedings and litigative waste without impairing proper justice. We find that the present suit is not hit by sub-s. (3-A) of S. 13 of the West Bengal Premises Tenancy Act.

16. The last point canvassed by Mr. Dutt is that the notice to quit served upon the defendant in the instant case was invalid in law and insufficient. The contention of Mr. Dutt is that the plaintiff has been doing manufacturing business in the suit premises and that in view of S. 106 of the T. P. Act when the defendant has not been given six months' notice to quit the suit is not maintainable. Admittedly one month's notice to quit was served upon the defendant. The allegation about the determination of tenancy by a notice has been made in para. 3 of the plaint. In para. 2 of the plaint it is stated that the defendant was a monthly tenant under the plaintiffs in respect of the suit premises at the rent of Rs. 102/- per month payable according to English Calendar. Regarding the allegation made in para. 3 about the notice to quit and the determination of tenancy it is stated in para. 4 of the written statement that the notice to quit is invalid, illegal, insufficient and void and as such it cannot determine the tenancy. In para. 5 of the written statement it is stated that the defendant has machineries installed in the suit property and that it runs its manufacturing business there. P. W. 5 on

the side of the plaintiff has stated that the defendant has no manufacturing business in the suit premises and that at the inception of the tenancy the defendant used the premises as an office room. During cross-examination by the defendant there was a suggestion that the defendant had manufacturing business, but the said suggestion has been denied. The witness has stated that the defendant carries on business of cutting and gumming cigarette paper. The plaintiff's witness was not cross-examined about his evidence that at the inception of the tenancy the defendant used the premises as an office room. D. W. 8 is the relevant witness from the side of the defendant. He has stated that the tenancy of Rs. 102/- was taken for manufacturing purposes. According to him the defendant carries on business of gumming, slitting and packing cigarette paper and he says that the defendant manufactures cigarette paper. During cross-examination this very witness has stated that the defendant does not manufacture the cigarette paper which the defendant purchases from elsewhere. This witness is a new comer in the defendant's company. He is an office assistant. No responsible officer comes to depose on behalf of the defendant. This witness does not know when the tenancy was created. According to this witness certain machineries are in the suit premises for the purpose of manufacturing of cigarette paper but it does not say what actually is done by the machineries. He does not say when the machineries were installed. He has no personal knowledge as to the terms of tenancy when it was taken because he was not at that time an employee of the defendant. He does not bring any reliable documentary evidence about the terms of tenancy. Neither any officer of the defendant nor the Directors thereof have been examined to show that the tenancy was taken for manufacturing business or purposes, although the Directors were in Calcutta at the time of trial of the suit. No explanation has been given why any responsible officer has not come forward to depose to show that the tenancy was for manufacturing purposes. It is for the defendant to prove that the lease or tenancy of immovable property was for manufacturing purposes. It may be that during the continuance of the tenancy taken for purposes other than manufacturing one the tenant might have started manufacturing business subsequently but that will not entitle him to get six months' notice to quit the suit

premises expiring with the end of a year of tenancy. We have got no doubt to hold that there is no reliable evidence on record to prove that the tenancy of the defendant was for manufacturing purposes and we agree with the findings of the court below. It is to be noted in particular that it has not been pleaded in the written statement that the tenancy of the defendant was for manufacturing purposes. On this point the defendant was silent. It was simply stated that the defendant has machineries installed in the suit property and runs manufacturing business. The defendant has failed to discharge the onus lying upon it to prove that the tenancy was for manufacturing purposes.

17. Coming to the question whether the company is doing any manufacturing business, Mr. Chakraborty for the respondent has urged in support of the decree that the court below ought to have held that the defendant has no manufacturing business in the suit premises. First of all in the written statement it has not been indicated the nature of manufacturing business the defendant runs. P. W. 5 has said during examination-in-chief that the defendant has no manufacturing business but in cross-examination no suggestion has been thrown as to the nature of the alleged manufacturing business. D. W. 8, an office assistant has stated "We carry on business of gumming, slitting and packing cigarette paper. We manufacture the cigarette paper". In cross-examination this very witness has admitted, "we do not manufacture the cigarette papers which we purchase from elsewhere". The story of manufacture crumbles down. Moreover, the question is whether gumming, slitting and packing cigarette paper is manufacturing business. In the case of Kartick Chandra Dutta v. Jagesh Chandra Das reported in (1976) 3 Cal HC (N) 112 the meaning of 'manufacture' referred to in S. 106 of the T. P. Act came to be considered by me and I had occasion to discuss that point with reference to several decisions. In particular the decision of the Supreme Court in the case of S. H. Sugar Mills v. Union of India, AIR 1968 SC 922 was relied upon. In that case it was held:

"The word 'manufacture' implies a change but every change in the raw material is not manufacture. There must be such a transformation that a new and different article must emerge having a distinctive name, character and use."

In the case before us simply putting gum on the cigarette paper purchased from market and cutting the said paper into strips and then packing the same again cannot be called manufacture of cigarette paper. This is not a manufacturing process as contemplated in S. 106 of the T. P. Act. The learned trial court, in my view failed to appreciate the true import of manufacturing purposes referred to in S. 106 already mentioned. The learned Judge below went wrong to hold that the defendant carried on manufacturing business without any evidence of manufacture.

18. In view of the decision and the findings above, it must be held that six months' notice to quit as required in S. 106 of the T. P. Act in case of tenancy for manufacturing purposes was not necessary to be served on the defendant and I express no view in this case on the question whether such a notice would be necessary even if the tenancy runs from month to month.

19. There is no merit in the appeal. The petition filed by the appellant on 2-9-1976 for application of the provision of the Urban Land (Ceiling and Regulation) Act, 1976 to set aside the decree of the trial court stands rejected in view of our findings in the judgment.

20. The appeal is dismissed with costs. The plaintiff is to complete the construction of the building within 3 (three) years from the date when he gets khas possession of the entire premises No 1, Crooked Lane, Calcutta by evicting the tenants. He may apply for extension of time under S. 18-A of the West Bengal Premises Tenancy Act to the trial court which is to dispose of the application according to law.

21. Send down the records to the trial court.

A. K. JANAH, J.:— I agree.

Appeal dismissed.

AIR 1977 CALCUTTA 312

MRS. PADMA KHASTGIR, J.

M/s. Daga Films. Plaintiff v. M/s. Lotus Production and others, Defendants.

Suit No. 288 of 1970, D/- 4-7-1977.

Civil P. C. (1908), O. 8, Rr. 6-A and 6-D (as amended by Act 104 of 1976) — Counter-claim by defendant — Plaintiff discontinuing his claim in plaint — Defen-

dant has a right to get a decree of a counter-claim.

Under the Civil P. C. (1908), a counter-claim by itself was incompetent and was enforceable by way of a separate suit. Order 8, Rule 6 read with O. 20, R. 19 empowered the court to make an order enabling the defendant to set off the plaintiff's claim and pronounce judgment for the sum due by way of counter-claim in favour of the defendant. Of course, in appropriate cases, courts could always grant equitable relief to the defendants, if necessary. Under the New Code specific provision has been made for counter-claim. Under O. 8, R. 6-A, sub-rr. (2) and (4) and O. 8, R. 6-D if the suit of the plaintiff is discontinued or dismissed, the counter-claim may nevertheless be proceeded with as in the case of a counter-claim written statement is really in the nature of a plaint. So even if the plaintiff's claim is not pressed or given up or withdrawn or breaks down for any reason whatsoever, the defendant has still the right to get a decree of a counterclaim as claimed in the written statement.

(Para 19)

Under the new amendment, by the Act of 1976 of the Civil P. C., 1908, pending suits would be governed by the provisions of the new Code. As nobody has any vested interest in procedural law, as such the new amendment would be attracted to the pending suits.

(Para 21)

In the instant case, although counter-claim has been pleaded in the written statement of the defendant the plaintiff did not seek for leave to file an additional written statement in answer to the counter-claim of the defendant nor the plaintiff at any time before the issues were settled applied to the Court for an order that such counter-claim may be excluded. Moreover, the plaintiff had discontinued its claim in the plaint in the sense that the plaintiff did not raise any issue, on the contrary, submitted before the Court that the plaintiff had accepted the position and has raised no objection so far as the counter-claim was concerned.

Held that the defendant was entitled to a decree of a counter-claim as claimed in the written statement.

(Para 21)

Cases Referred: Chronological Paras

AIR 1930 Cal 422	21
AIR 1926 Cal 447	22
(1907) ILR 34 Cal 289	22
(1906) ILR 33 Cal 702	22

J. N. Roy with Ranjan Dutt, for Plaintiff; B. K. Ghosh with P. K. Roy, for Defendant No. 2.

ORDER :— This suit was filed by Messrs. Daga Films, the plaintiff herein, against Messrs. Lotus Production and Mr. D. N. Mehta for (a) declaration that the document dated 7th April 1970 is void and/or voidable; (b) perpetual injunction restraining the defendants from enforcing the said document dated April 7, 1970 by realising any further sum from the plaintiff in respect of the film 'Juari'; (c) decree for Rs. 1,00,000/- by way of damages and (d) injunction, Receiver cost and other consequential reliefs.

2. The defendant No. 1 did not contest the suit nor filed any written statement. The defendant No. 2 Mr. D. N. Mehta filed a written statement and also contested the suit. The facts of this case are that the plaintiff carried on business in partnership as distributor of cinematographic films and the defendant No. 1 carried on business of motion pictures production at Ranjit Studio, Dadar, Bombay. The defendant No. 1 as such producer was producing a motion picture in Hindi version in black and white title 'Juari'. On 18th March 1964 an agreement was executed by and between the plaintiff and the defendant No. 1 wherein the defendant No. 1 assigned to the plaintiff the sole and exclusive right of execution, distribution and exploitation of the said picture 'Juari' in the Bengal Circuit territory, on various terms and conditions as contained in the original document dated 18th March 1964. The relevant clauses for the purpose of this suit are (1) in consideration of the assignment the distributors agreed to pay to the producer a sum of Rs. 1,30,000/- by way of minimum guarantee basis. Over and above, the distributors agreed to spend on behalf of the producer a sum of Rupees 40,000/- towards publicity. The producers agreed to supply to the distributor nine brand new positive release prints duly censored. It was further agreed that if the distributors required any extra prints or loan prints the same shall be supplied by the producer provided raw stocks were available and the negatives were in fit condition to take out such prints. Costs for such prints shall be paid by the distributor at the time of placing of such order. Distributors shall not cut, tamper with, edit, dupe or dub in any language the said picture. The producers agreed that they would complete the picture, get it censored and deliver to the distributors the quota release prints on or before 30th June 1964 with a grace period of two months. In case the producers fail to deliver the release prints on or be-

fore the expiry of the grace period, distributors shall be entitled to cancel the agreement and demand repayment of the amount with interest at 9%. In case the distributors fail to deliver the quota prints against stipulated payment within two months from date of the written intimation from the producers the producers shall have the option to terminate the agreement. Pursuant to that agreement, the plaintiff duly paid to the defendant No. 1 a sum of Rs. 60,000/-.

3. In October 1969 it was further agreed by and between the plaintiff and the defendant No. 1 that the defendant No. 1 would deliver or cause to be delivered 12 brand new prints to the plaintiff instead of 9 prints. By a letter dated 17th October 1969 the defendant No. 1 intimated to the plaintiff about further mutual agreement that was arrived at on 15th of October, 1969. Under the said agreement the plaintiff agreed to pay a total sum of Rs. 1,95,000/- on outright sale basis for perpetual period and not on minimum guarantee basis as was agreed upon by the first agreement, against delivery of 12 quota brand new released prints the plaintiff agreed out of the agreed amount of Rs. 1,35,000/- to send a bank draft of Rs. 35,000/- to Messrs. Ramnord Research Laboratories Ltd. for purchasing black and white positive stock for preparing 12 prints and will pay a sum of Rs. 1,00,000/- against delivery of 12 quota prints. The defendant No. 1 agreed to indemnify the plaintiff from any claim or loss for the said picture in the Bengal Circuit excluding Bihar and Nepal. By letter dated 3rd of July, 1968 the defendant No. 1 requested the plaintiff to get the said picture released in the Bengal Circuit and complained that the plaintiff had no inclination of taking delivery of material against payment of Rs. 20,000/-. In that letter the defendant No. 1 also stated that if the agreement was cancelled they would deposit with E. I. M. P. A., Calcutta the sum of Rs. 60,000/- so far paid by the plaintiff to enable them to negotiate and dispose of the distribution rights in respect of the said picture to any other party.

4. The defendant No. 1 assigned its right, title and/or interest in respect of the said film 'Juari' to the defendant No. 2. By letter dated 9th March 1970 the defendant No. 1 requested the plaintiff to ignore the previous arrangement of taking delivery of the prints from Messrs. Ramnord Research Laboratories Ltd. and in-

stead requested the plaintiff to take delivery from the defendant No. 2 or Messrs. Famous Cine Laboratories and Studios Private Limited, Mahalakshmi, Bombay of the prints of the said picture. By letter dated 7th April, 1970 the plaintiff intimated about the release of the picture 'Juari' on and from 17th April 1970 at Roxy and other cinema houses at Calcutta and requested the defendant No. 2 to deliver 12 brand new prints and 8 loan prints for one week's use and in return the plaintiff agreed to supply 4 prints on loan for two weeks for use in Delhi and U. P. By another letter dated 7th April 1970 the plaintiff and the defendant No. 2 recorded an agreement by and between them that the defendant No. 2 would give delivery of 12 brand new prints and 8 loan prints on condition that the plaintiff would pay to Mrs. Famous Cine Laboratories and Studios Pvt. Ltd., Bombay on account of Mr. D. N. Mehta under the contract, a sum of Rs. 90,000/- against delivery of 12 brand new prints and the balance Rupees 40,000/- would be paid to Mr. D. N. Mehta on instalments as envisaged in the said letter. The said letter has been signed by Mr. D. N. Mehta, the defendant No. 2 herein and also by Mr. S. N. Daga, a partner of the plaintiff under the endorsement "agreed and confirmed".

5. According to the plaintiff, the plaintiff made all arrangements to release the said prints on and from 17th April 1970 at Roxy and other cinemas at Calcutta and called upon the defendant No. 2 to deliver 12 brand new prints and 8 loan prints. According to the plaintiff, the letter dated 7th April 1970 was obtained by the defendant No. 2 wrongfully and illegally and by exercising undue influence and/or coercion whereunder the plaintiff was to pay a sum of Rs. 90,000/- against delivery of 12 brand new prints and further amount of Rs. 40,000/- on instalments. The plaintiff's further case is that the defendant No. 2 threatened that unless the plaintiff put his signature to the document the defendant No. 2 would refuse to endorse the R/R in favour of the plaintiff in respect of one print of the said film and further stated that only after signing of the letter dated April 7, 1970 the defendant No. 2 endorsed the R/R in favour of the plaintiff.

6. On 14th April 1970 the plaintiff paid a sum of Rs. 60,000/- and took delivery of 8 prints from Messrs. Famous Cine Laboratories and Studios Private Ltd., as instructed by the defendant No. 2. The plaintiff also took delivery of one loan

print and 6 extra prints by paying a total sum of Rs. 18,334.40.

7. After release of the said film on April 17, 1970 at Roxy and other cinemas according to the plaintiff, the plaintiff was surprised to find various complaints from various cinema halls in respect of the said prints being defective as because the prints were prepared from dupe negative. The said prints snapped frequently and were blurred and caused disturbances. The plaintiff's further case is that in spite of the repeated demand the defendant No. 2 failed and neglected and refused to supply to the plaintiff brand new prints replacing the use of the said defective prints.

8. In the written statement the defendant No. 2 in para. 10 has pleaded and also gave out the circumstances under which the Ramnord Laboratories did not deliver the release prints of the said picture even against payment of the balance sum of Rs. 1,35,000/-.

9. In view of the said wrongful conduct of the said Ramnord Laboratories, Mr. Barubax Daga on behalf of the plaintiff in order to recover the plaintiff's own investment of Rs. 60,000/- and to obtain the prints of the said picture suggested the defendant No. 2 to prepare dupe negative of the said picture in possession of the said defendant and offered to take delivery of such prints prepared from dupe negative. The defendant No. 2 agreed to the said suggestion and in January 1970 instructed the said Famous Cine Laboratories and Studios Ltd. to prepare the dupe negatives from the original prints. Thereafter the agreement was arrived at in March 1970 regarding delivery of the prints to be taken from Famous Cine Laboratories instead of from Ramnord Laboratories on payment by the plaintiff of the total sum of Rs. 1,35,000/-. Because of the plaintiff's inability to pay the entire sum of Rs. 1,35,000/- Mr. Barubax Daga requested the defendant No. 2 to reduce the said amount to some extent and after mutual discussion the defendant No. 2 agreed to reduce the sum of Rupees 5,000/-. According to the defendant No. 2 the said agreement was arrived at the presence of Mr. Nirmal Kumar Bose, Solicitor acting for and on behalf of the plaintiff. In fact, it is the case of the defendant No. 2 that said Mr. Bose dictated the said letters to the plaintiff's Stenographer dated 7th April 1970. According to the defendant No. 2 the print that was handed over to the plaintiff was exhibited by the plaintiff at a private show at Roxy

Cinema in the presence of other exhibitors and also the defendant No. 2 who approved of the same. On 8th April 1970 pursuant to the request made by the defendant No. 2 Messrs. Rashed Mehta and Co. despatched from Secunderabad 3 loan prints and the same were received by the plaintiff on April 13, 1970. The plaintiff expressed its satisfaction regarding the said prints and requested the defendant No. 2 to instruct Messrs. Famous Cine Laboratories Ltd. to despatch to the plaintiff 5 prints already prepared towards 3 quota prints together with 3 loan prints against payment of Rs. 60,000/-. Messrs. Famous Cine Laboratories Ltd. thereupon on April 9, 1970 issued 5 brand new prints against payment of Rs. 60,240/- inclusive of packing and forwarding charges. As Mr. Daga was not able to arrange for the balance amount of Rs. 30,000/- in full he paid the said Famous Cine Laboratories Ltd. a sum of Rs. 12,000/-, Rs. 6,334.40 on 11th April 1970 and 13th April 1970 respectively and personally took delivery of the remaining 7 brand new quota prints. Out of the 7 loan prints the plaintiff returned only one print but retained with them the remaining 6 loan prints. By letters dated 22nd April 1970, 30th April 1970 and telegram dated 27th April 1970 the defendant No. 2 called upon the plaintiff to remit the balance amount payable by the plaintiff and also to return the said loan prints. The plaintiff did not reply to any of the letters and/or the telegram. On repeated requests being made by the defendant No. 2 for return of loan prints the plaintiff ultimately agreed to return one and retain the said 6 loan prints and adjusted the price of the same with the amount of Rs. 18,334.40 already paid by the plaintiff. The defendant No. 2 by his letter dated May 18, May 29, June 6, June 20 and July 13 repeatedly demanded from the plaintiff for payment of the balance amount. By the letter dated 20th June 1970 the defendant No. 2 informed the plaintiff that unless the payments were made they would be compelled to take legal action against the plaintiff. None of the said letters has been replied to by the plaintiff. The plaintiff filed the present suit on July 7, 1970 and informed this defendant by their Solicitor's letter dated July 9, 1970. The defendant No. 2 denied about various alleged complaints regarding the exhibition of the said prints. The defendant No. 2's further case is that except the plaintiff none of the other distributors of Bombay, Nizam, C. P., Berar, East Punjab, Tamil Nadu, Andhra Pradesh, Fiji,

U. S. A., etc. had put forward any complaint in respect of the dupe prints. As one song sequence was very slow, uninteresting, it was cut by the parties to please the audience. It is the case of the defendant No. 2 that prior to the filing of the present suit the plaintiff did not anywhere record in writing or protest orally regarding the alleged defects of the dupe prints. There has been no whisper about the same. According to the defendant the plaintiff has accepted the said quota prints with full knowledge that the same were prepared from dupe negative by the said Famous Cine Laboratories Ltd. and after seeing the trial run by the said print. The defendant No. 2 has made out a counterclaim in the written statement in respect of a sum of Rs. 70,000/- from the plaintiff with interest and costs. Mr. Barubax Daga was examined on commission on behalf of the plaintiff and Mr. N. Sarkar, the proprietor of the defendant No. 1 was examined on behalf of the defendant No. 2 *in de bene esse*. The suit was opened before me on June 23, 1977 whereupon Mr. B. K. Ghosh, Barrister-at-Law appearing with Mr. P. K. Roy, Barrister-at-Law appeared on behalf of the defendant No. 2 and suggested the following issues to be framed in the trial:

1. Is the plaintiff firm duly registered under the Indian Partnership Act, 1932 as alleged in para. 1 of the plaint?

2. Did the defendant No. 2 get the document dated April 7, 1970 signed by Sri S. N. Daga, partner of the plaintiff firm wrongfully, illegally or by exercising any undue influence or coercion as alleged in para. 14 of the plaint?

3. Were the prints of the film 'Juari' supplied by the defendant No. 2 to the plaintiff thoroughly defective or unworthy of proper public exhibition as alleged in para. 19 of the plaint?

4. Were the prints in question made from dupe negative at the suggestion and instance and/or with the knowledge of the plaintiff as alleged in the Written Statement?

5. To what reliefs, if any, are the parties entitled?

10. Mr. J. N. Roy, Barrister-at-Law appearing with Mr. Ranjan Dutt, Barrister-at-Law at this stage stated that his client would not press the claims made against the defendants but would contest the claim of the defendant No. 2. As such, the only issue was framed in the manner following:

To what relief, if any, is the defendant No. 2 entitled?

11. The defendant No. 2 examined himself and in his examination he supported his

case. He was cross-examined at length but no material and/or substantial contradiction could be brought out from his cross-examination nor did he admit coercion and/or undue influence that was alleged to have been exercised by the defendant No. 2. The defendant No. 2 relied on the following questions so far as the examination of the defendant No. 2, defendant No. 1 and Mr. Barubax Daga is concerned are the following:

12. Questions Nos. 69, 70, 71, 73, 116, 117, 151, 338, 339, 340, 343, 346, 347, 348, 462, 521 and 522. He has further referred to the following questions on the point of outright sale by and between the plaintiff and the defendant No. 2 and the said questions are questions Nos. 30, 64, 65, 66, 67, 109, 110, 112, 116, 121, 122, 131, 132, 182, 187, 215, 220, 234, 261, 285, 357, 358, 380, 381, 438, 443, 444, 453, 455, 519, 524, 525, 531. So far as Mr. N. Sarkar's evidence is concerned, the defendant No. 2 has relied on the following questions so far as dupe negative is concerned. The said questions are 7, 8, 9, 10, 30, 31, 32, 36, 39, 68, 69, 70, 87, 94, 98, 99, 100, 101, 103, 106, 107, 110, 111, 117, 118, 134 to 136, 138, 139, 141, 142, 146, 148, 155, 156, 162, 163, 171, 172, 293, 336, 361, 363, 364, 366, 369, 370, 372, 374, 376, 377, 381, 383, 384, 388, 396, 399, 402, 404, 405.

13. On the question of outright sale the questions 19 and 20 have been referred to in the examination of Mr. N. Sarkar. Mr. Barubax Daga, defendant No. 2 has examined himself in Court and his evidence so far as dupe negatives are concerned has been mainly relied on by the defendant No. 2, the following questions: 41, 42, 44 to 52, 56, 64, 65, 71-73, 92, 94-100, 123, 126, 198, 205, 266, 285, 289, 290, 292, 318, 319, 327, 328, 332, 333, 335, 338, 340, 341, 344, 349, 350, 351, 363, 366, 369, 372, 373, 389, 392, 406, 413, 415, 424-433, 435, 438, 439, 444, 485, 489, 490, 493-497.

14. On the question of outright sale the defendant No. 1 has relied on the following questions so far as Mr. Mehta is concerned: 86, 290, 281, 309 and regarding the total length of the running of the picture 'Juari' the defendant No. 2 has deposed to that effect in questions Nos. 90, 91, 57, 70, 67, 69, 70, etc.

15. Mr. Barubax Daga was examined on commission by the plaintiff. In his examination in chief he has supported and/or admitted execution of his first agreement and/or terms therein and also various modifications and subsequent agreements that have been entered into by and between the par-

ties. He although stated in his examination-in-chief that the letter dated 7th April, 1970 was obtained by fear and threat of cancellation of the release. The signatory to the said letter, Mr. S. N. Daga was not examined by the plaintiff to substantiate the charge of coercion and undue influence. In answer to question No. 73 put to him in examination-in-chief he has stated that by "brand new prints" he meant those prints which were never exhibited in any cinema house before. Although subsequently he has tried to change his answer in answer to a leading question put to him by his counsel Mr. Dutt. Although he has stated in his examination-in-chief in answer to question 107 that the plaintiff has made complaints regarding the defective nature of the prints supplied to the plaintiff there does not seem to be any letter written by or on behalf of the plaintiff to the defendant No. 2 otherwise that letter would have disclosed and proved in this suit. Save and except that the plaintiff has tried to make out the case of defective nature of dupe prints and also of the case of undue influence and coercion at the time of execution of documents dated 7th April 1970 not a single letter was ever written by the plaintiff to the defendant regarding the same. It would also appear from the conduct of the plaintiff that after receipts of 12 brand new prints and 7 loan prints of the film 'Juari' the plaintiff did not complain to the defendant No. 2 regarding his objections. It is a positive case of the defendant No. 2 that at the instance of Mr. B. B. Daga dupe prints were prepared from one original negative by the said Messrs. Famous Cine Laboratories Ltd. and at his instance dupe prints were prepared. Had not that been the position the plaintiff would not have accepted and/or exhibited the dupe prints but would have straightway returned the same to the defendant No. 1 under protest. In fact the film 'Juari' has run in Bengal area for 3 weeks, which according to the practice is the normal run of a black and white picture. After receiving the prints, making part payment and fully utilising the prints the plaintiff for the first time made his case in the plaint which is contrary to the evidence and to his own conduct.

16. In this case the contractual obligation was subsequently converted into an outright sale which was accepted by the plaintiff expressly and/or by implication. In this respect reference may be made to S. 42 and section 13 of the Sale of Goods Act. S. 42 of the Sale of Goods Act provides— "The buyer is deemed to have accepted the goods

when he intimates to the seller that he has accepted them, or when the goods have been delivered to him and he does any act in relation to them which is inconsistent with the ownership of the seller or when after the lapse of a reasonable time he retains the goods without intimating to the seller that he has rejected them."

17. Applying the above principles to the facts of the present case it would appear that the plaintiff not only accepted the goods but in fact used the same and has not decided to return the said prints and in fact the said prints are still with the plaintiff. Moreover, the plaintiff has not exercised its right under the section of the Sale of Goods Act. The property in the goods had passed as soon as the delivery was given in respect of the same and they were appropriated by the plaintiff irrespective of the payment of the price.

18. The next question arose whether the counter-claim is by itself maintainable. The expression "counter-claim" found no mention in the provisions of the Civil Procedure Code of 1908. Still it cannot be said that the said expression was foreign to law. In a number of cases the expressions like "counter-claim" or "cross-claim" will be found to have been used in connection with the plea of set off.

19. Under the Civil Procedure Code a counter-claim by itself was incompetent and was enforceable by way of a separate suit. Order 8 R. 6 read with O. 20 R. 19 empowered the court to make an order enabling the defendant to set off the plaintiff's claim and pronounce judgment for the sum due by way of counter-claim in favour of the defendant. Of course, in appropriate cases, courts, could always grant equitable relief to the defendants, if necessary. As set out hereinafter, under the New Code specific provision has been made for counter-claim. Under O. 8, R. 6-A sub-rs. (2) and (4) and O. 8 R. 6-D if the suit of the plaintiff is discontinued or dismissed the counter-claim may nevertheless be proceeded with as in the case of a counter-claim written statement is really in the nature of a plaint. So even if the plaintiff's claim is not pressed or given up or withdrawn or breaks down for any reason whatsoever, the defendant has still the right to get a decree of a counter-claim as claimed in the written statement.

20. O. 8 R. 6-A of the amended Civil Procedure Code provides — "A defendant in a suit may in addition to his right of pleading a set-off under R. 6, set up by way of counter-claim against the claim of the plaintiff any right or claim in respect of a

cause of action accruing to the defendant against the plaintiff either before or after the filing of the suit but before the defendant has delivered his defence or before the time limited for delivery of his defence has expired, whether such counter-claim is in the nature of a claim for damages or not: provided that such counter-claim shall not exceed the pecuniary limits of the jurisdiction of the court."

Clause (2) — "Such counter-claim shall have the same effect as a cross suit so as to enable the court to pronounce a final judgment in the same suit, both on the original claim and on the counter-claim".

Clause (3) — "The plaintiff shall be at liberty to file written statement in answer to the counter-claim of the defendant within such period as may be fixed by the court".

Clause (4) — "The counter-claim shall be treated as plaint and governed by the rules applicable to plaint".

21. Under the new amendment, by the Act of 1976 of the Code of Civil Procedure 1908 pending suits would be governed by the provisions of the new Code. As nobody has any vested interest in procedural law, as such the new amendment would be attracted in this case. On this point there is a Division Bench Judgment of this Court reported in AIR 1930 Cal 422. In that case it has been decided that no litigant has any vested interest on procedural law and any amendment to the procedure would govern also pending matters before the court. In this case, although counter-claim has been pleaded in the written statement of the defendant No. 2 the plaintiff did not seek for leave to file an additional written statement in answer to the counter-claim of the defendant nor the plaintiff at any time before the issues were settled applied to this Court for an order that such counter-claim may be excluded. Moreover, the plaintiff has discontinued its claim in the plaint in the sense that the plaintiff did not raise any issue, on the contrary, submitted before the Court that the plaintiff has accepted the position and has raised no objection so far as the counter-claim is concerned.

22. Mr. J. N. Roy on behalf of the plaintiff although did not press his claim but most vehemently opposed the defendant No. 2's claim as made out in the written statement. Amongst other points his main point was that the defendant No. 2 has irrevocably assigned his right to Messrs. Famous Cine Laboratories and Studios Pvt. Ltd. to the extent of Rs. 90,000/-. As such no decree could be passed in favour of the plaintiff for the balance sum of Rs. 30,000/- as the sum of Rs. 60,000/- has already been paid

by the plaintiff to the said Famous Cine Laboratories and Studios Ltd. In this respect, he referred to S. 130 of the Transfer of Property Act as also Division Bench Judgment of this High Court reported in (1906) ILR 33 Cal 702 and also (1907) ILR 34 Cal 289. There is no doubt that the benefits of a contract can be assigned and there can also be no dispute over the principle as laid down in the above two cases. On principle it is true that the benefits of a contract under a contract can be assigned. An order for payment of money is not an assignment. An assignment of a chose in action must be made in writing under the law signed by the transferor or his duly authorised agent but no particular form of words is necessary provided the words used sufficiently indicate the transferor's intention to assign the chose in action. The language is immaterial if the meaning is clear. An order for payment of money is not the same thing as an assignment of debt but it is only a direction to pay the amount due. The test is whether the right of the seller of the goods to the price of the same has been transferred to a third party by an effectual assignment and the assignee becomes entitled as of right to the payment. In a case reported in AIR 1926 Cal 447 the Division Bench Judgment of this Hon'ble High Court presided over by the then Chief Justice Sanderson and Buckland J. upheld the decision of the Hon'ble Mr. Justice C. C. Ghose and it was held that order for payment of money is not an assignment of debt. In that case the direction "remit to B on behalf of E" was held not to amount to any assignment but only an order for payment. Applying the above principles to the facts of this case I find that it would appear from the letter dated 7th April 1970 that the plaintiff and the defendant No. 2 agreed that the plaintiff would pay to Messrs. Famous Cine Laboratories and Studios Pvt. Ltd., Mahalakshmi, Bombay on account of the defendant No. 2 a sum of Rs. 90,000/- against delivery of 12 brand new prints. It would also appear from the letter dated 18th May 1970 that the plaintiff agreed to make the payment to Messrs. Famous Cine Laboratories and Studios Pvt. Ltd. on account of the defendant No. 2. Neither in the pleadings, correspondence nor in the evidence it has ever transpired that there has been an assignment of the benefits of the contract by the defendant No. 2 in favour of Famous Cine Laboratories and Studios Ltd. to the extent of Rs. 90,000/-. It is for the first time at the time of the argument that this point has been taken which is not borne out by the facts of this case. Had there

been a true and proper assignment in favour of Messrs. Famous Cine Laboratories and Studios Ltd. by the defendant No. 2 then the plaintiff would have immediately protested to the defendant No. 2 regarding the claim of Rs. 30,000/- in answer to the various demand letters sent by the defendant No. 2 to the plaintiff. Moreover, Mr. Daga in his examination on commission has nowhere stated about the said alleged assignment.

23. Applying the above principles and in view of the facts stated above, I dismiss the plaintiff's claim in the suit and pass a decree for the sum of Rs. 70,000/- in favour of the defendant No. 2 together with interim and further interest @ 6 per cent and cost against the plaintiff.

24. Certified for two counsel.

Counter-claim allowed.

AIR 1977 CALCUTTA 318

M. M. DUTT, J.

Loken Bose, Petitioner v. Sm. Ashima Dey and another, Opposite Parties.

C. R. No. 2993 of 1976, D/- 16-6-1977.

West Bengal Premises Tenancy Act (12 of 1956), S. 34 — Suit for ejectment — Section 34 does not bar grant of relief under O. 39, Rr. 1 and 2, Civil P. C. to defendant. (Paras 2, 3)

J. N. Bakshi, for Petitioner; R. N. Mitra, for Opposite Party No. 1.

ORDER :— This Rule is at the instance of the tenant-defendant in a suit for ejectment and it is directed against an order of the learned Munsif dismissing his application under O. 39, Rr. 1 and 2 of the Civil P. C. In the said application, the defendant prayed for a temporary mandatory injunction, directing the plaintiff landlord to restore water supply to the first floor of premises No. 4/1, Russa Road, South First Lane, Jadabpur, Calcutta. The learned Munsif dismissed the said application of the defendant on the ground that in view of S. 34 of the West Bengal Premises Tenancy Act, 1956, the application was not maintainable. In other words, the learned Munsif took the view that in a suit for ejectment the court will have no jurisdiction to entertain an application for the grant of relief in respect of matters as provided for in S. 34 of the Act.

2. Under S. 34, the Controller has been authorised to grant relief to the tenant for the making of repairs and taking of measures for the maintenance of essential

services. There is nothing in S. 34 or in any other provisions of the West Bengal Premises Tenancy Act, 1956 which bars either expressly or by necessary implications the jurisdiction of the Civil Court to grant the same or similar relief to a tenant who is a defendant in a suit for ejectment. It is true that the remedy under S. 34 is a speedy remedy which a tenant can avail of for the restoration of essential services to and repairs of the premises. But, if the tenant has an additional remedy under any other law, I do not think that he should be deprived of that remedy.

3. It is, however, contended on behalf of the plaintiff opposite party that as a special remedy has been provided for in the statute for the grant of relief to the tenant as mentioned in S. 34, it should be presumed that by necessary implication the legislature has barred the jurisdiction of the Civil Court to grant the same relief to the tenant in a suit for ejectment. I am unable to accept this contention. The bar of jurisdiction of a Civil Court should not be readily inferred. It is not the intention of the legislature to drive a tenant to a separate proceeding under S. 34 to avail of the relief as provided for therein. If, in spite of the fact that a suit for eviction is pending, the tenant has to approach the Controller under S. 34 for the restoration of essential services to the premises, it will mean multiplicity of proceedings. Moreover, a temporary injunction under O. 39, Rr. 1 and 2 of the Civil P. C. is granted in aid of the legal right of the party who seeks such an injunction. The duration of such injunction will be for the period during which the suit will continue. It does not at all stand to reason that by enacting S. 34, the legislature has impliedly curtailed the power of the Court under O. 39, Rr. 1 and 2 of the Civil P. C. in respect of the matters provided for in S. 34. In a suit for eviction, the power of the court to grant temporary mandatory injunction for the restoration of essential services, in my view, has not been fettered or restricted by the provision of S. 34 of the Act. In these circumstances, I hold that the learned Munsif was not right in dismissing the application of the defendant petitioner on the ground that it was not maintainable. The learned Munsif has, therefore, failed to exercise his jurisdiction vested in him by law by dismissing the application for temporary injunction. The order of the learned Munsif is accordingly set aside and he is directed to

dispose of the application on merits in accordance with law. The Rule is made absolute, but there will be no order as to costs.

Rule made absolute.

AIR 1977 CALCUTTA 319

N. C. MUKHERJI AND B. C. RAY, JJ.

Shibdas Gopalji Patel, Appellant v. Ram Chandra Mookerjee, Respondent.

S. A. No. 5 of 1975, D/- 28-4-1977.

Civil P. C. (1908), O. 20, R. 12 (1) (c) — Decree for damages with direction for proceeding for mesne profits — High Court in Second Appeal confirming decree by judgment and decree on 21-6-1971 — Plaintiff, held, was entitled to get a decree for mesne profits upto 21-6-1974, that is, three years from the date of decree by High Court. AIR 1959 Bom 536, (1900) ILR 27 Cal 951 (PC), (1900) 27 Ind App 209 (PC), AIR 1959 All 242, AIR 1924 Pat 781 and (1910) 11 Cal LJ 541, AIR 1959 Cal 76, AIR 1958 Mad 462 and AIR 1963 SC 1405, Ref. (Para 6)

Cases Referred: Chronological Paras

AIR 1963 SC 1405	5
AIR 1959 Cal 76 : 63 Cal WN 334	5
AIR 1959 All 242	4
AIR 1959 Bom 536	3
AIR 1958 Mad 462	5
AIR 1924 Pat 781 : ILR 4 Pat 57	4
(1910) 11 Cal LJ 541	4
(1900) ILR 27 Cal 951 : 27 Ind App 110 (PC)	3
(1900) 27 Ind App 209 (PC)	3

Rabindranath Mitter, for Appellant; Ranjit Kumar Banerjee, for Respondent.

N. C. MUKHERJI, J.:— This is an appeal against judgment and decree dated 31st of May 1974 passed by Sri S. K. Chatterjee, Additional District Judge, 10th Court, Alipore, in Title Appeal No. 134 of 1973 affirming those of Sri H. Banerjee, Munsif, 3rd Court, Alipore, passed in Title Suit No. 209 of 1966 on 31st of May 1972.

2. The respondent filed a suit for recovery of possession, mandatory injunction and for damages against the appellant on the ground that licence granted to the defendant in respect of the suit land had been revoked. The defendant contested the suit claiming to be a tenant in respect of the suit land being a part of 44, S. R. Das Road and measuring about 7 cottas. The suit was decreed and the de-

cree was confirmed by the appellate court. A second appeal was filed by the defendant being S. A. 9 of 1970. This Court agreed with the concurrent findings of the courts below that the defendant was a licensee and his licence had been validly terminated. As regards damages for the unauthorised occupation of the suit land this Court found that there was no sufficient material on record to decide whether the sum of Rs. 10/- per diem as decreed by the courts below was a reasonable amount of compensation or not. As such this question was left open. His Lordship agreed with the courts below that the defendant was liable to pay damages but the determination of the rate of damages payable by the defendant was relegated to the proceeding under O. 20, R. 12 of the Civil P. C. This Court directed: "The trial court while deciding the amount of damages which the plaintiff may be entitled to recover will also record finding as regards the rate of damages payable by the defendant on the evidence already on record and on further evidence if adduced by the parties. I accordingly dismiss this appeal and affirm the judgment and decree of the lower appellate court subject to the modification that the plaintiff would get a decree for damages since 15th May 1966 till he recovers possession of the suit land but the rate of damages and the quantum of the same would be decided by the trial court in the subsequent proceeding on payment of proper court-fees". After remand the trial court held that the plaintiff is entitled to recover mesne profits at the rate of Rs. 10/- per diem from 15-5-1966 till recovery of possession. It was also ordered that the plaintiff would get mesne profits at the aforesaid rate from 1-6-1972 till the recovery of possession on payment of additional court-fees. The order was passed by the learned Munsif on 31-5-1972. The learned appellate court affirmed the decision of the trial court and the cross-objection filed by the plaintiff with regard to costs was allowed. Being aggrieved, the defendant has come up to this Court.

3. Mr. Rabindranath Mitter, learned Advocate appearing on behalf of the appellant, in the first place, submits that the court below overlooked the provisions of O. 20, R. 12 and were wrong in allowing the plaintiff mesne profits from the date of the institution of the suit till the recovery of possession. Order 20, Rule 12 of the Code reads as follows:—

"(1) Where a suit is for the recovery of possession of immovable property and for rent or mesne profits, the Court may pass a decree—

- (a) for the possession of the property;
- (b) for the rent or mesne profits which have accrued on the property during a period prior to the institution of the suit or directing an inquiry as to such rent or mesne profits;
- (c) directing an inquiry as to rent or mesne profits from the institution of the suit until—
 - (i) the delivery of possession to the decree-holder,
 - (ii) the relinquishment of possession by the judgment-debtor with notice to the decree-holder through the Court, or
 - (iii) the expiration of three years from the date of the decree, whichever event first occurs.

(2) Where an inquiry is directed under Cl. (b) or Cl. (c), a final decree in respect of the rent or mesne profits shall be passed in accordance with the result of such inquiry".

Mr. Mitter draws our attention to Cl. (c) of O. 20, R. 12 which provides that "the Court may pass a decree directing an inquiry as to rent or mesne profits from the institution of the suit until the delivery of possession or the relinquishment of possession by the judgment-debtor or the expiration of three years from the date of the decree whichever event first occurs", and that being so, in a case where the plaintiff has not yet recovered possession he cannot get a decree for mesne profits beyond three years from the passing of the decree. Mr. Mitter, however, concedes that the decree passed by the trial court was merged with the decree of this Court. This Court passed the decree on June 21, 1971. Therefore the plaintiff is entitled to get mesne profits from 15-5-1966 up to 21-6-1974 and not beyond that. The courts below were wrong in passing a decree for mesne profits from 1-6-1972 till the recovery of possession. In support of his contention Mr. Mitter first refers to a decision reported in AIR 1959 Bom 536, (*Bhagwant Vinayak v. Radhakisan Gangabisan*). In this case his Lordship had to consider the provisions of O. 20, R. 12 and it was held that "when a decree is passed for payment of mesne profits until delivery of possession, there is always an implied term in the decree that mesne profits are not to be awarded for a period of more than three years in any case". In coming to such conclusion his Lordship relied on (1900) ILR 27 Cal 951; 27 Ind

App 110 (PC), (*Girish Chunder Lahiri v. Shoshi Shikhareswar Roy*). In this case it was held by the Judicial Committee that "the expression 'mesne profits' in a decree include interest thereon but may not be allowed for any time later than three years from date of decree." Mr. Mitter also relies on (1900) 27 Ind App 209 (PC), (*Raja Bhup Indar Bahadur Singh v. Bijai Bahadur Singh*). In this case: a decree in ejectment dated November 12, 1887 declared the plaintiff entitled to future mesne profits, and was eventually affirmed by the Queen in Council on May 11, 1895. It was held "that mesne profits were recoverable upto May 11, 1895 and for a further period not exceeding three years until recovery of possession".

4. Mr. Mitter next refers to a Bench decision of Allahabad High Court reported in AIR 1959 All 242 (*Kumar Jagdish Chandra v. Bulaqi Das*). It was held by their Lordships that "A decree for mesne profits till delivery of possession cannot be interpreted as a decree for the realisation of the mesne profits till the actual delivery of possession which may never take place. It cannot be contemplated that the decree-holders by failing to take action to obtain possession could create a right in themselves to recover mesne profits upto an imaginary date for the delivery of possession". It was held that "the decree for mesne profits till recovery of possession should be construed as an award of mesne profits upto three years from the date of the decree in view of R. 12 (1) (c) of O. 20". Mr. Mitter raised a point to the effect that an application under O. 20, R. 12 cannot be entertained until the period for which the mesne profits have been awarded has expired. In this case mesne profits have been awarded till recovery of possession and until the decree-holder gets recovery of possession an enquiry cannot be made under O. 20, R. 12. In support of his contention Mr. Mitter refers to a decision reported in ILR 4 Pat 57: (AIR 1924 Pat 781), (*Karakhan Missir v. Jagdeo Missir*). It has been held that "Where a decree awards future mesne profits the right to apply for ascertainment of the amount of mesne profits does not accrue until the period for which the mesne profits have been awarded has expired." Their Lordships of the Patna High Court in coming to the above conclusion relied on (1910) 11 Cal LJ 541. (*Gangadhar Marwari v. Lachman Singh*).

5. Mr. Ranjit Kumar Banerjee, learned Advocate appearing on behalf of the respondent, contends in the first place,

that Chittatosh Mookerjee, J. in S. A. 9 of 1970 has clearly directed that the plaintiff would get a decree for damages since 15th May 1966 till he recovers possession of the suit land. In such circumstances, the appellant cannot now agitate that the plaintiff is not entitled to get mesne profits beyond three years from the date of the decree. Secondly, it is contended that the plaintiff is entitled to file more than one application and get more than one decree for mesne profits on payment of court-fees. In support of his contention he first refers to a decision reported in (1959) 63 Cal WN 334: (AIR 1959 Cal 76), (*Kanai Lal Maity v. Shyam Kishore Das*). Their Lordships held that "There is nothing in O. 20, R. 12 of the Code or any principle of law to prevent a further application from being made and a fresh decree being passed to such relief in terms of the decree already obtained. Although sub-r. (2) speaks of a final decree to be passed in accordance with the results of such enquiry it does not consequently follow that no other decree can be made previous to that final decree". Mr. Banerjee also relies to a decision reported in AIR 1958 Mad 462 (*Nallasivam Chettiar, minor by next friend Subbiah Chettiar v. Avudayammal, minor by father and guardian Ekambaram Chetti*). In this case his Lordship lays down: "Between the preliminary decree and the final decree the lower court can pass many interim final decrees. And when the lower court adjudicates upon this matter it can be treated as an interim final decree." None of the decisions referred to above have, however, laid down that the plaintiff can get a decree for mesne profits beyond three years from the decree where he has not recovered possession. Reference may be made to a decision reported in AIR 1963 SC 1405 (*Fateh Chand v. Balkishan Dass*). At page 1413. in para. 19 their Lordships ordered that the plaintiff would be entitled to mesne profits at a certain rate together with interest at the rate of 6% till the date of delivery of possession subject to the restriction prescribed by O. 20, R. 12 (1) (c) of the Civil P. C. The restriction is that the plaintiff would not get a decree beyond three years from the date of the decree in a case where possession has not yet been delivered.

6. Thus considering the provisions of O. 20, R. 12 of the Code and the decisions referred to above we have no hesitation to hold that the plaintiff is entitled to get decree for mesne profits from 15-5-1966 i.e. the date of the institution of the suit

till 21-6-1974 i.e. three years from the date of the decree passed by this Court in S. A. 9 of 1970.

7. Mr. Mitter next contends that this Court found that there was no determination by the courts below as regards the quantum of the compensation payable by the defendant for occupying the suit land after the licence was revoked, and that there was no sufficient material to decide whether the sum of Rs. 10/- per diem was a reasonable amount of compensation or not. The question was left open and the trial court was directed to determine the rate of damages on the evidence already on record and on further evidence. Mr. Mitter submits that in ascertaining the rate of damages the learned courts below ought to have considered the fact that for the back portion of the disputed land, the area of which is almost the same as that of the disputed land, the defendant is a tenant at a rate of Rs. 72/- per month. This ought to have been the basis for determination of the rate of damages as according to Mr. Mitter this is the best evidence available. Both the courts below have taken into consideration the fact that the rent of back portion of the land is Rs. 72/- per month. The courts below have considered all other relevant facts and circumstances and have concurrently come to the conclusion that the rate of damages should be Rs. 10/- per diem. We are not inclined to interfere with the said determination. Mr. Mitter also submits that the learned appellate court below was wrong in allowing the cross-objection and granting the plaintiff the decree for costs. We do not think that the learned appellate court below has done any wrong in allowing the cross-objection.

8. In the result, the appeal is allowed in part on contest. The judgment and decree passed by the courts below allowing the plaintiff to recover mesne profits till recovery of possession are set aside and it is decreed that the plaintiff will get mesne profits from 15-5-1966 till 21-6-1974. The other portion of the decree is hereby affirmed. In the circumstances of the case there will be no order as to costs.

B. C. RAY, J.:— I agree.

Appeal partly allowed.

AIR 1977 CALCUTTA 322

**SALIL KUMAR DATTA AND
GANENDRA NARAYAN RAY, JJ.**

Shibapada Tripathy and others, Appellants v. State of West Bengal and others, Respondents.

A. F. O. O. No. 111 of 1977, D/- 6-5-1977.

Constitution of India, Art. 226 — Petition under, for enforcement of commitment or representation made by Government or authority acted upon by petitioner — Order granting relief — Construction of.

Where in a petition under Art. 226 for enforcement of a commitment or representation made by Government or authority acted upon by the petitioner, such commitment or representation in material aspects is the primary and basic material fact in the cause of action for relief claimed and it is the basis and fundamental condition for grant of the relief. Even if it is not expressly provided for in the order granting the relief, whether on consent or otherwise, it remains and continues to remain an implicit but effective condition of the relief as without it the relief granted will be one without jurisdiction in an application under Art. 226. Its absence in the order does not extinguish or affect the basic arrangement founded in Government's commitment, which remained and continues to remain an implicit but effective condition of the order. (Paras 24, 27)

Cases Referred: Chronological Para

AIR 1968 SC 718	20
AIR 1959 SC 1362	21
AIR 1956 SC 346	19

Kalipada Sinha and Parimal Das, for Appellants; Somendra Ch. Bose and Suprakash Banerjee (for Nos. 1-4) and B. C. Dutt and D. K. Choudhury (for No. 5), for Respondents.

SALIL KUMAR DATTA, J.:— This is an appeal from the orders dated November 12 and 24, 1976 passed by M. M. Dutt J. modifying his earlier order dated August 5, 1976 disposing the Civil Rule No. 18143 (W) of 1975.

2. For the establishment of Haldia Dock, lands of residents in Mouza Debhog whereon, it was alleged, their homes and hearths were situated, were acquired under the provisions of the Land Acquisition Act, 1894 by the State of West Bengal for the Board of Trustees for the Port of Calcutta (hereinafter referred to as the "Cal-

cutta Port Trust"). There were negotiations between the State Government and the representatives of the people of Mouza Debhog for rehabilitation of the inhabitants of Mouza Debhog affected by the said acquisition and the Government of West Bengal by its letter of January 8, 1974 communicated its decision to the Collector of 24-Parganas to allot plots to the affected families of the Mouza Debhog for rehabilitation out of lands adjacent to the town area to be obtained from the Calcutta Port Trust, on payment of costs of acquisition, and 4 cottah plot without development was to be allotted to each affected family.

3. The Collector of Midnapore by its letter dated July 17, 1974 informed the Secretary, Haldia Mulyan Committee, as representing the local people, to arrange for deposit of Rs. 3,01,699.75 p. to the Calcutta Port Trust as costs of acquisition of 28.38 acres of such land for allotment to affected families of Mouza Debhog. The Collector further advised that on such deposit the said under-developed land would be handed over to the Secretary for allotment to the evicted families of Mouza Debhog. The same position was reiterated in the letter of the Special Land Acquisition Officer, Haldia Project, Midnapore dated August 14, 1974 and letter dated October 1, 1974 (Annexs. B, D, G & I respectively of the petition of motion in C. R. No. 6665(W) of 1974 referred to hereinafter).

4. Before the arrangements were finalised, it was alleged, on or about November 3, 1974 some residents of Mouza Debhog were served with notice under S. 47 of the Act by the Government without honouring the commitments aforesaid and informing them that as they failed to deliver possession of the lands acquired, possession of such lands would be taken by the Additional District Magistrate, Tamluk on November 8, 1974. Some of residents of the Mouza numbering 160 thereupon moved an application in this Court under Art. 226 of the Constitution challenging the acquisition and for appropriate writs commanding the respondents the State of West Bengal and the Calcutta Port Trust to show cause why the notices for possession should not be cancelled and directing them not to take possession of the properties of the petitioners until they were provided with suitable accommodation as disclosed in Government communications referred to above. On this application Civil Rule No. 6665(W) of 1974

was issued on November 5, 1974 with interim injunction restraining them from taking possession of the lands acquired in Debhog Mouza.

5. The Rule was contested by the respondents by filing affidavits-in-opposition and was ultimately disposed of by A. K. Mookherjee, J. by order dated April 8, 1975 in effect on consent. It was provided therein as follows:—

(i) The petitioners in the Rule would deposit the costs of acquisition being Rs. 3,01,699.75 p. of the lands described in the schedule to the order within three months from date. The schedule was subsequently modified in minor aspects.

(ii) Upon such payment the Calcutta Port Trust would make over possession thereof to the Special Land Acquisition Officer, Haldia who would in his turn make over possession of such lands within one week thereafter to the authorised representatives of the petitioners.

(iii) Within November 30, 1975 the petitioners would make over possession of the acquired lands in their possession and in default possession would be taken "without recourse to law".

(iv) The Special Land Acquisition Officer (Haldia) Midnapore on receipt of possession of acquired lands from the petitioners would forthwith deliver possession of the same to the Calcutta Port Trust.

6. It may be noted here that the acquisition of lands described in the schedule to the said order on payment of costs of acquisition thereof by the petitioners therein was intended for the rehabilitation of the families of Debhog Mouza who were affected by the impugned acquisition. Each of such family was to be allotted four cottah plot of undeveloped land out of lands to be acquired aforesaid in accordance with the commitment made by the Government which was also the petitioners' case and the basis of such proposed acquisition under the order though the same was not expressly mentioned therein.

7. In terms of the order of April 8, 1975 in C. R. No. 6665(W) of 1974, the petitioners therein (excluding some about 26 who did not make any proportionate contribution and as such not interested) made payment of the entire amount of Rs. 3,01,699.75 p. as the costs of acquisition of land for rehabilitation of the persons of Mouza Debhog affected by the acquisition of the Calcutta Port Trust. These

petitioners formed a co-operative housing society named as Debhog Rehabilitation Colony Development Co-operative Society Ltd. which confined its membership to persons evicted by Haldia Dock Project and intended to be rehabilitated in Debhog. Thereafter the petitioners approached the respondents for delivery of lands to them and they were informed that the possession would be given to one of their nominee selected unanimously. The petitioner No. 107 of the 'Basic' petition appeared before the Special Land Acquisition Officer Haldia Project with authorisation letter in his favour by 126 petitioners out of the original petitioners, the other remaining petitioners did not sign as they did not contribute towards compensation money and as such were not interested. The document of authorisation provided that possession was to be made either to Shibapada Tripathy or to him as the Secretary of the Society. The respondent No. 3 however did not accept the authorisation letter and it was thus evident, it was alleged, that there was no intention on the part the said respondent to give possession of the lands in pursuance of the order in C. R. No. 6665(W) of 1974 and the respondents were trying to avoid giving possession to the petitioners.

8. On the above allegations the said 126 petitioners moved another application under Art. 226 of the Constitution praying for issuance of appropriate writs directing the Special Land Acquisition Officer Haldia Project to give possession of land of the Schedule to aforesaid order dated April 8, 1975 in Civil Rule No. 6665(W) of 1974 in terms thereof to Shibapada Tripathy as their authorised representative or to him as the Secretary of the Society and in the meantime not to take possession of hearths and homes of the petitioners situated in acquired lands for Haldia Port. In this application other remaining petitioners of the earlier rule were made pro forma respondents. This Court on this application issued a Rule on November 24, 1975 being Civil Rule No. 18143(W) of 1975 in terms of the prayer granting an ad interim injunction restraining the respondents from taking possession of the said acquired lands.

9. The Rule was opposed by the respondents who filed two sets of affidavits-in-opposition one by the Calcutta Port Trust respondent No. 5 and the other by the State of West Bengal and its concerned Officers respondents Nos. 1 to 4. The common objection was that in ab-

sence of all the petitioners the order of April 8, 1975 could not be enforced. It was further stated that the acquisition of lands for the Haldia Project was legally and validly made. The Calcutta Port Trust admitted that there were some mistakes in respect of the lands of the schedule to the order, for rectification whereof, steps were being made. It was submitted that the President and the Secretary of the Haldia Mulyan Committee were at the back of the society interested in selling lands at higher prices for their own benefit. The authorisation in favour of Shibapada Tripathy, it was contended, was rightly refused as he was not authorised by all the petitioners of the C. R. No. 6665(W) of 1974.

10. The Special Land Acquisition Officer Haldia Project, affirming the affidavit-in-opposition on behalf of the respondents Nos. 1-4 stated that the letter of authorisation produced before him did not appear to be genuine and as such he wanted to verify the same. The petitioner No. 1 wanted 2 days time to resubmit the document and that the same was not filed till then. Accordingly it was recorded by him that the petitioners failed to comply with the directions of this Court. Some other petitioners of C. R. No. 6665(W) of 1974 informed by letters that they were not interested in rehabilitation nor had they authorised anyone as their representative. Further there was written report from Sasadhar Samui of Debhog that the Society was demanding from affected persons price at the rate of Rs. 200/- per decimal, otherwise, no land would be allotted and in fact such price had been realised from many residents of Debhog. In view of the non-compliance by the petitioners of the provisions of order of April 8, 1975 by unanimously selecting their representative the respondent No. 3 was unable to deliver possession of lands acquired for purpose of rehabilitation of Debhog residents and it was no longer possible to implement the order. As however the lands acquired by the Calcutta Port Trust on payment of full compensation were urgently required for Haldia Port Project, it was prayed that the respondents should be given leave to take steps for obtaining possession. Except as aforesaid all other allegations were denied.

11. The petitioners filed affidavit-in-reply to the above affidavits denying allegations therein made but there was no effective denial to the allegations that the society had been charging higher rates for

allotment of land out of the lands acquired for rehabilitation as aforesaid.

12. The rule came up for hearing before M. M. Dutt, J. on August 5, 1976 and the learned Judge directed the petitioners who signed the letter of authority to appear before the respondent No. 3 for verification of signatures by him. On his satisfaction about the signatures of the petitioners in the letter of authority the said respondent would deliver possession of the lands described in the schedule to the said order to their representative by August 30, 1976. His Lordship further directed the respondent No. 3 to keep back such quantity of land not less than 4 cottahs per head as might be allotted to the remaining petitioners, who till then were not signatories to the said letter of authority, on proof of their signature and payment of proportionate compensation. On his satisfaction on those aspects the said respondent would deliver possession of their share of land to them accordingly.

13. In any event it was further directed the petitioners were to give possession of acquired lands by December 31, 1976 failing which the respondents were given leave to take possession of acquired lands without reference to any legal proceeding.

14. By order dated August 9, 1976 the respondent No. 3 was directed to accept signatures of two petitioners who were in jail if such signatures were authenticated by the Jail Authority.

15. The petitioners thereafter filed an application on August 26, 1976 for certain directions for delivery of possession to Shibapada Tripathy in respect of some other petitioners also whose signatures could not be verified in accordance with the directions under the order dated August 5, 1976 and for allotment of lands to persons other than the petitioners affected by the acquisition from lands kept for the remaining petitioners of the original rule in event of their failure within a specified time to pay proportionate costs at the rate of four cottahs for each person. The application was opposed by the respondents Nos. 1 to 4 as no account books were produced before the Special Land Acquisition Officer to establish the proportionate costs of acquisition paid by the petitioners, in view of the fact that the land was acquired for rehabilitation of 300 to 400 affected families.

16. By order dated November 12, 1976 the learned Judge directed the Collector to consider the account books and docu-

ments to establish the contributions made by each of the petitioners and, if he was so satisfied, to distribute land to the petitioners "through their authorised representative proportionate to the contribution made by each of the petitioners, subject to a maximum quantity of 4 cottahs". Further such allotments of land could be made jointly to the extent of each of the petitioners' land proportionate to his contribution subject to the maximum of 4 cottahs through the said representative.

17. The petitioners thereafter filed another application on Nov. 22, 1976 for modification of the order dated Nov. 12, 1976. It was stated therein that the original proposal of January 8, 1974 for allotment of 4 cottahs of land to each affected family of Mouza Debhog was superseded by letter of July 17, 1974 wherein the petitioners were directed to pay a sum of Rs. 3,01,699.75 p. for total area of 28-38 acres or 1700 cottahs, in terms of the order in Civil Rule No. 6665(W) of 1974. Further as the land was low lying area, the same would have to be developed and roads and tanks to be made which would cover 12/14 acres. The direction in subsequent order providing for maximum allotment of 4 cottahs to each petitioner was in conflict with earlier order and was unworkable, as costs of land acquired on that basis would only amount to Rupees 98,859.00 p. while the petitioners had to deposit Rs. 3,01,699.75 p. to avoid forcible dispossession and over Rs. 2 lacs would be lying with Government for no purpose.

18. On this application the learned Judge passed the following order on November 24, 1976.

"After hearing the learned Advocates for both the parties my order dated November 12, 1976 is modified to this extent that the Collector shall allot four cottahs of land to each of the petitioners provided he has paid the price for the same. The date for delivery of possession by the petitioner is extended till January 31, 1977.

It is stated by Mr. Dutta appearing for the Port Commissioners that as soon as the lands are distributed to the petitioners, the surplus money, if any, shall be refunded to the petitioners' Advocate Mr. Parimal Das, who is on record. The petitioners will be at liberty to make representations to the Government for allotment of more lands for the purpose of development.

This application is thus disposed of without any order as to costs."

These orders of November 12 and 24, 1976 are the subject-matter of this appeal.

19. Mr. K. P. Sinha learned Advocate for the petitioners appellants contended that the order in C. R. No. 6665(W) of 1974 dated April 8, 1975 was passed on consent and the terms thereof could not be varied, except by consent of all parties, even by the court. He has referred to the decision in *Sailendra v. State of Orissa*, AIR 1956 SC 346 which lays down the proposition that a judgment by consent or default is an effective estoppel between the parties as a judgment whereby the court exercises its mind on a contested case. He further submitted that it is not open to a party to approbate and reprobate and take inconsistent position, when acting on a position taken earlier, the other party has acted upon the same culminating in an order of court. He submitted that the order of April 8, 1974 directed the petitioners to deposit Rs. 3,01,699.75 p. for acquisition of about 28 acres of land and when the amount has been duly deposited, the respondents should not be heard to contend that the petitioners are entitled to much less area at this stage.

20. Reliance was placed on the decision in *Union of India v. Anglo Afgan Agencies* AIR 1968 SC 718, wherein it was held that when a representation by Government is acted upon by a party, the Government is bound to carry out the promise. In this case also it was submitted, the petitioners have acted upon by the representations made by the Government and as such the Government is bound to give complete effect to the order passed by Court on basis of such representation.

21. Mr. Sinha also referred to the decision in *Union of India v. Kishorilal*, AIR 1959 SC 1362, and contended that the order of April 8, 1975 passed on consent concluded the arrangement between the parties in clear and unambiguous terms and it is not necessary nor permissible to look into any anterior fact. Accordingly it was not permissible for the learned Judge to fix the limit of allotment of land to 4 cottahs of land to each of the petitioners contrary to the provisions of the order on compromise as also his earlier order.

22. Anticipating a possible objection that a joint contract must be enforceable jointly if at all, Mr. Sinha submitted that the order of April 8, 1975 embodied a joint contract with petitioners on one hand and the respondents on the other. If some petitioners do not join for enforcement of

the contract, such contract even in terms of the impugned orders has been made as it could be made, enforceable in part in respect of the petitioners who have moved for the purpose.

23. It is well known that when land is acquired under the provisions of Land Acquisition Act, 1894, there is no obligation in law on the Government or the acquiring authority to provide for rehabilitation of persons as may be affected by such acquisition though as a welfare State provision for rehabilitation is often made on humanitarian grounds without legal obligation. The same was the position here in the case of the acquisition of lands for Haldia project on behalf of the Calcutta Port Trust. As however representations and appeals were made to the persons in authority on behalf of such affected persons the Government in consultation with the Calcutta Port Trust arranged for acquisition of an area of approximately 30 acres for rehabilitation of persons affected by such acquisition. The letter of January 8, 1974 to the Collector, Midnapore which discloses the decision of the Government is to the following effect.

"The undersigned (Special Officer and Dy. Secretary Ex-officio to the Government of West Bengal) is directed to say that some representatives of the people of Mouza Debhog whose lands have been subjected to acquisition for the Haldia Dock Project saw the Minister-in-charge of this Department a few days back and expressed their readiness to co-operate with Government in the matter of delivering peaceful possession of land to Government provided the persons affected were given plots for rehabilitation from the land adjacent to the township area already acquired for the Calcutta Port Commissioners. During the discussion it was made clear to the representatives that subject to the approval of the Calcutta Port Commissioners the land mentioned by them may be available to the affected families on payment of cost of acquisition thereof by them and also on the distinct understanding that the same would not be developed by any agency before allotment.

Since the representatives agreed to receive allotment of plots for rehabilitation on the above condition and also gave their assurance to co-operate with Government in the matter of finalisation of acquisition proceedings including making over possession of the land, it is requested that arrangement may please be made to allot 4 cottahs plot without any development,

to each of the affected families of mouza Debhog on prior payment of pro-rata acquisition costs thereof to the Calcutta Port Commissioners out of the 30 acres of land adjacent to the township area which is provisionally earmarked for the purpose by the Calcutta Port Commissioners. The above arrangement may, however, be given effect to after the prior approval of the Calcutta Port Commissioners has been obtained..."

24. Letter of July 17, 1974 by the Collector asked the Mulyan Committee to deposit Rs. 3,01,699.75 p. as cost of acquisition of 28.38 acres of land advising that after such allotment undeveloped lands would be handed over to it for allotment to the evicted families of mouza Debhog. Letter of August 14, 1974 also provided for allotment of land as stipulated in above letter of January 8, 1974. The provision of allotment of lands to evicted families on payment of proportionate acquisition costs by them against allotment of 4 cottahs plot of undeveloped land to each evicted family was never altered or superseded and in fact in the writ petition of C. R. No. 6665(W) of 1974 the prayer was for issuance of writ directing the respondents to provide for respective accommodation of the petitioners on the basis of commitments made by the respondents concerned as disclosed in the aforesaid letters being the annexures in question to the said petition. The order on consent was passed for enforcement of the above commitment as was prayed for in the petition as otherwise there was no scope for a legal challenge on acquisition of land on the ground of absence of provisions for rehabilitation of families affected by acquisition. Such commitment for allotment of 4 cottah plot of undeveloped land to each evicted family should have been expressly provided in the order of April 8, 1975 for the absence whereof the learned Advocates must share the responsibility. Even so the absence of the provision for rehabilitation of affected families of Debhog in the said order does not extinguish or affect the basic arrangement founded on the Government's commitment in respect of such rehabilitation, which remained and continues to remain an implicit but effective condition of the order and the petitioners cannot be permitted to turn round and take advantage of the absence of the provision which would lead to a strange and absurd situation never contemplated by the parties when the petitioners approached the Court on November 5, 1974 and would

result in undue and unfair benefit and advantage to them at the cost of other displaced families.

25. In the subsequent petition of motion in the connected rule the petitioners referred to the Government Memo. of October 1, 1974 which required of the petitioners to form a co-operative society competent to act on behalf of the affected families of Mouza Debhog in the matter of allotment of land for rehabilitation. The co-operative society was also formed, it is said, with provision for admission of members thereto who desired to be rehabilitated in Debhog as a result of acquisition so that it could not be said or urged that the land offered for rehabilitation was to be distributed only to the petitioners and not to other families of Mouza Debhog affected by the acquisition.

26. In the order of August 5, 1976 in the connected rule there is no mention for such allotment of land not exceeding 4 cottahs to each petitioner as per Government commitment. The position was soon realised and in subsequent order dated November 12, 1976, the Court made explicit what was all through an implicit and binding provision, well known to parties, of the order of April 8, 1975 directing that each petitioner would be allotted land subject to the maximum quantity of 4 cottahs for each affected family for rehabilitation, which was, as we have seen, was the basis of the commitment made by Government when the land was offered for rehabilitation.

27. It is to be remembered that in the matter for enforcement of a commitment or representation made by Government or other authority acted upon by the claimant by writ proceedings, such commitment or representation is the basis and fundamental condition for grant of the relief without which no relief will be available in writ proceedings. Such commitment or representation in material aspects is the primary and basic material fact in the cause of action for relief claimed and even if it is not expressly provided for in the order granting the relief, whether on consent or otherwise, it remains and continues to remain an implicit but effective condition of the relief as without it the relief granted will be one without jurisdiction in an application under Art. 226 of the Constitution.

28. In the aforesaid circumstances we do not find that there was any scope for review or modification of the order of November 12, 1976 by substituting "mini-

imum quantity of four cottahs" for "maximum quantity of four cottahs" as prayed for by the petitioners. We accordingly do not find any infirmity in the impugned orders on any ground warranting our interference. It may also be noted that the petitioners have been given the right in the impugned order to apply for allotment of more lands for purpose of development.

29. In the view we have taken, we do not consider it necessary to deal with the contentions raised by Mr. Sinha as indicated above. While there can be little dispute on the propositions of law laid down in the judgments cited by Mr. Sinha, they have no application to the facts of the case.

30. As we propose to dismiss the appeal, sustaining the orders in the connected rule, we feel that some directions in addition should be made as indicated below in partial modification of the relevant provisions of the orders under challenge in the appeal as indicated below. We direct that the Calcutta Port Trust will on allotment and delivery of possession of lands to the petitioners and others in terms of the said orders refund the surplus money out of the costs of acquisition to the petitioner's Advocate on record Mr. Parimal Das or as they may require in that behalf, but such money as may be refunded will carry interest at the rate of 6% per annum for period from date of receipt by the Calcutta Port Trust to date of payment and will be payable by the Calcutta Port Trust. The Land Acquisition Officer, Haldia Project will in his turn deliver, as early as possible after such allotment and delivery of possession as aforesaid, the surplus lands back to the Calcutta Port Trust. The allotment and delivery of possession of lands will be made by the Special Land Acquisition Officer Haldia Project, without least delay as the petitioners approach him in manner indicated in the orders in the connected rule and date of possession for delivery of possession of the acquired lands for Haldia Project by the petitioners is extended to August 31, 1977.

31. Subject to the above modification the appeal is dismissed, without however any order as to costs in the circumstances. There will be no order on the applications in the rule which will be treated as disposed of.

32. Before we conclude, on behalf of the respondents it was stated that an application for recalling the order of April 8, 1975 passed by A. K. Mookerjee, J. is

pending. We find that in fact such an application has been filed on May 7, 1976 but no step for its hearing for all these days has been taken on behalf of the State and others who are the applicants. According to Mr. Sinha this application was also disposed of by the learned Judge and no order was passed thereon which statement is denied by the other side. There is however no order on record in respect of this application and it is not necessary for us to express any opinion in respect thereof.

G. N. RAY, J. : I agree.

Order accordingly.

AIR 1977 CALCUTTA 328

SABYASACHI MUKHARJI, J.

Bareilly Electricity Supply Co. Ltd.,
Petitioner v. State of Uttar Pradesh, Res-
pondent.

Suit No. 149 of 1976 (Re. Arb.), D/-
22-3-1977.

Arbitration Act (1940), S. 30 — Error of law on face of award — Reference of specific question of law to arbitrator — Decision cannot be challenged — (Electricity (Supply) Act (1948), Sch. VI, Paragraph XIII, sub-para. (3) — Words "shall be a percentage" — Meaning).

Where questions of law are specifically referred to the arbitrator for his decision, the award of the arbitrator on those questions is binding upon the parties for by referring the specific questions parties desire to have a decision from the arbitrator on those questions rather than from the court and the court will not, unless it is satisfied that the arbitrator had proceeded illegally, interfere with the decision.

(Para 4)

Whether any specific question of law had been referred to or not must be determined having regard to the reference before the arbitrators. It is essential to keep the case, where the disputes are referred to the arbitrator in the decision of which the question of law becomes material, distinct from the case in which a specific question of law has been referred to him for a decision.

(Para 5)

Where the question referred to arbitration was whether the managing agents were entitled to draw the expenses claimed or to draw only the actual expenditure incurred on office allowance subject to the ceiling laid down in para. XIII (3)

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of the Sixth Schedule of the Electricity Act, and, there was no factual dispute which had been referred to the arbitrator;

Held that the only question in the case necessarily to be decided was the construction of Para. XIII (3) of the Sixth Schedule to the Act and that was a question of law. (Para 6)

That specific question of law had been referred to the arbitrators. Therefore, even if the arbitrators had made an erroneous decision that could not be challenged by the petitioner. (Para 6)

Held further that the decision of the arbitrator that the managing Agent's claim for office allowance in terms of the provisions laid down in para. XIII (3) of the Sixth Schedule should be limited to the actual expenditure incurred and should not exceed the ceiling specified therein, could not be challenged as erroneous in law. The expressions "based on a percentage" used in sub-para. (1) of paragraph XIII of the Sixth Schedule to the Act and "shall be a percentage" in sub-para. (3) mean the same thing and intend to convey that the expenditure allowable must be based on a percentage, especially in view of the fact that office allowance include certain expenses but not all. Furthermore unless the actual expenditure was contemplated there was no need to put a ceiling. Case law discussed.

(Para 7)

Cases Referred: Chronological Paras

AIR 1973 SC 683	5
AIR 1963 SC 1685	4
AIR 1955 SC 468	5
AIR 1949 PC 334	5
1933 AC 592	5

ORDER:— This is an application by Bareilly Electricity Supply Co. Ltd., filed on the 18th January, 1977, challenging the award dated the 28th September, 1974.

2. Before I go to the merits of the rival contentions of the parties it has to be mentioned that a preliminary objection was taken as to the maintainability of this application. It was contended that on the 19th January, 1977, the name of the petitioner Company was changed into Bareilly Holdings Limited. Therefore, the petitioner, it was urged, was not entitled to continue the present proceeding in this form and name. As would appear from what is stated above, when the application was made it was a competent application because the change in the name had not taken place at that time. The change took place subsequently.

Therefore, in view of the provisions of S. 23 (3) of the Companies Act, 1956 and the facts and circumstances of this case, in my opinion, it would be proper to allow the prayer, on the oral application of Counsel for the petitioner, to change the name of the petitioner to Bareilly Holdings Limited. I, therefore, direct that the name of the petitioner be changed in the records of this case to Bareilly Holdings Limited.

3. The petitioner Company is registered under the Indian Companies Act and during the period 1965-66 to 1969-70 M/s. Martin Burn Ltd. were the Secretaries and Treasurers of the petitioner company under an agreement dated the 30th August, 1965. As such Secretaries and Treasurers, M/s. Martin Burn Ltd. were paid certain amounts as and by way of office allowances. The payment of such office allowance was duly approved, according to the petitioner company, by the Central Government under the provisions of the Companies Act, 1956. The agreement dated the 30th August, 1965, inter alia, provided as follows:

"5. The Secretaries and Treasurers shall be entitled to receive from the Company by way of remuneration for their services in relation to such management, in respect of each financial year (as defined in S. 2 (17) of the Act) of the Company or part thereof;

(a) Ordinary remuneration as and to the maximum extent specified in sub-para. (1) of para. XIII of the Sixth Schedule to the Electricity (Supply) Act, 1948 subject to the minimum payment specified in sub-para. (2) of the said para. XIII.

(b) An Office allowance as and to the maximum extent specified in sub-para. (3) of the said para. XIII to cover wages and salaries."

It appears that dispute arose between the petitioner and the State of Uttar Pradesh represented by the Secretary of the Government of Uttar Pradesh, Irrigation and Power Department with regard to the amounts which M/s. Martin Burn Ltd. were entitled to draw as office allowances during the aforesaid period. It is not in dispute that the payment of office allowance in this case is governed by the provisions of para. XIII (3) of the Sixth Schedule of the Electricity (Supply) Act, 1948. It was the case of the petitioner that on an interpretation of the said clause of para. XIII (3), the amounts paid to M/s. Martin Burn Ltd., during the relevant year, which were within the ceiling pro-

vided by the Cl. XIII (3), were permitted by the said clause. The petitioner contended that the office allowance had to be calculated as a percentage of the operating expenditure and the expenditure on capital works as laid down in the said Schedule of the Act. On the other hand, the respondent's case was that M/s. Martin Burn Ltd. were entitled to draw only the 'actual expenditure' incurred on office allowance. It is the case of the petitioner that there was no question of 'actual expenditure' involved and therefore, the petitioner contended the concept of 'actual expenditure' was foreign to the said paragraph XIII (3) of the said Schedule. It was further the case of the petitioner that it was not possible or practically feasible to calculate such actual expenditure nor was any guideline laid down for calculation of actual expenditure. The dispute was referred to the arbitration of the Central Electricity Authority under the provisions of para. XVI of the Sixth Schedule to the Electricity (Supply) Act, 1948, and on or about the 27th December, 1972 the Central Electricity Authority had decided to admit for arbitration on the following issues in respect of the said dispute:

"Whether the Managing Agents are entitled to draw the following amounts as office allowance during the years 1965-66 to 1969-70:

Year of Account.	Amount Charged (Rs.)
1965-66	Rs. 45,376.00
1966-67	Rs. 51,366.00
1967-68	Rs. 48,990.00
1968-69	Rs. 54,537.00
1969-70	Rs. 53,951.00

or

Whether the Managing Agents are entitled to draw only the actual expenditure incurred on office allowance subject to the ceiling laid down under para. XIII (3) of the Sixth Schedule."

Thereafter, after the statements of facts had been filed, the arbitrators made the award on the 28th September, 1974 which is the subject-matter of challenge in this application. The award was to the following effect:

"AND WHEREAS a dispute arose between the Government of Uttar Pradesh (hereinafter referred to as the 'Government') and the Bareilly Electricity Supply Co. Ltd. (hereinafter referred to as 'the company') on the following points:

Whether the Managing Agents are entitled to draw the following amounts as

office allowance during the years 1965-66 to 1969-70:

Year of Account	Amount Charged in Rs.
1965-66	Rs. 45,376/-
1966-67	Rs. 51,366/-
1967-68	Rs. 48,990/-
1968-69	Rs. 54,537/-
1969-70	Rs. 53,951/-

"Whether the Managing Agents are entitled to draw only the actual expenditure incurred on office allowance subject to the ceiling laid down under Paragraph XIII (3) of the Sixth Schedule.

"AND WHEREAS the Government referred the above mentioned dispute between itself and the Company to the Authority for Arbitration under Paragraph XVI of the Sixth Schedule by its letter No. 3590-V/71/XXIII-PB-455/62 dated 31st January, 1972.

"AND WHEREAS the Government filed its statement of case vide its letter No. 155-V/XXIII-P-4/62 dated 20th January, 1973.

"AND WHEREAS the Company filed its statement of the case vide its letter No. BE/30A/73/2490, dated 20th February, 1973.

"AND WHEREAS the Government filed its rejoinder to the statement of case of the Company vide its letter No. 714-V/73/XXIII-P-455/62 dated 17th March, 1973.

"NOW THEREFORE, We N. Venkatesan and N. Tata Rao having considered the written statement filed by the Government and the Company and having heard the aforementioned representatives of the parties in person on the aforesaid date and having considered all the materials placed before us by the parties, make our Award in respect of the dispute referred to above as follows:

"The Managing Agents' claim for office allowance in terms of the provision laid down under paragraph XIII (3) of the Sixth Schedule to the Electricity (Supply) Act, 1948 should be limited to the actual expenditure incurred and shall not exceed the ceiling specified therein." As is apparent from the award the arbitrators have awarded that the Managing Agents' claim for office allowance in terms of the provisions laid down in paragraph XIII (3) of the Sixth Schedule should be limited to the actual expenditure incurred and should not exceed the ceiling specified therein. It is material at this stage to refer to the provisions of paragraph XIII of the Sixth Schedule of

the Electricity (Supply) Act, 1948. The said paragraph is to the following effect:

"XIII (1) Subject to the provisions of the sub-paragraph (2) the ordinary remuneration of a managing agent excluding the office allowance mentioned in sub-paragraph (3) but including purchasing commission, if any, shall be based on a percentage of net profits (as determined in accordance with the provisions of Section 349 of the Companies Act, 1956) and shall not exceed—

(a) in respect of the first Rs. 5 lakhs of such net profits — 10 per cent.; and

(b) in respect of all net profits in excess of Rs. 5 lakhs — 7 per cent.

(2) The amount paid to a managing agent shall be subject to a minimum payment on account of ordinary remuneration not exceeding two rupees per annum for each complete thousand rupees of paid up share and debenture capital, provided that for purposes of computing the minimum payment should the share and debenture capital be less than rupees five lakhs it shall be taken as rupees five lakhs and should the said capital be greater than rupees one crore it shall be taken as rupees one crore.

(3) An office allowance drawn by a managing agent which shall include the salaries and wages of all persons employed in the office of the managing agent, but not the salaries of the engineering staff employed for purposes of the undertaking, shall be a percentage of the operating expenditure and the expenditure during the year of account on capital works. The office allowance so drawn shall not exceed—

(a) In respect of the first Rs. 1 lakh of operating expenditure — 8 per cent.

In respect of next Rs. 2 lakhs of operating expenditure — 5 per cent.

In respect of the next Rs. 7 lakhs of operating expenditure — $2\frac{1}{2}$ per cent.

In respect of all operating expenditure in excess of Rs. 10 lakhs — $1\frac{1}{2}$ per cent; and

(b) In respect of the first Rs. 1 lakh of capital expenditure incurred during the year of account — 4 per cent.

In respect of next Rs. 2 lakhs of capital expenditure incurred during the year of account — 3 per cent.

In respect of the next Rs. 7 lakhs of capital expenditure incurred during the year of account — $1\frac{1}{2}$ per cent.

In respect of all capital expenditure in excess of Rs. 10 lakhs incurred during the year of account — 1 per cent,

Operating expenditure for the purposes of sub-paragraph (3) (a) above shall mean the sum of the items of expenditure as defined in sub-paragraph (2) (b) of paragraph XVII with the omission of those under clauses (i), (iv), (ix) and (x) thereof."

On behalf of the petitioner it was contended that inasmuch as the arbitrators held that the office allowance should be limited only to the actual expenditure, the arbitrators had committed an error of law on the face of the award in view of the provisions of paragraph XIII (3) of the Sixth Schedule referred to hereinbefore. It was urged that the said sub-paragraph directed that office allowance 'shall be a percentage'. It was emphasised that unlike sub-paragraph (1) of paragraph XIII of the said Schedule, it did not stipulate that it should be based on a percentage but it directed that it should be a percentage. It was, therefore, argued that the office allowance had to be computed on a notional basis of the percentage provided such computation did not exceed the ceiling, and there is no dispute in this case that payments claimed had not exceeded the ceiling — and therefore, the arbitrators had to allow the percentage claimed by the petitioner. It was submitted that inasmuch as the arbitrators had proceeded on the concept of actual expenditure subject to the ceiling, the arbitrators had misconstrued or misread the provisions of sub-paragraph (3) of paragraph XIII of the Sixth Schedule of the said Act.

4. The contention in opposition to this argument on behalf of the respondent was that specific question of law had been referred to the arbitrators. Therefore, the petitioner was not entitled to challenge the finding of the arbitrators. In aid of this submission reliance was placed on the observations of the Supreme Court in the case of Union of India v. Ralli Ram (AIR 1963 SC 1685). There the Supreme Court observed that an award being a decision of an Arbitrator, whether a lawyer or a layman chosen by the parties, and entrusted with power to decide a dispute submitted to him is ordinarily not libale to be challenged on the ground that it was erroneous. The award of the arbitrator was ordinarily final and conclusive unless a contrary intention was disclosed by the agreement. The award was a decision of a domestic tribunal chosen by the parties, and the civil courts which were entrusted with the power to facilitate arbitration and to effectuate the

awards, could not exercise appellate powers over the decision. Wrong or right the decision was binding, if it had been reached fairly, after giving adequate opportunity to the parties to place their grievances in the manner provided by the arbitration agreement. But it was firmly established, according to the Supreme Court, that an award was bad on the ground of error of law on the face of it, when in the award itself or in a document actually incorporated in it, there was found some legal proposition which was the basis of the award and which was erroneous. An error in law on the face of the award means, 'you can find in the award or a document' actually incorporated thereto, as for instance, a note appended by the arbitrator stating the reason for his judgment, some legal proposition which was the basis of the award and which could be said to be erroneous. It did not mean that if a narrative reference was made to a contention of one party that would open the door to setting first what that contention was and then going to the contract on which the parties' right depended to see if that contention was sound. The Supreme Court observed, but this rule did not apply where questions of law were specifically referred to the arbitrator for his decision, the award of the arbitrator on those questions was binding upon the parties for by referring the specific questions parties desired to have a decision from the arbitrator on those questions rather than from the Court and the Court would not, unless it was satisfied that the arbitrator had proceeded illegally, interfere with the decision.

5. In this case, therefore, two questions are relevant, viz. whether specific questions of law had been referred to the arbitrators and secondly whether there is any error of law in the award on the face of it. So far as the first question is concerned whether any specific question of law had been referred to or not must be determined having regard to the reference before the arbitrators. It is essential to keep the case, where the disputes are referred to the arbitrator in the decision of which the question of law becomes material distinct from the case in which a specific question of law has been referred to him for a decision. See in this connection the observations of Lord Russell in the case of *F. R. Absalom Ltd. v. Great Western (London) Garden Village Society*, 1933 AC 592 at p 607 and Lord

Wright at page 616 of the report observed as follows:

"There is here no submission of any specific question of law as such and as a specific question of law, no doubt incidentally, and indeed necessarily, the arbitrator will have to decide some questions on the construction of the building contract, but the two matters submitted are both composite questions of law and fact; there is no express submission of the true effect of the contract on the basis of undisputed facts."

Lord Wright further observed that there was no reason to think that the parties had any specific question of law in mind at all. Therefore, it is necessary to emphasise that there must be submission on a specific question of law as such and it must be distinct from a reference where the question of law must necessarily have to be decided.

6. In this case, as mentioned hereinbefore, the question referred to arbitration was whether the managing agents were entitled to draw the expenses claimed or to draw only the actual expenditure incurred on office allowance subject to the ceiling laid down in paragraph XIII (3) of the Sixth Schedule. In such form the disputes were referred to arbitration. But in the background of the reference it is abundantly clear that the reference to the arbitrators was whether on a true interpretation of paragraph XIII (3) of the Sixth Schedule of the Electricity Act the petitioners were entitled to the actual expenses or only on a percentage as contemplated in paragraph XIII (3) of the Sixth Schedule. In the instant case, there was no dispute as to the facts, there was no dispute as to the quantum of actual expenditure, there was no dispute as to whether the allowable expenditure exceeded the ceiling. The only dispute was whether on the construction of the relevant clause the claim of the petitioner was justified. The construction of that clause is a question of law. That specific question of law had been referred to the arbitrators. Therefore, even if the arbitrators had made an erroneous decision this cannot be challenged by the petitioner in the instant case. Reliance was also placed on this aspect on the decision *U. G. V. E. S. Co. v. U. P. Electricity Board*, AIR 1973 SC 683. There, the Supreme Court held, relying on the decision in the case of *Durga Prosad Chamaria v. Shew Kishendas Bhatta*, AIR 1949 PC 334 in which it was held, if a question of

law had been specifically referred to an arbitrator for his decision it would be contrary to well established principles for a Court of law to interfere with the award even if the Court itself would have taken a different view of the point of view had it been before it that the said decision could have no application because the parties in the case before the Supreme Court had not referred to any specific question of law for the decision of the arbitrators. In the case of Thawar-das v. Union of India, AIR 1955 SC 468 the Supreme Court referred to the importance of the question where any question of law had been specifically referred to the arbitrator because the Supreme Court observed that it was necessary to stress the word 'specifically' as the parties who made the reference to arbitration have the right to insist that the tribunal of their choice should decide their dispute according to law, so before the right could be denied to them in any particular matter the Court must be very sure that both parties wanted the decision of the arbitrator on a point of law rather than that of the Courts that they wanted his decision on that point to be final. In this case the reference specifically was the quantum of expenditure allowable in terms of paragraph XIII (3) of the Sixth Schedule to the Act. There was no factual dispute which had been referred to the arbitrator. Therefore, in my opinion, the only question in this case necessarily not merely incidentally to be decided is the construction of paragraph XIII (3) of the Sixth Schedule to the Act and it is indisputable that it is a question of law. That question was the only question. Therefore that question of law had only been specifically referred to the arbitrators in the instant case. Whether any question of law has been referred to the arbitrators must be determined in the background of the facts and circumstances of the case. It is not necessary to use the words "specifically referred" in the reference itself. In that view of the matter it must be held that specific question of law had been referred to the arbitrators and the petitioner is not entitled to challenge the decision.

7. Apart from that there is another aspect of the matter. The question here is whether in accordance to sub-paragraph (3) of paragraph XIII, which I have referred to hereinbefore, the said office allowance drawn by a managing agent shall be only a percentage of the operating expendi-

ture and the expenditure during the year of account on capital work. In my opinion the expression 'based on a percentage' used in sub-para. (1) of paragraph XIII of the Sixth Schedule to the Act and "shall be a percentage" in sub-paragraph (3) mean the same thing and intend to convey that the expenditure allowable must be based on a percentage, especially in view of the fact that office allowance includes certain expenses but not all. Furthermore unless the actual expenditure was contemplated there was no need to put a ceiling. In my opinion, the decision of the arbitrators cannot be challenged as erroneous in law. In the aforesaid view of the matter, I am unable to sustain the challenge to the impugned award.

8. The application therefore fails and I accordingly dismiss the application.

9. In the facts and circumstances of this case, each party will pay and bear their own cost.

10. Judgment upon award is stayed for three weeks.

11. Allegations made in the affidavit-in-opposition are not admitted by Mr. Banerji's client.

Application dismissed.

AIR 1977 CALCUTTA 333

NIRMAL CHANDRA MUKHERJI AND
BANKIM CHANDRA RAY, JJ.

Biva's Private Ltd., Petitioner v. West Bengal Khadi and Village Industries Board, Respondents.

Civil Rule No. 28 of 1976, D/- 11-3-1977.

Civil P. C. (1908), O. 6, R. 17 — Amendment of written Statement — Amendment seeking to introduce a new case and to make out a new claim and to negative admission already made in written statement ought not to be allowed — Suit for price of goods supplied to agent — Admission in written statement about defendant being sole selling agent — Amendment making out a case that plaintiff sought to avoid and failed to execute sole selling agency agreement — Amendment, held, could not be allowed. AIR 1953 Mad 958 and AIR 1967 SC 96, Rel. on. (Paras 8 & 9)

Cases Referred:	Chronological	Paras
AIR 1967 SC 96		7, 11
AIR 1957 SC 357		7
AIR 1953 Mad 958		7, 10

R. P. Bagchi, Snehansu S. Roy, Miss Nandita Ghose, for Petitioner; Arun Kr. Motilal, Chandra Sekhar Das, for Respondents.

B. C. RAY, J.:— This Rule arises out of an application under Section 115 of the Code of Civil Procedure and is directed against Order No. 35 dated December 17, 1975 passed in Title Suit No. 93 of 1973 by the Subordinate Judge 3rd Court, Alipore, rejecting the defendant/petitioner's application for amendment of the written statement.

2. The plaintiff opposite party which is a statutory body set up under the West Bengal Act 19 of 1959 instituted Title Suit No. 93 of 1973 in the Third Court of Subordinate Judge at Alipore, stating inter alia, that the defendant Bivas Private Limited which had long experience of providing the markets for the filter papers, with a view to promoting the qualities of the goods, was appointed as the selling Agent for the sale of goods to be produced at Kalyani Unit and Dasghara unit. In terms of the said agency the defendant used to take delivery of goods and sell them in the market and used to make payment to the plaintiff from time to time. The price of the goods was at first fixed at Rs. 12-0- per Kg. But subsequently, as the cost of production increased the plaintiff too increased the price from Rs. 12/- to Rs. 20/- per Kg. and the same was duly communicated to the defendant by letter dated 16th of January, 1970. To this letter the defendant did not send any reply. Thereafter the plaintiff sent a statement of account to the defendant and requested to pay a sum of Rs. 47,361.90 which remained due from the defendant. It was alleged that on 15th of November, 1971 the defendant repudiated the agency by their letter. The plaintiff thereafter issued a notice through their lawyer demanding payment of the aforesaid sum due to them, but no reply was received from the defendant and hence the suit was filed for a decree for recovery of the sum of Rs. 47,361.80 and for other ancillary reliefs.

3. The defendant on 25th February, 1974 filed a written statement. In paragraph 10 (c) of the said written statement it has been stated as follows:

"This illegal arbitrary and wrongful increase in price was made by the plaintiffs without prior reference to the defendant and even before..... the sole selling Agent."

In paragraph 10 (d) of the said written statement it has been stated that it was

settled that in consideration of the technical know-how, supplied by the defendants and the investments made by them the defendants would be the sole selling Agent for five years. In paragraph 13 of the written statement it has been stated that the defendant did not repudiate the agreement by their letter dated 15-11-71 or on any date. In paragraph 15 of the written statement it has been stated that as the repudiation of the agency by the plaintiffs is unilateral, illegal and mala fide the plaintiffs are not entitled to get any relief.

4. Thereafter issues were framed and the suit was fixed for hearing peremptorily on 19th November, 1975. On that date an application for amendment of the written statement was filed by the defendant seeking to amend the statements made in paragraph 10 (c) by inserting the following words after the words "the sole selling Agent". "as proposed and assured although the plaintiff put off approval and execution of the said agreement of agency." and in para. 10 (d) also the defendant also wanted to insert the following words after the words "interest of the defendants." An objection was filed by the plaintiff submitting that the amendment, if allowed, will have the effect of taking away the legal right already accrued to them and will render the admission made by the defendant nugatory.

5. On December 17, 1975 the Subordinate Judge, Third Court, Alipore, after hearing the parties rejected the said application for amendment holding that in paragraph 10 (c) of the written statement the agreement of agency was admitted and by the proposed amendment the defendant wanted to do away with the admission. It was further held that the defendant could not make out a new case or even a contradictory case by way of amendment. Moreover the proposed amendment aimed at destroying the admission already made by the party. As such the same was rejected. It is against this order this revisional application was moved in this Court and the instant Rule was issued.

6. Mr. R. P. Bagchi, learned Advocate appearing on behalf of the petitioner has submitted that there was no new case made out by the proposed amendment nor the proposed amendment had the effect of changing the nature and character of the suit and as such the same should

have been allowed by the learned Subordinate Judge. Mr. Bagchi further submitted that there was no agreement of sole selling agency to be entered into between the petitioner and the opposite party and in the written statement the admission about the defendant being the sole selling agent was made inadvertently inasmuch as in fact the defendant has not been appointed the sole selling agent of the products of the plaintiff, as the agreement had not been finalised between the parties. It has, therefore, been submitted that the proposed amendment ought to have been allowed by the Court below as the same was necessary for the proper adjudication of the case and the same will not cause any injustice on the other side.

7. Mr. A. K. Motilal, learned Advocate appearing on behalf of the opposite party, has on the other hand submitted that the suit was filed on the basis of the agency agreement and the relief sought for was for a decree for the goods supplied to the defendant who was the sole selling agent of the plaintiff's products. Art. 3 of the Lim. Act governs such suit and the period of limitation is three years. As the defendant by their letter issued in 1971 repudiated the selling agency agreement, this action has been brought and as such the suit was within the period of limitation. He further submitted that the defendant in their written statement admitted the contract of selling agency between the defendant and the plaintiff and by the proposed amendment a new case was sought to be made out by pleading that there was no agreement of sole selling agency between the plaintiff and the defendant. Thus the proposed amendment, according to Mr. Motilal will seriously prejudice the plaintiff and will create such injustice on the plaintiff inasmuch as the same if allowed, will render the suit as one barred by limitation, as it will be a suit only for recovery of price of the goods sold and delivery to the defendant. Moreover, the said amendment, if allowed, will destroy the effect of the admission that has been made by the defendant in their written statement and will seriously prejudice the plaintiff. Mr. Motilal has, therefore, submitted that this amendment should not be allowed. In support of his submission Mr. Motilal has cited the decisions reported in Shaikh Masthan Sahib v. Palayani Balarami Reddi, AIR 1953 Mad 958, A. K. Gupta & Sons v. Damodar Valley Corpn., AIR 1967 SC 96

and L. J. Leach & Co. Ltd. v. Messrs. Jardine Skinner & Co., AIR 1957 SC 357 at p. 363.

8. It appears on a reading of the written statement that the defendant in paragraph 10 (c) and (d) admitted that the defendant was appointed the sole selling agent of the products of the plaintiff. From paragraphs 13 and 15 of the written statement also it appears that the defendant admitted that the agency agreement existed and it was repudiated unilaterally by the plaintiff. The proposed amendment clearly aims at setting out a case that the plaintiff avoided and failed to approve and execute the said agreement of agency. Thus the proposed amendment completely aims at denying the relationship of plaintiff and the defendant as principal and agent which the defendant admitted in their original written statement.

9. In that view of the matter, it appears to us quite clear that by the proposed amendment the defendant tries to make out a new claim and to set up a new case than what was made in the earlier written statement. Moreover, by this proposed amendment the defendant is attempting to negative the admission that they were the sole selling agents of the products of the plaintiff.

10. In AIR 1953 Madras 958 (Shaikh Masthan Sahib v. Palayani Balarami Reddi), it has been held that where by the proposed amendment the respondent sought to negate his own admission in the written statement, it should not be allowed.

11. In AIR 1967 SC 96 (A. K. Gupta & Sons v. Damodar Valley Corpn.) it has been held that a party is not allowed by amendment to set up a new case or a new cause of action, particularly when a suit on the new case or cause of action is barred.

12. For the reasons aforesaid the contentions raised on behalf of the petitioner fail. The Rule is therefore discharged. There will be no order as to costs. Let the records go down as soon as possible.

N. C. MUKHERJI, J.:— I agree.
Rule discharged.

AIR 1977 CALCUTTA 336

**SALIL KUMAR DATTA AND
GANENDRA NARAYAN RAY, JJ.**

Gour Chandra Mukherjee, Petitioner
v. Andrew Yules Co-operative Credit Society Ltd. & others, Opposite Parties.

C. R. No. 3207 of 1975, D/- 18-2-1977.

Contract Act (1872), S. 73 — Negligence of servant — Loss caused — Liability — Disappearance of cash in custody of custodian following insecure and risky practice — Custodian is liable for loss. (Master and Servant).

Where the custodian of the society kept a certain amount of cash in the appointed drawer duly locked before he left his office for the day and when he re-opened cash box after two or three days found that the cash amount was missing and relied upon the practice followed by his predecessors in office in keeping heavy cash in the cash box inside the drawer which was never objected to by the Managing Committee nor did it provide for better security arrangements,

Held, that the custodian owed an obligation and legal duty to the Managing Committee for safe custody of the cash belonging to the society kept in his charge. In discharge of his duty, he was expected and bound to take all such precautions as a reasonable man would take in similar circumstances. A practice insecure and risky is no answer to the omission to take adequate care and precaution a reasonable man entrusted with cash would and is expected to take in such circumstances. It was also no answer that the Managing Committee acquiesced to the practice imperfect as it was, for the Managing Committee, had put the custodian in charge of the cash who was free to take all precautions in discharge of his legal responsibility. Even though the informal arrangements were acquiesced by the Managing Committee, the custodian had further responsibility in regard to cash entrusted to his charge and he was negligent as a reasonable man should have taken further precaution for safe custody of such fund.

(Para 6)

Ramen Banerjee and Nikhil Kumar Bhattacharya, for Petitioner; Krishna Dulal Mukherjee, for Opposite Parties.

SALIL KUMAR DATTA, J.:— This Rule is directed against order dated 20-2-75 passed by the Assistant Registrar of

DU/EU/B167/77/AYP/WNG

Co-operative Societies in Appeal Case No. 5/Calcutta of 1974-75 affirming the Award of the Arbitrator in Dispute Case No. 40/ Calcutta of 1973-74. The petitioner was an elected director of the Andrew Yule's Co-operative Credit Society Limited which had its office at 8, Clive Row. It had also an Unit office at 38, Chowrangi Road, Calcutta for collection from and payment of sanctioned money to member employees of the Concord of India Insurance Co. Ltd. According to the arrangement, an elected director being an employee of the Concord Insurance was to handle society's fund appertaining to the Concord unit and to render statement of receipts and payments at the close of the day's transaction. A cash box inside a lock drawer was provided for keeping the money pending disbursement or remittance. The petitioner at the material time was an elected director of the society and handled the cash of that unit during the relevant period from 3-11-72 to 25-6-73. On 25-6-73 the petitioner reported to the Vice Chairman of the Society that he had kept a sum of Rs. 5842.38 P. on 22-6-1973 in the cash box, locked it and kept the same in the appointed drawer duly locked before he left his office for the day. On 25-6-73 when he opened the cash box he found that the cash amount stated above was missing. The Vice-Chairman reported the matter to the Chief Executive of the Concord Insurance who ultimately sent a report to the police. The police made investigation but the results were not known. Thereafter the Managing Committee considered the position and directed the petitioner to make good the loss arising out of the alleged disappearance of the cash within a specified time. As the requisition was not complied with the Society raised a dispute being No. 40/Calcutta of 1973-74 claiming Rs. 5842.38p with interest from the petitioner. The dispute was referred to the Arbitrator No. III for adjudication. The Arbitrator after taking evidence and considering the material on record decreed the amount in favour of the society directing the petitioner to pay the aforesaid amount with interest thereon from 26-6-73 till realisation.

2. The petitioner thereafter preferred an appeal referred to above and the Assistant Registrar of Co-operative Societies the appellate authority upheld the Award of the Arbitrator. The appellate authority raised two points for consideration

(1) Whether the defendant appellant was custodian of the cash appertaining to Concord Unit?

(2) Whether he had any civil liability arising out of the disappearance of the cash balance and if so, what is the extent of the liability?

In coming to his decision the appellate authority in agreement with the Arbitrator noted the informal arrangement made by the Managing Committee in maintaining the cash. It was held that even so, such arrangement did not alter the fact of the petitioner's being the custodian of the cash and the petitioner was liable to make good the loss arising out of sheer negligence of his duty.

3. Mr. Banerjee appearing for the petitioner submitted that both the Arbitrator as also the appellate authority acted without jurisdiction in holding that the petitioner was guilty of negligence when there was no issue framed on that basis. He submitted that if an issue was framed the petitioner would have been in a position to establish that he had followed the informal and conventional arrangement for maintaining the cash and was not negligent in any respect and the arrangement being imperfect the Managing Committee should have been held guilty of contributory negligence. On this ground it was submitted the Award was without jurisdiction and was liable to be interfered with under Article 227 of the Constitution.

4. There was no dispute that the petitioner was the custodian of the cash appertaining to Concord unit. The second issue as to whether he had a civil liability arising out of disappearance of the cash balance embrace all aspects of the question involving the liability of the petitioner. This point for decision as already stated involved the question of determination of the conduct of the petitioner in regard to the maintenance of the cash vis-a-vis the arrangement made by the Managing Committee. We accordingly think that no specific issue was called for and/or that there was any prejudice caused to the petitioner on account thereof. As the records indicate the parties adduced their evidence in support of their respective cases touching all these aspects.

5. It has next been said that on the findings arrived at by the appellate authority the petitioner should not have been found liable for the amount under claim. It has been held by the appellate

authority that the Managing Committee had evolved arrangement in exercise of their lawful jurisdiction and such arrangement was acted by the successive directors who have been in charge of the cash without any protests on the part of the committee. Even so, the authority held that informal or conventional nature of arrangement did not alter the fact of the petitioner being the custodian of the cash. Mr. Banerjee contended that the petitioner was not negligent in respect of the disappearance of cash and referred in support to Winfield on Tort, 7th Edition, page 190 wherein it has been said that a defendant charged with negligence can clear (himself) if he shows that he has acted in accord with general and approved practice. He relied on the practice followed by his predecessors in office in keeping heavy cash in the cash box inside the drawer which was never objected to by the Managing Committee nor did it provide for better security arrangements.

6. The petitioner, as we have seen, was the legal custodian and in charge of the cash for day-to-day operations. He accordingly owed an obligation and legal duty to the Managing Committee for safe custody of the cash belonging to the Society kept in his charge. In discharge of his duty, he was expected and bound to take all such precautions as a reasonable man would take in similar circumstances. A practice insecure and risky as is obvious, is no answer to the omission to take adequate care and precaution a reasonable man entrusted with cash would and is expected to take in such circumstances. It is also no answer that the Managing Committee acquiesced to the practice imperfect as it was, for the Managing Committee had put a director in charge of the cash who was free to take all precautions in discharge of his legal responsibility.

We accordingly find no lacuna in the finding of the appellate authority that even though the informal arrangements were acquiesced by the Managing Committee, the elected director had further responsibility in regard to the cash entrusted to his charge. There can be no dispute that he was negligent as a reasonable man should have taken further precaution for safe custody of such fund.

7. It has further been pointed that the petitioner on two occasions remitted heavy cash to the office of the Concord Insurance for safe custody and even on

21-6-73 Rs. 15,000/- out of day's cash balance of about Rs. 20,000/- was kept in the employer's office. Even on 22-6-73 he remitted Rs. 11,000/- to the Head Office keeping a balance of Rs. 5842.38 P. It was said that the Vice-Chairman refused to accept any amount beyond Rs. 15,000/- for safe keeping in custody of Concord Insurance Company. The Vice-Chairman was a witness in the proceedings but no such question on his alleged refusal was put to him. Accordingly it was rightly found that his alleged explanation for not keeping the cash with Concord office was incredible. Further there also appears to be a practice about the deposit of cash with the Concord office which was not availed of by the petitioner and no reason therefore has been established.

8. In the circumstances we are of opinion that the petitioner did not take sufficient precaution for the heavy cash which he had in his custody after the day's working and there is no escape from the conclusion that he was negligent in respect thereof as has been found by the impugned judgment. For all these reasons, we do not propose to interfere with the impugned order. The Rule accordingly fails and is discharged. There will be no order as to costs.

G. N. RAY, J.:— I agree.

Petition dismissed.

AIR 1977 CALCUTTA 338

**SABYASACHI MUKHARJI AND
M. M. DUTT, JJ.**

Smt. Bimla Debi Jalan and another, Applicants v. Raja Ram Shaw and others, Respondents.

Appeal from Original Order No. 545 of 1969, D/- 15-2-1977.

Motor Vehicles Act (1939), Ss. 110 and 110-F — Jurisdiction of tribunal — Not restricted by S. 110 to accidents happening only in public places — Only manner of adjudicating liability provided. Decision of D. Basu J. (Cal), Reversed.

In case of accidents causing death or bodily injury the liability might arise under the law of Torts or under the provisions of the Fatal Accidents Act. How that liability has to be adjudicated in respect of accident arising out of the use of the Motor Vehicle has been provided by Section 110. Section 110 does not limit that jurisdiction only to accidents occur-

ring in public places. The jurisdiction of the Claims Tribunals is for the purpose of adjudicating upon claims for compensation in respect of accidents (not limited to particular places), involving the death of, or bodily injury to, persons arising out of use of motor vehicles. The scope of this section has to be understood in conjunction with Section 110-F of the Act. Therefore, from the fact that the liabilities of insurer are limited only to accidents occurring in public places, it cannot be inferred that the jurisdiction of the Claims Tribunals is also restricted to accidents taking place in public places. AIR 1974 Mys 16 and AIR 1968 Mad 436, Rel. on. Decision of D. Basu, J. (Cal), Reversed.

(Para 3)

Cases Referred: Chronological Paras
AIR 1974 Mys 16 : 1973 ACJ 78 3
AIR 1968 Mad 436 3

Bhabesh Chandra Mitter and Miss Aruna Mukherjee, for Applicants; P. K. Sengupta and Miss. Jolly Sett (for No. 1) and Miss Manju Roychoudhury (for Nos. 2 (a)-2 (c)), for Respondents.

SABYASACHI MUKHARJI, J.:— Mur-lidhar Jalan met with an accident on the 28th October, 1963 within the compound of the factory of Messrs. Dalmia Iron & Steel Co. Ltd., Khardah. As a result of the injuries suffered by the said accident, he died on the 2nd November, 1963. His mother and his minor widow preferred a claim before the Motor Accident Claims Tribunal, Howrah against the owner of the vehicle as well as against the Insurance Company. Issues were raised and settled. One of the preliminary issues that was raised before the Tribunal was whether the Tribunal had jurisdiction to entertain the claim. The Tribunal tried the said issue as a preliminary issue. The Tribunal came to the conclusion that the factory premises of Messrs. Dalmia Iron & Steel Co. Ltd. was not a "public place" within sub-section (24) of Section 2 of the Motor Vehicles Act, 1939. But the Tribunal was further of the view that under Section 110 of the said Act, the Tribunal had jurisdiction to adjudicate upon claims for compensation in respect of accidents occurring at places which were not public places. In the premises, the Tribunal came to the conclusion that the Tribunal had jurisdiction to entertain the claim. Being aggrieved by the aforesaid decision of the Tribunal, the respondent No. 1 being the owner of the Motor Vehicle moved an application under Article 226 of the Constitution and obtained a rule nisi. The rule

ultimately came up for hearing before D. Basu, J. and was disposed of by an order made and judgment passed on 31st May, 1967. The judgment, however, is not available. We had caused searches to be made for the judgment in the records of this Court as well as before the Motor Accident Claims Tribunal but without any success. The parties were also unable to furnish any copy of the judgment. In the premises, it was not possible to reconstruct the judgment. But we have been able to gather the reasons or the grounds upon which the learned Judge disposed of the application from the arguments advanced by the learned advocates appearing on behalf of the parties. D. Basu, J. held that the Tribunal had no jurisdiction as the accident in question occurred at a place which was not a public place and, therefore, he made the Rule absolute. This appeal arises from the said decision of D. Basu, J.

2. The Motor Vehicles Act, 1939 is an Act to consolidate and amend the law relating to Motor Vehicles. Sub-sec. (24) of Section 2 defines public place. The said definition is to the following effect:

"(24) 'public place' means a road, street, way or other place, whether a thoroughfare or not, to which the public have a right of access, and includes any place or stand at which passengers are picked up or set down by a stage carriage;"

The Act also defines "public service vehicles". But we are concerned in this case with Section 110 which deals with the setting up of the Claims Tribunals. Sub-s. (1) of Section 110 provides that the State Government might, by notification, constitute one or more Accident Claims Tribunal for such area as might be specified in the notification "for the purpose of adjudicating upon claims for compensation in respect of accidents involving the death of, or bodily injury to, persons arising out of the use of Motor Vehicles, or damages to any property of a third party so arising or both." The proviso to the said Section provides that if such claim includes a claim for compensation in respect of damage to property exceeding Rs. 2,000, the claimant might, at his discretion, refer the claim to a civil court for adjudication, and where a reference is so made, the Claims Tribunal should have no jurisdiction to entertain any question relating to such claim. Section 110-A deals with application for compensation and provides the manner of the making of the

application. Section 110-AA deals with option given regarding claims for compensation in certain cases. It is not necessary for us to refer in detail to the other Sections in Chapter VIII dealing with claims and the awards that would be made by the Tribunal. But Chapter VIII also contains the obligation of insuring the Motor Vehicles against third party risks. Section 94 stipulates that no person shall use except as a passenger or cause or allow any other person to use a Motor Vehicle in a public place, unless there is in force in relation to the use of the vehicle by that person or that other person, as the case may be, a policy of insurance complying with the requirements of the Chapter. Sections 95A, 96, 97, 98, 99, 103 and 106 deal with the effect of such insurance policy and the obligation of the insurer to be liable for such policy. On behalf of the respondents it was contended that an insurer was liable only if the accident occurred in a public place. Secondly, it was emphasised that the obligation to have the vehicles registered arose only if the vehicles plied in public places.

3. The liability for damage is, however not limited to accidents occurring only in public places. That liability might arise under the law of Torts or under the provisions of the Fatal Accidents Act. How that liability has to be adjudicated in respect of accident arising out of the use of the Motor Vehicle has been provided by Section 110. Section 110 does not limit that jurisdiction only to accidents occurring in public places. The jurisdiction of the Claims Tribunals is for the purpose of adjudicating upon claims for compensation in respect of accidents (not limited to particular places) involving the death or bodily injury to or persons arising out of use of Motor Vehicles. The scope of this section has to be understood in conjunction with Section 110-F of the Act. Therefore, from the fact that the liabilities of insurers are limited only to accidents occurring in public places, it cannot be inferred that the jurisdiction of the Claims Tribunals is also restricted to accidents taking place in public places. In the aforesaid view of the matter, we are unable to accept the position that the Claims Tribunal had no jurisdiction to entertain this claim. This view we are taking is in consonance with the views of the Mysore High Court in the case of K. Hanumantha Rao v. National Aeronautical Laboratory, 1973 ACJ 78: (AIR 1974 Mys 16) and of the bench decision of the

Madras High Court in the case of K. Gopalakrishnan v. Shankara Narayana, AIR 1968 Mad 436.

4. In the aforesaid view of the matter, this appeal is allowed, the judgment of the learned trial Judge, which is unfortunately not available, is set aside and the rule nisi is discharged. The Claims Tribunal is directed to dispose of the matter as expeditiously as possible.

5. In the facts and circumstances of this case, there will be no order as to costs.

6. Let this order be communicated to the Claims Tribunal as quickly as possible.

M. M. DUTT, J.:— I agree.
Appeal allowed.

AIR 1977 CALCUTTA 340

SABYASACHI MUKHARJI, J.

Pramode Kumar Mittal, Petitioner v. Sri Bhuramal Chiranjilal Mittal and others, Respondents.

Matter No. 36 of 1977, D/- 24-3-1977.

(A) Arbitration Act (1940), S. 14 (2) — Application for filing interim award — Jurisdiction of the Court to entertain the application — Existence of a dispute as to whether the property under dispute referred to arbitration and in respect of which directions have been given by the arbitrator is within the jurisdiction of the Court — Such a dispute is a sufficient part of cause of action entitling the Court to entertain the application. AIR 1949 Cal 549 and ILR (1973) 1 Cal 529, Rel. on. (Para 4)

(B) Arbitration Act (1940), Ss. 17 and 14 — Award containing obligations, some of which requiring registration — Award is admissible in evidence. AIR 1972 SC 1121, Rel. on. (Para 6)

(C) Arbitration Act (1940), Ss. 14 (2) and 17 — Award, filing of — Award dealing with moveable assets and immoveable assets severable — Non-registration — Effect — Award can be filed.

If the award is not registered it does not prevent the Court from directing the filing of the award, this is so because even if an award requires registration, it could be filed before its registration. But it might not be enforceable or it might not be relied on in evidence for the assertion of the rights created in the

immovable properties by the award: AIR 1960 SC 629, Foll.; AIR 1949 Cal 549 and AIR 1970 SC 833, Disting.

(Paras 6 & 7)

Cases Referred: Chronological Paras

ILR (1973) 1 Cal 529	4
AIR 1972 SC 1121	6
AIR 1970 SC 833	6
AIR 1960 SC 629	6
AIR 1949 Cal 549	4, 6
AIR 1945 Cal 19	6

ORDER:— This is an application under S. 14 (2) of the Arbitration Act, 1940 for directing the arbitrator to file the interim award made and published by him on the 6th January, 1977, in this Court.

2. In order to appreciate the controversy in this case, it is necessary to briefly refer to certain facts. Pramode Kumar Mittal, the petitioner herein, and the respondents all belong to the same family, hereinafter referred to as Mittal family. They are all descendants of the first respondent Bhuramal Chiranjilal Mittal. It is not necessary to refer to the actual relationship between the parties. There are several companies and firms which belong to the different parties to which also it is not necessary to refer in detail. The family was also interested in several trusts. Diverse disputes and/or differences arose in the Mittal family relating to and concerning the business of the said firms, trusts and companies and regarding the control and management thereof and also regarding the properties belonging to the parties. With a view to settle the said disputes the same were referred to the sole arbitration of Shri B. P. Khaitan, Solicitor and Advocate, by an arbitration agreement dated the 21st June, 1975. Thereafter, there were several meetings but on the 8th January, 1977 the petitioner received by registered post an interim award and/or directions signed by the arbitrator. The petitioner is asking that the said interim award and/or directions be filed in Court.

3. One of the contentions raised in this application was that the directions sent by the arbitrator was not an interim award and as such was not capable of being filed in Court. Having regard to the nature of the directions given and having regard to the definition of 'Award' under S. 2 (b) of the Arbitration Act, 1940 I am unable to uphold this objection. This objection

was also not very seriously pressed on behalf of the respondents, who are opposing this application.

4. The next question that requires consideration in this case is whether this Court has jurisdiction to entertain this application for filing of the award, in other words, whether this is the appropriate Court for filing of the award. Under S. 2 (c) of the Act Court means a Civil Court having jurisdiction to decide the questions forming the subject-matter of the reference if the same had been the subject-matter of the suit. In para 21 (1) of the award the Arbitrator has directed as follows:

"21. (1) Andhra Steel Corporation Ltd. has a tenancy right in respect of premises No. 24 Alipore Road, Calcutta which is being used as residential house of members of Mittal family as also in respect of office space at No. 2, Brabourne Road, Calcutta. It has been agreed between the parties that Shri M. L. Mittal and members of his family will be entitled to the tenancy rights in respect of premises No. 24 Alipore Road, Calcutta as also the office space at No. 2, Brabourne Road, Calcutta 1, therefore direct the parties to cause Andhra Steel Corporation Ltd. to surrender its tenancy rights in respect of premises No. 24 Alipore, Calcutta as also office space at No. 2 Brabourne Road, Calcutta in favour of Shri M. L. Mittal or his nominee. Shri M. L. Mittal will be entitled to obtain the tenancy rights in respect of premises No. 24, Alipore Road, Calcutta as also office space at No. 2, Brabourne Road, Calcutta from the respective landlords either in his name or in the name of his nominee on such terms and conditions as he may think fit. I direct that the resolutions be passed in the meeting of the Board of Directors of Andhra Steel Corporation Ltd. surrendering the tenancy rights in consultation with Shri M. L. Mittal. The implementation of these directions will also reduce expenses of Andhra Steel Corporation Ltd."

Admittedly there was direction regarding the immoveable property within the jurisdiction of this Court, namely No. 2, Brabourne Road, Calcutta. Therefore, by virtue of the aforesaid direction this Court would have jurisdiction to entertain this application. On behalf of the opposing respondents it was contended that No. 2, Brabourne Road premises belonged to Andhra Steel Corporation

Ltd. and was not the subject-matter of properties agreed to be referred to the arbitration of Shri Khaitan. It was contended that what were agreed to be referred to arbitration were the disputes regarding the properties of the parties in their own name or in the names of the members of their families but disputes regarding properties standing in the name of separate corporate entities had not been agreed to be referred to arbitration. The arbitrator merely by giving direction in respect of the properties which had not been referred to his arbitration could not enlarge the scope of the arbitration, it was submitted. It, however, appears from the award of the arbitrator that all disputes had been agreed to be referred to his arbitration. The opposing respondents dispute this assumption. The question whether the No. 2 Brabourne Road property or other properties which are not standing in the name of the parties themselves and their families were the subject-matter of arbitration is a disputed question of fact which cannot and, in my opinion, should not be resolved in an application for filing of the award. It is clear, however, that there is a dispute whether the dispute in respect of the property which is within the jurisdiction of this Court and in respect of which directions have been given by the arbitrator had been referred to arbitration. That, in my opinion, would be sufficient part of the cause of action arising within the jurisdiction of this Court which will entitle this Court to entertain this application. In that view of the matter, I am unable to sustain this objection raised on behalf of the opposing respondents. The view which I am taking, in my opinion, is in consonance with the observations of the learned single Judge of this Court in the case of Anandi Lal Poddar v. Keshavdeo Poddar (AIR 1949 Cal 549) wherein the definition under S. 2 of the Arbitration Act 1899 was slightly different. This view is also in consonance with the view of another learned single Judge of this Court in the case of Union of India v. Khem Chand Rajkumar (ILR (1973) 1 Cal 529). I, however, make it clear that the question whether the arbitration agreement had included disputes regarding properties other than those standing in the names of the parties to the dispute or of the members of their family, will have to be decided later on if this contention is raised in appropriate proceed-

ing and directions, if any, given for filing of the award will not preclude raising such contention.

5. The next objection was that the award being an unregistered document could not be directed to be filed. It was contended that the award purported or operated to create or declare or assign or limit or extinguish rights in the immovable property and therefore, it required registration under the Registration Act, 1908 and not having been registered it was not capable of being filed. I am unable to accept this contention. The award itself, in my opinion, does neither create nor assign nor declare nor extinguish any right in any immovable property. The award read properly only recognises certain rights in the immovable properties which would require further instruments to be executed in order to implement the directions contained in the award.

6. I have set out cl. 21 (1) of the award. This is typical of the directions contained in the award regarding immovable property. Read properly, in my opinion, this does not, by itself create or declare or assign or extinguish a title or interest in the property but only gives a narration of transactions which had taken place in the past or, at best, which gives certain directions in respect of the immovable assets; it had to be enforced by execution of other documents. Apart from that, as I have noticed before, the award admittedly contains a direction regarding the movable assets as well as immovable properties, movable properties being shares in several companies. It is possible to contend that the award is severable and, as such, the award in as far as the same deals with the movable assets is enforceable without registration. I need not, at this stage, decide finally whether the award is severable as such in the instant case but I recognise only the possibility of such severance. Where an award contains severable obligations, one requiring registration and the other not, such an award is admissible in evidence. See in this connection the observations of the Supreme Court in the case of Mettapalli Chelamayya v. Mettapalli Venkataratnam, AIR 1972 SC 1121 at p. 1125 or the report. It is not necessary for me at this stage to decide whether in the facts and circumstances of this case, the award dealing with movable assets and the award dealing with immovable assets

were severable. But I only notice that this award is capable of this consideration and, if this is so, unless the award is filed this question cannot, in my opinion, be adjudicated. In the aforesaid view of the matter, as the Supreme Court observed, even if the award requires registration, it could be filed before its registration. But it might not be enforceable or it might not be relied on in evidence for the assertion of the rights created in the immovable properties by the award. See for this observations of the Supreme Court in the case of Champalal v. Mst. Samrathbai, AIR 1960 SC 629 and specially the observation at p. 631 or the report. In my opinion, the facts and circumstances of the case of Satish Kumar v. Surinder Kumar, AIR 1970 SC 833 were different from the facts of the instant case. In view of the decisions of the Supreme Court referred to hereinbefore, I am of the opinion that the opposing respondents cannot get much assistance from the observations of the Division Bench of this Court in the case of Nanibala v. Ram Gopal, AIR 1945 Cal 19 and the observations of the learned single Judge in the case of Anandi Lal Poddar v. Keshav Lal Poddar, AIR 1949 Cal 549. For the reasons aforesaid, in any event if the award is not registered it does not prevent the Court from directing the filing of the award at this stage.

7. Next objection was that the award had not been properly stamped as required under Art. 12 of the Stamp Act. Undoubtedly that is so. But in view of the provision of S. 35 of the said Act, it would not be proper, in my opinion, to reject this application on this ground. But if the filing of the award is directed the document should be stamped properly by the arbitrator and for this purpose the applicant would, in the first instance, put the arbitrator in necessary funds. It appears that the arbitrator was called upon both by the petitioner as well as by the opposing respondents to file the award, which has not been done.

8. As I have negated the contentions of the opposing respondents, there will therefore be an order in terms of prayer (a) of the petition subject to this direction that the arbitrator will stamp the document and for this purpose the applicant would put in the necessary funds, in the first instance. This order, however, will not prejudice the opposing

respondents from raising any of the contentions about the validity and the propriety of the award, inter alia, on the ground of jurisdiction as well as on any other grounds.

9. Costs of this application will be costs in the arbitration proceedings.

10. The arbitrator will act on the signed copy of the minutes.

Order accordingly.

AIR 1977 CALCUTTA 343

N. C. MUKHERJI AND B. C. RAY, JJ.

Saradindu Mukherjee, Appellant v. Amiya Kumar Basu, Respondent.

A. F. O. D. No. 191 of 1969, D/- 9-2-1977.

Transfer of Property Act (1882), S. 58 — Equitable mortgage — Mere deposit of title deeds with creditor by debtor would not constitute equitable mortgage unless intention of creating mortgage is proved by creditor. (1896) 23 Ind App 106 (PC), Relied on. (Para 7)

Cases Referred: Chronological Paras

AIR 1974 Cal 319 7

AIR 1965 SC 430 7

(1896) 23 Ind App 106 (PC) 7

P. N. Mitter, Satya Priya Ghosh and Amal Kumar Mukherji, for Appellant; Saktinath Mukherji and Tapan Kumar Mitra, for Respondent.

B. C. RAY, J.:— This appeal is at the instance of the plaintiff appellant against the judgment and decree dated 28th July, 1967 passed by Shri R. N. Patra, Subordinate Judge, Third Court, Alipore in Title Suit No. 4 of 1961 dismissing in part the plaintiff's suit with respect to the claim for Rs. 14,200 with interest thereon. The plaintiff appellant instituted a suit for recovery of Rs. 20,324 due on a mortgage stating inter alia that the defendants borrowed from him the sum of Rs. 14,200 on 16-11-57 and a further sum of Rs. 2,200 on November 10, 1958. There was a stipulation that the said sums would carry interest at the rate of 8 per cent per annum. In respect of the advance of Rs. 14,200 the defendant No. 1 drew a Hundi payable to the plaintiff on 30 days' sight without grace and it was accepted by the defendant No. 2 and as evidence of the later loan of Rs. 2,200 the defendant No. 1 gave an

'I owe you' in writing dated February 10, 1958. The Hundi was presented to the defendant No. 2 on maturity for payment but he did not make any payment. The notice of dishonour was given to each of the defendants. On March 28, 1956, the defendant No. 1 deposited with the plaintiff at 3/1, Bankshall Street the deed of lease dated 2-3-46 executed between Sm. Kumidini Ghosh and the defendant No. 1 by which the property in Schedule 'A' to the plaint has been let out at a monthly rent of Rs. 750 and subsequent increments in rent for the term of 15 years with option to renew of the same for a further period of 15 years. The same was deposited with an intent to create an equitable mortgage in favour of the plaintiff by the defendant No. 1 in respect of moneys advanced or to be advanced by the plaintiff to the defendant. It was made to secure the payments of a loan made by the defendant for the sum of Rs. 3,650 from the plaintiff under a promissory note dated March 28, 1956. This amount was included in the Hundi drawn by the defendant No. 1 in favour of the plaintiff for a sum of Rs. 5,000. Again this sum of Rs. 5,000 has been included in the loan for Rs. 14,200 referred to above. The said deposit of title deeds was regarded as security for loan that was made from time to time by the defendants. A sum of Rs. 17,600 and Rs. 2,716 respectively due and payable by the defendants as stated in schedule 'B' to the plaint. The defendants had not made any payment in repayment of the said loans and as such the plaintiff has filed the present suit for recovery of Rs. 20,324 i.e. Rs. 17,608 as principal and Rs. 2,716 as interest.

2. The defendant No. 1, Amiya Kumar Basu, filed a written statement on January 8, 1962 denying the allegations made in the plaint. It has been stated that a Hundi was executed by him as alleged but the same was without consideration. It was further alleged that the said Hundi was not executed in accordance with law and it did not bear the proper stamp fee and as such no loan was created by the said Hundi. It has also been alleged that the statement made in the plaint 'I owe you' has not the effect of creating the loan or it was not intended to be an admission of the loan. It has also been stated that there was no deposition of title deeds in respect of the alleged loans. The true fact is that the document of lease dated 2-6-46 along with some share scripts of A. K.

Collieries Limited was handed over to the plaintiff in order to help him in Rent Execution Case No. 4 of 1955 of the Court of the 5th Subordinate Judge at Alipore. This will be evident from the receipts granted on behalf of the plaintiff and it will falsify the story of the deposit of title deeds. It has also been stated that there was no deposit of the document with intent to create a security or an equitable mortgage in favour of the plaintiff.

3. The plaintiff in support of his case that the title deeds of the land described in schedule 'A' to the plaint has been deposited with an intent to create an equitable mortgage for the loans that have been advanced and will be advanced by the plaintiff examined three witnesses besides examining himself whereas the defendant has examined one witness in order to negative the case of deposit of title deeds with intent to create a mortgage in respect of the loans advanced and to be advanced. On July 28, 1967, the Subordinate Judge, Third Court, Alipore after considering the evidences on record held that the suit was barred by limitation under Art. 57 of the Indian Limitation Act (old). It was also held that the original lease deed dated March 2, 1946 was deposited by the defendant with the plaintiff on March 28, 1956 as security against the pro-note dated March 28, 1956. This would appear from letter Ext. 1 dated March 28, 1956. It was also held that there was no mortgage in favour of the plaintiff in respect of sum of Rs. 14,200 and as such the plaintiff's claim for the same was barred by limitation. The loan of Rs. 2,200 advanced on 10-2-58 was admitted by the defendant himself as would appear from Ext. 4. This claim is not barred by limitation. A decree for Rs. 2,200 with interest at the rate of 8 per cent per annum from 10-2-58 till the filing of the suit has therefore been passed by the court below against the defendants.

4. It is against this judgment and decree this appeal has been filed.

5. Mr. Pramatha Nath Mitter, learned Advocate for the appellant has submitted that the title deed was deposited with the plaintiff not only to secure the loan advanced on 28-3-56 but also the future loan that will be advanced to the defendant inasmuch as the said loan of Rs. 3,650 was included in the loan of Rs. 14,200 evidenced by the Hundi executed by the defendant on 16-12-57. Mr.

Mitter has secondly submitted that it is not necessary that for each loan fresh security is to be furnished. He also submitted that the keeping of the said title deed with the plaintiff and non-production of any receipt or evidence in support of repayment of the loan taken on 28-3-56 will prove that the said loan was not repaid and the said title deed has been kept as security for the payment of the loans advanced on different dates as evident from the Hundi marked X (3) for identification executed on 16-12-57. The loan of Rs. 14,200 being a mortgage loan the suit is not barred by limitation so far as this claim is concerned.

6. Mr. Saktinath Mukherjee, learned Advocate appearing on behalf of the respondent submitted that from the pleading of the plaintiff it is evident that the said title deed Ext. 3 was handed over to the plaintiff to secure the loan of Rs. 3,650 advanced on 28-3-56 under a promissory note. Mr. Mukherjee has further submitted that this pleading of the plaintiff in para 3 of the plaint read with the letter Ext. 1 whereby the title deed was deposited with the plaintiff clearly belied the case of the plaintiff that the said document was intended to be a security for all future loans that will be advanced by the plaintiff to the defendant. As such the loan of Rs. 14,200 evidenced by Hundi dated 16-12-57 does not constitute a mortgage and the trial Court has rightly held that the suit which was instituted more than three years after the date fixed for repayment is barred by limitation so far as this loan is concerned.

7. The plaintiff appellant has pleaded in paragraph 3 of the plaint that the registered deed of lease Ext. 3 dated 2nd March, 1946, was deposited with the plaintiff by the defendant No. 1 to secure the repayment of a loan made by the defendant for a sum of Rs. 3,650 from the plaintiff under a promissory note dated 28-3-56. It has further been pleaded that the said deposit was made also with an intent to create an equitable mortgage in favour of the plaintiff by the defendant No. 1 in respect of moneys that were advanced or will be advanced by the plaintiff to the defendant. It appears from Ext. 1, that is, letter written by Amiya Kumar Basu the defendant to the plaintiff on 28-3-56, that he deposited the original lease deed with the plaintiff at 3/1, Bankshall Street as security against the pro-note dated

28-3-56. This along with the pleading in paragraph 3 of the plaint clearly establishes that this title deed had been deposited in order to create a mortgage in respect of the loan of Rs. 3,650. The plaintiff has pleaded that the title deeds have been kept in deposit with him with an intention of securing other loans that were advanced subsequently. The plaintiff has further stated that this loan of Rs. 3,650 has been included in the loan of Rs. 14,200 evidenced by a hundi executed by the defendant. This hundi has not been marked as an exhibit and as such the plaintiff cannot prove that this loan of Rs. 14,200 has been included in the loan of Rs. 3,650. Moreover, the said loan of Rs. 14,200 was advanced on 16-12-57 as stated in the plaint and this suit was filed on 14th January, 1961. Now the question is whether this loan does constitute a mortgage as the title deeds came out of the custody of the plaintiff. I have already mentioned that the lease deed Ext. 3 was deposited by the defendant with the plaintiff on 28-3-56 as security against the pro-note dated 28-3-56. This is evident from the letter Ext. 1 written by the defendant to the plaintiff while depositing the title deed. There is nothing in writing to show that the lease deed was deposited with the plaintiff in order to secure all advances made subsequently. It is well established that mere deposit of title deeds with the creditor by the debtor will not constitute an equitable mortgage unless it is proved that the said title deeds had been deposited with the intention of creating a mortgage. It appears from Ext. 4 (1) a letter, written by Shri Makhan Lal Bondopadhyay, an employee of the plaintiff to the defendant on 9th June, 1956 that the lease deed was taken from the defendant promising to return the same to him within a day or two. This clearly shows that the document which was kept as security in respect of the loan of Rs. 3,650 was returned to the defendant. The court below is therefore perfectly justified in holding that the loan was repaid and the property was released from mortgage before 9-6-56. Moreover, P.W. 1, Makhan Lal Bondopadhyay admitted in cross-examination that the mortgage was created on 28-3-56 and on that day the document was made over. He also stated that the letter Ext. 1 was written by Shri Amiya Kumar Basu and the mortgage was created. He further admitted that there was no paper to show that the mortgage was

created as security for future loans. He also admitted that the lease deed was taken by him from the defendant from his house at 34A, Sardar Sankar Road. The plaintiff who was examined on commission stated that on the date on which the letter of deposit was given, the mortgage was created. D.W. 1, Balai Chandra Das stated that on 28-3-56 a mortgage was executed by transfer of title deeds. He also stated that the lease deed was taken back on the date on which the loan was repaid. He further stated that the defendant made over the deeds to the employee of the plaintiff on taking receipt on 9-6-56. Thus considering these evidences we have no hesitation to hold that the lease deed was not deposited with the plaintiff with an intention to create security in respect of all loans that will be advanced subsequent to 28-3-56. We also hold that the plaintiff failed to prove by any cogent evidence that the defendant had kept the said title deeds with the plaintiff with an intention of creating a security in respect of the property on which the lease deed was taken by the plaintiff. It is pertinent to refer in this connection the decision reported in (1896) 23 Ind App 106 (PC), *Miller v. Babu Madho Das* where it has been observed by their Lordships of the Privy Council that in a suit against an insolvent and the official assignee for sale of mortgaged property, the onus is on the plaintiff to prove that the title deeds in his possession after the insolvency was deposited with him as security before the adjudication of insolvency. In AIR 1965 SC 430, *K. J. Nathan v. S. V. Maruthi Rao* it has been held that in order to constitute a mortgage there are three requisites which are to be satisfied viz. (i) debt, (ii) deposit of title deed, and (iii) an intention that the deeds shall be security for the debt. Whether there is an intention that the deed shall be security for the debt is a question of fact which will have to be decided like any other fact on presumptions and on oral, documentary or circumstantial evidence. In a Bench decision of this Court reported in AIR 1974 Cal 319, *Bejoy Ranjan Das v. Ajit Kumar Datta* the above decision of the Supreme Court was followed and it was held that the question whether the deed was kept with the intention of creating the security for the debt has got to be decided on the materials on record. We, therefore, hold that the plaintiff failed to prove that the loan of Rs. 14,200 was

secured by keeping the title deeds and as such there was no mortgage in favour of the plaintiff. The suit being filed beyond the period prescribed is barred by limitation under Art. 57 of the Indian Limitation Act (old) with respect to the claim for Rs. 14,200.

8. For the reasons aforesaid the appeal is dismissed. The judgment and decree of the court below are hereby affirmed. There will be no order as to costs in the circumstances of the case. Let the records be sent down to the court below immediately.

N. C. MUKHERJI, J.— I agree.

Appeal dismissed.

AIR 1977 CALCUTTA 346

A. N. SEN AND BIMAL CHANDRA BASAK, JJ.

Bhagirathmall Kanodia and others, Petitioners v. Ramricklal Girdhardas and others, Respondents.

Suit No: 1660 of 1950; Appeal No. 113 of 1975, D/- 23-12-1976.

(A) Civil P. C. (1908), O. 1, R. 10 — Necessary and proper parties — Suit for possession — Consent decree — Tenancy created in favour of third parties under terms of settlement — Order making third parties as party defendants to the suit — Validity.

Both the suits viz. the suit by the plaintiffs for possession of the premises and the suit by the defendants for declaration that they continued to be tenants under the plaintiffs were settled and the terms of settlement were filed. The plaintiffs agreed to create a tenancy in respect of the suit premises in favour of third parties and the settlement made necessary provisions for granting a tenancy in their favour on basis of the terms and conditions recorded in the settlement. There was no decree in favour of the third parties, nor did the plaintiffs intend that any decree would be passed in favour of third parties. The consent decree was between the parties to the suit i.e. the plaintiffs and the defendants. Thereafter, on an application made by the third parties the learned trial Judge passed an order directing the third parties to be added as parties defendants to the suit.

Held, the learned trial Judge had no jurisdiction to change the nature and

character of the consent decree and to pass a decree in favour of third parties in the absence of consent of all the parties. For proper determination of the disputes in the two suits the presence of the third parties was not necessary nor were they necessary or proper parties. They had no kind of interest in the subject-matter of the two suits. Their interest came into existence only as a result of the settlement between the parties. The compromise of the suit between the parties to the suit on the basis of settlement cannot be said to form any part of the subject-matter of the dispute in the suit. (Para 10)

(B) Civil P. C. (1908), O. 1, R. 10 — Appeal — Suit for possession — Consent decree — Tenancy created in favour of third parties under terms of settlement — Order making third parties as party defendants to the suit — Held, order has effect of creating new decree and hence appealable. (Para 10)

Cases Referred: Chronological Paras

AIR 1949 Cal 24 8, 9

AIR 1924 Cal 188: 27 Cal WN 755 8

AIR 1915 Cal 586 (1): 19 Cal WN 1021 8

Bhabra, for Petitioners; Dutt, for Respondents.

A. N. SEN, J.— This appeal arises out of the judgment and order passed by Ramendra Mohan Dutta, J. on the 20th of March 1975. The facts material for the purpose of this appeal may be briefly indicated.

2. A suit was filed by the appellants as plaintiffs who happened to be the Trustees of a Trust known as Rai Bahadur Bissessurlal Motilal Halwasiya Trust for recovery of possession of premises No. 150B, Lower Chitpur Road, Calcutta. The defendants to the said suit were (1) Ramricklal Girdhardas, (2) Narsinghadas Haldia and (3) Naaz Cinema. The defendants were carrying on business in the said premises under the name and style of Naaz Cinema. The defendants also filed a suit against the Trustees and in the said suit the defendants had asked for a declaration that the defendants continued to be the tenants under the plaintiffs in respect of the said premises. Both the said suits were settled and terms of settlement were filed. It is necessary to set out the terms of settlement which were filed in the suit. The said settlement between the parties to the suit reads as follows:—

"It is declared that the defendant No. 2 was never the tenant on the premises in suit and a decree is made accordingly.

The plaintiffs and the defendants Nos. 1 and 3 have settled the disputes in the suit on the following terms and conditions:

Terms of Settlement

That from 1st July, 1968 the tenancy in respect of the suit premises will be in favour of Mrs. Laxmi V. Mansata, Hirendra V. Mansata, Suryakanta V. Mansata, Jitendra V. Mansata of No. 87-K, Park Street, Calcutta-16. But for the purpose of serving notice of any sort in respect of tenancy the same shall be deemed to have been served on all if served on any one of them.

2. That the tenancy shall be according to English Calendar month starting from the 1st day of the month and ending with the last day of the same month.

3. That on and from 1st July, 1968 the rent of the suit premises will be Rs. 2,000 (Rupees two thousand) only per month which shall be payable to the plaintiffs landlords of their succeeding month for which the rent shall be due.

4. That the rent of Rs. 2,000 per month, as aforesaid, is inclusive of occupiers' share of the Corporation taxes.

5. That the tenant shall pay from 1st July, 1968 a sum of Rs. 600 (Rupees six hundred) per month by way of hire charged for furnitures along with the rent as aforesaid and will continue to pay the same so long they do not surrender the tenancy or give vacant possession of the premises to the landlords.

6. That the tenants will use the Cinema House being the premises in suit for exhibition of Films and theatrical performance with liberty to make provisions for Canteen and Restaurants outside the auditorium for the facility of its audience only.

7. That the tenants paying rent regularly as per Cl. 3 and hire charges as per clause No. 5 and using the premises as per Cl. 6 will not be liable to be evicted by the plaintiff/landlords on any grounds whatsoever including the grounds of own use and occupation and/or buildings or re-buildings except as provided herein-after.

8. That the tenants shall have the option to surrender the tenancy to the plaintiff/landlords or their successors in office by giving six calendar months' notice in writing in advance to them.

9. That the tenants shall carry out all the requisitions and requirements imposed by any competent authority for carrying on the said Cinema business at the

suit premises and in no way the plaintiffs/landlords shall be liable for the breach of same by the tenants.

10. The tenants shall be entitled to make at their own costs any additions and alterations to their demised premises or any part thereof including constructional and structural changes and erect any kind of permanent structures and also to install airconditioning plants, machines and apparatus, as would be required from time to time only for the improvement of the Cinema business with prior approval in writing of the landlords and such approval shall not be withheld provided that any such additions and/or alterations will not diminish the total value of the premises in suit. The landlords will sign any plans or drawings which the tenants may submit from time to time for procuring the sanction of the Calcutta Corporation or other local or statutory bodies in connection with such additions, alterations and improvements. But, under no circumstances, the tenants are allowed to make unauthorised constructions, additions or alterations from now onwards which in any way contravenes any law for the time being in force. All repairs, if any, required to the demised premises, the same will be done by the tenants at their own costs. All additions and alterations of a fixed nature will belong to the landlords. The tenants shall have no right to demolish the demised premises in its entirety.

11. The tenants will have the right to sublet the premises partly or wholly to its allied concerns limited to the purpose hereinbefore mentioned but subletting must have the prior approval of the landlords in writing and such permission shall not be unduly withheld. Provided that notwithstanding such subletting the tenants will be responsible for the regular payment of rent and for due performance of the other terms and conditions of the tenancy. Such subtenants shall be bound to observe all the terms and conditions mentioned herein and any breach of any of the terms by the sub-tenants shall be deemed to be the breach by the tenants.

12. That the plaintiffs/landlords shall be entitled to issue 4 (four) passes for free entry in any available class in any or every show at the cinema house except Friday, Saturday and Sunday and public holidays and in the first week of the picture. The entertainment tax, if any, will be payable by the pass-holders.

13. Notwithstanding anything contained hereinabove, if the tenants fail to pay the rent and hire charges in time in respect of the suit premises for any two months or make any breach of any of the terms the landlords shall have the right to take action for ejectment of the tenants.

14. Suit No. 1394 of 1961 filed by the defendant No. 1 in his Court against the plaintiffs in the suit and others in the High Court at Calcutta (Ordinary Original Civil Jurisdiction) is unconditionally withdrawn against all the parties and there will be no order of costs in that suit.

15. Each party will bear and pay its respective costs in the suit.

Dated this 6th day of August, 1968.

For self and Naaz Cinema Ramricklal Girdhar- das C. S. Roy Chow- dhury & Co. Attorney for the defendant Nos. 1 and 3. Signature in Vernac- ular (Laxmi V. Mansata) (in Vernacular) Narendra V. Mansata Surya Kant V. Man- sata Jitendra V. Mansata	Sd/. Bhagirathmul Kanodia. Ram Prasad Goenka Bhagwati Prasad Khaitan Madhav Prasad Birla Jagannath Beriwalla Purushottam Das Hal- waisya by the pen of Ganeshmal Baid Constituted Attorney. Sham Sundar Halwasiya, L. P. Agarwalla & Co., Solicitors, for the plaintiffs."
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The said settlement was signed on behalf of the plaintiffs, on behalf of the defendants and also on behalf of the Mansatas in whose favour a tenancy on the terms and conditions mentioned in the settlement was agreed to be created.

3. Though the said settlement was put in on the 7th of August 1968, it appears that the decree on the basis of the said settlement was not drawn up for a number of years thereafter. It further appears that the department had pointed out to the Court that the department felt some difficulty in drawing up the said decree on the basis of the said settlement.

4. An application was thereafter made on the 29th of January 1975 on behalf of the Mansatas in whose favour the tenancy in respect of the said premises was to be created under the said settlement for being added as parties to the said suit. The prayers of the Mansatas in the said application were—

(a) That the petitioners be added as parties defendants to the above suit.

(b) That the Cause Title of the suit in the plaint and the suit register be am-

ended as shown in Annexure 'B' to the petition being the grounds herein.

(c) That the minutes of the decree dated 7th August 1968 be rectified as shown in Annexure 'B' to the petition being the grounds herein.

(d) Such other incidental orders be made and directions be given as may be necessary to give effect to the said amendments.

(e) Costs of and incidental to this application be paid by the plaintiffs.

5. The said application moved on behalf of the Mansatas was opposed on behalf of the plaintiffs. The learned trial Judge for reasons recorded in his judgment passed an order directing the Mansatas to be added as party defendants to the suit in terms of prayer (a) of the said application. He also made further order directing that the minutes of the decree dated 7th August 1968 be rectified in the manner following:—

"The suit being suit No. 1650 of 1960. Bhagirathmal Kanodia and others v. Ramricklal Girdhardas is decreed in terms of the settlement put in. The suit do stand dismissed as against the defendant No. 2, Narshingdas Haldia. Leave is given to Mr. B. Mullick, Solicitor, to file the warrant of attorney on behalf of the added defendants on his undertaking to complete the order of amendment. The amendment be effected within a fortnight after the reopening of the Court after Easter Holidays on a signed copy of the minutes. The order and the decree be drawn up and completed expeditiously. Leave is granted to the plaintiffs in the cross suit being No. 1399 of 1961 Ramricklal Girdhardas and others v. Bhagirathmal Kanodia and others to withdraw the same unconditionally against all the parties and no order is made in respect of costs thereof. In the facts and circumstances of this case the applicants must pay the costs of this application to the plaintiffs. Interim order made herein is vacated. Let the order not to be effected till 10th April, 1975. Let this order be incorporated in the minutes of the order dated 7th August 1968. Department to act on a signed copy of the minutes." The learned Judge in his judgment has observed that "If the order as prayed for is made the Mansatas would enjoy their rights under a decree which would be perfected after the same would be drawn up, completed and filed."

6. Against the said order of the learned trial Judge, the plaintiffs in the suit have preferred this appeal.

7. The principal contention of Mr. Bhabra who has appeared on behalf of the appellants in support of this appeal is that the learned trial Judge had no jurisdiction to pass the order making the Mansatas as party defendants to the said suit and passing a decree in their favour in the said suit. Mr. Bhabra has argued that the decree is a consent decree and parties to the decree were the plaintiffs and the defendants to the suit. It is the argument of Mr. Bhabra that though under the terms of settlement the plaintiffs agreed to create a tenancy in favour of the Mansatas and the said agreement, if necessary, may be enforced in an appropriate proceeding by way of a suit, the learned trial Judge had no jurisdiction to pass a decree in favour of the Mansatas on the basis of the said settlement. Mr. Bhabra has submitted that on the basis of the said settlement the tenancy has already been created in favour of the Mansatas who has come into possession of the said premises on the basis of the said settlement. It is his argument that if there be any disputes between the Mansatas and the plaintiffs with regard to the said agreement between the parties, the said disputes can be adjudicated in a suit. He contends that the plaintiffs never agreed to a decree being passed in favour of the Mansatas in the said suit filed by them for possession against the defendants in the said suit. Mr. Bhabra argues that the plaintiffs had undoubtedly intended to create a tenancy in favour of the Mansatas on the basis of the said settlement but the plaintiffs had never agreed to submit to a decree in favour of the Mansatas. It is the argument of Mr. Bhabra that the said decree was a consent decree which was binding on the parties to the said decree and parties to the decree were parties to the suit. Mr. Bhabra argues that as the decree was a consent decree the learned Judge did not have any jurisdiction without the consent of the parties to alter the nature or character of the said decree and convert the said decree into a decree in favour of the Mansatas. It is the argument of Mr. Bhabra that the plaintiffs never agreed to a decree being passed in favour of the Mansatas and the plaintiffs very likely would not have settled the suit on these terms if the plaintiffs would be called upon to submit to a decree in favour of the Mansatas on the basis of the said settlement. Mr. Bhabra has submitted that the appellants do not have any objection to the said

settlement and the tenancy which has been created in favour of the Mansatas on the basis of the said settlement. It is his submission that the appellants have acted and want to act on the basis of the said settlement and if the Mansatas have any grievance against the appellants in the matter of implementation of the said agreement between the parties the Mansatas can take necessary action and file a suit against the plaintiffs for enforcement of the said contract between the parties. He contends that the plaintiffs have never agreed that Mansatas would enjoy any rights under a decree or there will be a decree in favour of the Mansatas against the plaintiffs which the Mansatas could execute against the plaintiffs on the basis of the said settlement. Mr. Bhabra has further submitted that the question whether the decree is executable or not is indeed a debatable question. It may be, according to Mr. Bhabra, that the said decree is not executable as the said decree does not relate to the subject-matter of the suit and brings in its scope matters which are entirely extraneous to the subject-matter of the suit. Mr. Bhabra has fairly stated before us that if the Mansatas defendants agree to this clarification that the said decree is not executable and will not be executed by the Mansatas against the plaintiffs/appellants he will not have any grievance merely to the addition of the Mansatas as parties to the suit. As we have already observed his main grievance is against the passing of the decree against the plaintiffs in the suit in favour of the Mansatas.

8. On behalf of the Mansatas Mr. Dutt has argued that the said order of the learned trial Judge is perfectly valid and proper. He has argued that as the decree has not been drawn up and perfected the suit was still continuing and had not terminated and the learned trial Judge had therefore jurisdiction to pass appropriate orders in the suit. He has contended that as the suit was still pending and had not terminated, the learned trial Judge on the application of the Mansatas who are vitally interested in the settlement was perfectly right in adding the Mansatas as party defendants to the suit under the provisions of O. 1, R. 10 of the Civil P. C. Mr. Dutt has raised an objection that as the impugned order is an order passed by the learned trial Judge on an application under O. 1, R. 10 of the Civil P. C. this appeal is in-

competent and is not maintainable. In support of his contention that the suit remains pending till the decree had been perfected Mr. Dutt has referred to the following decisions:— 1. Sarojendra Kumar Dutt v. Purnachandra Sinha, reported in AIR 1949 Cal 24 at p. 37. 2. Lakshman Chandra Das v. Nikunja Moni Dassi, reported in 27 Cal WN 755: (AIR 1924 Cal 188). 3. Mohabir Proshad Choudhury v. Chandra Sekhar Sahi, reported in 19 Cal WN 1021: (AIR 1915 Cal 586 (1)).

9. Mr. Dutt has placed particular reliance on the following observations of Das J. in the case of Sarojendra Kumar Dutt v. Purnachandra Sinha, AIR 1949 Cal 24 at p. 37 — "There is, therefore, no escape from the conclusion that the suit is not terminated until the decree is perfected, i.e., completed and filed". Mr. Dutt has argued that as a result of the order adding the Mansatas as parties to the suit, there has been no alteration or change in the consent decree:

10. In the facts and circumstances of this case, we are of the opinion that the order passed by the learned trial Judge clearly changes the nature of the consent decree. Under the terms of settlement there was no decree in favour of the Mansatas. If the parties had intended to create a decree in favour of the Mansatas the parties would, undoubtedly, have impleaded the Mansatas as party to the suit before the terms of settlement were filed. We earlier indicated the nature of the suit which was filed by the plaintiffs and also the nature of the suit which was filed by the defendants against the appellants. It cannot be said by any stretch of imagination that the Mansatas were necessary or proper parties to any of the said two suits. It appears that at the time of settlement of the dispute between the parties, the plaintiffs agreed to create a tenancy in respect of the said premises in favour of the Mansatas and the settlement between the parties made necessary provisions for granting of a tenancy in favour of the Mansatas on the basis of the terms and conditions recorded in the settlement between the parties to the suit. As the tenancy was being created in favour of the Mansatas, the Mansatas also signed the said terms of settlement. There was no decree in favour of the Mansatas and it does not appear that the plaintiffs ever intended that any decree would be passed in favour of the Mansatas. The consent decree was a decree between the

parties to the suit and the parties to the suit were the plaintiffs and the defendants. The Mansatas were not parties to the suit. The effect of the order of the learned trial Judge is to change the entire character of the consent decree, and to pass a decree in favour of the Mansatas who have not filed any suit and who were not parties to any of the suits filed. In our opinion, the learned trial Judge had no jurisdiction to change the nature and character of the consent decree by adding the Mansatas as parties to the suit and by directing that there will be a decree in favour of the Mansatas in the absence of consent of all the parties. As, in our view, the nature of the decree has been completely changed by the order passed by the learned trial Judge, it cannot be said that the order passed by the learned trial Judge was merely an order adding the Mansatas as parties to the suit under the provisions of O. 1, R. 10 of the Code and, therefore, the order is not appealable. The order of the learned trial Judge has the effect of bringing about a new decree and the appeal, therefore, in the facts of the instant case, is perfectly competent. We have also our doubts as to whether the provisions of O. 1, R. 10 can be said to be applicable in the facts of the present case. For proper determination of the suit filed by the plaintiffs against the defendants in the suit the presence of the Mansatas was in no way necessary. For determination of the suit filed by the defendants against the appellants the Mansatas were also not necessary or proper parties. The Mansatas had no kind of interest in the subject-matter of the suit which was filed by the appellant as the plaintiffs against the defendants in their action and by the defendants against the appellants. As we have earlier observed, the suit by the appellants was a suit for possession of the premises and for other reliefs and the suit by the defendants was a suit for declaration that they continued to be tenants under the plaintiffs. In these suits the Mansatas had no interests whatsoever. It cannot be said that for a proper adjudication of the disputes in the said two suits the presence of the Mansatas was necessary. It cannot also be said that any of the said suits were not properly instituted. The interest of the Mansatas came into existence only as a result of the settlement between the parties. The compromise of the suit between the parties to the suit on the basis of the settlement cannot be

said to form any part of the subject-matter of the dispute in the suit. In the view that we have taken we do not consider it necessary to pursue this matter any further and to decide the further question whether the application of the Mansatas under O. 1. R. 10 would be maintainable or not. The executability of the decree does not form any part of the subject-matter of the present proceeding. Though we are inclined to the view that the settlement, which relates to matters entirely outside the scope of the suit, could not be enforced in execution of the decree, yet in the view that we have taken and as the said question does not fall for determination in the present appeal, we do not propose to discuss this contention of Mr. Bhabra any further and we do not think it necessary to decide this question in the present appeal. As we have already observed the learned trial Judge clearly erred in passing the order as a result of which the character of the entire consent decree was changed. The decree was a consent decree and the learned trial Judge did not indeed have any jurisdiction to change or modify the said decree in the absence of the consent of the parties. In the view that we have taken we do not consider it necessary to deal with the cases which have been cited from the Bar. In our view, the order passed by the learned trial Judge in the instant case is clearly untenable and is without jurisdiction.

11. The appeal is, therefore, allowed. The order of the learned trial Judge is set aside. The application of the Mansatas is dismissed. The learned trial Judge in his order has directed that the Mansatas would pay the costs of the application. That part of the order of the learned trial Judge is sustained. The Mansata-respondents will pay the costs of the appeal to the appellants.

12. If any decree had been drawn up and perfected on the basis of the order passed by the learned trial Judge on the 7th August, 1968 which is under appeal, the said decree is hereby set aside. The Department will proceed to draw up a fresh decree on the basis of the settlement of the suit between the parties to the suit and will include the terms of settlement as an annexure to the said decree between the parties to the suit.

BIMAL CHANDRA BASAK, J.:— I agree.

Appeal allowed.

AIR 1977 CALCUTTA 351

NIRMAL CHANDRA MUKHERJI AND BANKIM CHANDRA RAY, JJ.

Sashi Bhusan Mitra and others. Appellants v. Ramlal Mitra, Respondent.

Appeal From Original Order No. 1062 of 1975, D/- 1-9-1976.*

Civil P. C. (1908), O. 21, R. 90 — Order of confirmation of sale — May be implied — Application to set aside sale on ground of irregularity — Trial Court dismissing the application in default — No express order for confirmation of sale necessary — Sale becomes absolute.

The judgment-debtor filed an application under O. 34, R. 5 for making payment of the amount due under the decree on the ground that the trial Court while dismissing for default his application under O. 21, R. 90 had not passed any express order for confirmation of sale. Held that the fact that in this case a distinct order has not been recorded confirming the sale is quite immaterial. An express order for confirmation of sale is not absolutely necessary. Case law discussed. (Para 15)

Cases Referred: Chronological Paras

AIR 1968 SC 86	15
AIR 1967 SC 608	10
AIR 1963 Mad 423	11
AIR 1958 Mad 317	15
AIR 1958 Pat 430 (FB)	6
AIR 1956 Cal 510	10
AIR 1954 SC 340	3
AIR 1942 Cal 60	5
AIR 1941 Cal 411	10
AIR 1934 PC 134: 38 Cal WN 901	9
AIR 1934 Cal 822: 38 Cal WN 924	11
AIR 1933 Cal 311	7
AIR 1931 PC 33: 35 Cal WN 381	15
AIR 1929 Cal 407 (2): ILR 56 Cal 969	14, 15
AIR 1927 Cal 881	14
AIR 1925 Cal 510	13
AIR 1923 Cal 405	4
(1897) ILR 24 Cal 682	12
(1896) 23 Ind App 45 (PC)	8

Dr. S. Das and Manula Chowdhri, for Appellants; Saktinath Mukherjee, Rathindra Kumar Dey, Shyamal Sen and Asoke Kr. Sengupta, for Respondent.

N. C. MUKHERJI, J.:— This is an appeal against an order dated 5th May, 1975 passed by Shri M. M. Das, 4th Subordinate Judge, Alipore in Title Execution

* (Against order of M. M. Das, Sub-J., 4th Court of Zillah 24 Parganas Alipore in case No. 1 of 1971. D/- 5-5-1975.)

Case No. 1 of 1971 dismissing the application filed by the appellant under O. 34, R. 5 of the Code of Civil Procedure.

2. The facts of the case may briefly be stated as follows:—

The property in suit is 75, Chakraberia North, Calcutta, comprising 10 cottahs of land with two storied buildings. The property was sold at Rs. 41,600 to the decree-holder in execution of a mortgage decree. The appellant, who is the judgment-debtor filed an application under O. 21, R. 90 of the Code for setting aside the sale. A Miscellaneous Case was started and the same was dismissed for default. Thereafter the appellant filed an application under S. 151 of the Code for setting aside the order of dismissal. That application was also dismissed. The appellant also filed an application under S. 36 of the Bengal Money Lenders Act and obtained order staying execution proceedings till the disposal of the case. The appellant preferred an appeal to this Court against order dated 16th June 1973 by which the application under O. 21, R. 90 was dismissed. The appeal was numbered at F.M.A.T. 2827 of 1974. On 11th January 1975 the appellant made an application under O. 34, R. 5 of the Code and deposited Rs. 19,625 for decretal amount, costs and interest and also 5% of the purchase money on Rs. 41,600. The application under the Bengal Money Lenders Act was not pressed and the same was dismissed for non-prosecution in view of the application under O. 34, R. 5 of the Code. The application under O. 34, R. 5 was dismissed by the Court below on the ground that the sale was deemed to be confirmed on 16th of June 1973 when the application under O. 21, R. 90 was dismissed although the court omitted to pass an order confirming the sale, and also on the ground that there was no appeal from the order of dismissal dated 16th of June 1973 and there was no order of stay. Being aggrieved by the aforesaid order, the judgment-debtor has preferred the present appeal.

3. Mr. Saktinath Mukherjee, learned Advocate appearing on behalf of the respondent, raises a preliminary objection about the maintainability of the appeal. Mr. Mukherjee submits that the suit for the enforcement of the mortgage decree and recovery of dues was valued at Rs. 13,000, and that being so, any proceeding in connection with that suit should be similarly valued and as such the learned District Judge was the proper

court where the appeal ought to have been filed. As the valuation of the subject-matter falls within the jurisdiction of that court the appeal has been wrongly filed in this Court. Mr. Mukherjee submits that the valuation of the suit determines the forum of the appeal. In support of his contention he refers to several decisions. He first cites a case reported in AIR 1954 SC 340 (Kiran Singh v. Chaman Paswan). In this case it was held that the decree passed without jurisdiction is a nullity. It was further held "The words 'unless the over-valuation or under-valuation thereof has prejudicially affected the disposal of the suit or appeal on its merits' in S. 11 clearly show that the decrees passed in such cases are liable to be interfered with in an appellate court, not in all cases and as a matter of course, but only if prejudice such as is mentioned in the section results and that the prejudice contemplated by the section is something different from the fact of the appeal having been heard in a forum which would not have been competent to hear it on a correct valuation of the suit as ultimately determined". We do not see how the principle laid down in this case applies to the fact of the present case.

4. Mr. Mukherjee next refers to a decision reported in AIR 1923 Cal 405 (Harihar Das Chowdhury v. Raj Kumar Mukherjee). In this case it has been held that "When S. 21 of the Bengal Civil Courts Act refers to the value of the original suit, the reference is to the valuation as made by the plaintiff, subject to such amendment as may have been made under the orders of the trial court. The Legislature did not intend that the expression 'the value of the original suit' in S. 21 means the real value of the subject-matter of the original suit, regardless of what may have happened in the trial court." In this case the plaintiff filed a suit for redemption and valued the same at Rs. 3,600. The plaintiff got a decree. The defendant at the trial did not challenge the valuation. After the defendants have been defeated they sought to change the forum of appeal by the assertion that the value of the subject-matter of the suit exceeds Rs. 10,000. It was held that the defendants should not be permitted to take recourse to such a procedure. In the present case the suit was valued at Rs. 13,000. But the total decretal dues and costs were much higher and the appellant deposited a sum

of Rs. 19,625 for decretal amount, costs and interest and also 5% of the purchase money on Rs. 41,600. The judgment-debtor previously filed F.M.A.T. No. 2827 of 1974 in this Court against the order dismissing his application under S. 151 of the Code. The present appeal has been valued by the appellant at Rs. 16,000. Dr. Das contends that though the original suit was for Rs. 13,000 as the decretal amount was much higher he has rightly filed the appeal in this Court. It is submitted by Dr. Das that in a mortgage suit the valuation for the purpose of the suit and the valuation for the purpose of an appeal may vary.

5. Mr. Mukherjee also refers to a decision reported in AIR 1942 Cal 60 (Priya Nath Roy v. Sridhar Chandra Ray). In this case it was held "In a suit for partition the decision of the trial court as to valuation of the subject-matter of the suit for the purposes of jurisdiction must be taken as final and conclusive during all the stages of the suit irrespective of what the parties might agree later on to be the actual market value of the suit properties and must determine the right of appeal under S. 21". The principle laid down in this case does not apply to the facts of the present case.

6. The last case referred to by Mr. Mukherjee on this point has been reported in AIR 1958 Pat 430 (FB) (Deonath Missir v. Chandraman Missir). In this case a suit for partition was valued at Rs. 5,000. It was held that "For the purpose of determining the forum of the appeal under S. 21 of the Civil Courts Act, the value of the suit as given in the plaint, not challenged by the defendants and accepted by the trial court, must be deemed to be the only value of the suit, and the appeal against the final decree in the suit would lie to the District Judge". This principle also does not apply to the facts of the present case. Considering the facts and circumstances of the case, we are of the opinion that though the mortgage suit was valued at Rs. 13,000 the present appeal has been rightly valued and that being so, this appeal is maintainable. The objection raised by Mr. Mukherjee is negatived.

7. Now with regards to the merits of the appeal. Dr. Das submits that after the judgment-debtor's application under O. 21, R. 90 of the Code was dismissed for default no order was passed by the court confirming the sale, and as such the judgment-debtor's application under

O. 34, R. 5 was maintainable. The learned Judge wrongly dismissed the application holding that the sale was confirmed on 16th June 1973 when the application under O. 21, R. 90 was dismissed for default although it is the admitted position that no order was passed by the learned Judge confirming the sale. In support of his contention Dr. Das has placed before us several decisions. The first case referred to by Dr. Das has been reported in AIR 1933 Cal 311 (Chhogan Lal Bagri v. Behari Lal Saha Ray). This case dealt with the period of limitation for filing an application for setting aside a sale after the same was confirmed. It was further held in that case that the order was passed by the court under S. 47 rejecting the application for delivery of possession by the decree-holder auction-purchaser and as such the appeal was competent. This is not an authority on the point whether when an application under O. 21, R. 90 is dismissed the sale automatically becomes absolute or the sale cannot be considered to be absolute when a formal order was not passed by the court.

8. The next case relied on by Dr. Das has been reported in (1896) 23 Ind App 45 (PC) (Bajinath Sahai v. Ramgut Singh). In this case their Lordships were of the opinion that there was no final, conclusive and definitive order confirming the sale while the question whether the sale should be confirmed was in litigation or until the order of the Commissioner became definitive and operative by the final judgment of the Board of Revenue. The facts of this case are completely different from the facts of the present case.

9. The next case referred to by Dr. Das has been reported in (1934) 38 Cal WN 901: (AIR 1934 PC 134) (Chandra Mani Saha v. Sreemati Anarjan Bibi). In this case it was held "When an appeal has been taken from an order made under O. 21, R. 92 disallowing an application for setting aside a sale, the sale does not become absolute within the meaning of Art. 180 of the Limitation Act until the disposal of the appeal, even though the first court may have confirmed the sale". In this case their Lordships were deciding the question of limitation and it was held "The period provided for in Art. 180 for an application for delivery of possession should be computed, when there has been an appeal from an order refusing to set aside the sale, from the date of the final disposal of the appeal".

10. Dr. Das next refers to a decision reported in AIR 1941 Cal 411 (Mandi Mia v. Sekander Mea). In this case it has been held that "In the absence of an order setting aside a sale, it is the duty of the Court to confirm the sale and there is no provision in the Civil Procedure Code for an application to be made by the auction purchaser for confirmation of the sale". At page 412 it has been observed "Under O. 21, R. 92 Civil Procedure Code, the sale has got to be confirmed when there is no application under O. 21, Rr. 89, 90 or 91 Civil Procedure Code or when such application is made and disallowed: in the absence of an order setting aside a sale, it is the duty of the court to confirm the sale and there is no provision in the Code of Civil Procedure for an application to be made by the auction purchaser for confirmation of the sale. We do not see how this decision helps the appellant. It has been clearly laid down that when an application is made and disallowed it is the duty of the court to confirm the sale. Their Lordships have not laid down that it is necessary for the court to pass a formal order confirming the sale. Dr. Das also relies on a decision reported in AIR 1967 SC 608 (Janak Raj v. Gurdial Singh). In this case in execution of an ex parte money decree a house property was sold. The judgment-debtor did not apply for setting aside the sale but applied for setting aside the decree, but the decree was reversed. After reversal, the auction-purchaser filed an application under O. 21, R. 92 for confirmation of sale. It was held that the sale must be confirmed notwithstanding reversal of decree after sale. Title of purchaser related back to date of sale and not to that of its confirmation. This case also, in our opinion, does not help the appellant. Dr. Das next refers to a decision reported in AIR 1956 Cal 510 (Sm. Priti Rekha Mitra v. Narayan Chandra Dutta). In this case it has been laid down that "In a mortgage suit for sale the equity of redemption can be claimed by the mortgagor when an application by the purchaser himself is pending for confirmation of the sale. The equity of redemption in such cases is not extinguished by the final decree for sale nor by the actual sale itself but survives until the sale is confirmed and made absolute under O. 21, R. 92 of the Civil Procedure Code". This proposition of law is not disputed by Mr. Mukherjee appearing on behalf of the respondent.

11. The next case cited by Dr. Das has been reported in (1934) 38 Cal WN 924: (AIR 1934 Cal 822) (Baruram Kalwar. Auction-purchaser v. Upendra Nath Das). In this case it was held "Under O. 34, R. 5, C.P.C. if the judgment-debtor pays into Court the amount due from him after the disallowance of an application under O. 21, R. 90 and before it has been possible to confirm the sale (as when the record has not arrived to the Court which held the sale from the Appellate Court which dealt with the application for setting the sale aside), the sale must be set aside, although such payment may be long after the sale and although the delay may have been caused by action of the judgment-debtor". The facts of the present case are not such that it can be said that it became impossible to confirm the sale. The contention of Dr. Das is that in the absence of an order passed by the Court for confirmation of the sale, the sale was not made absolute while Mr. Mukherjee contends that rejection of the application under O. 21, R. 90 is confirmation of the sale. In such cases the confirmation is automatic and no formal order need be passed. Dr. Das also refers to a decision reported in AIR 1963 Mad 423 (Chellappa Chettiar v. T. P. Kalyanasundaram). In this case it was held "The right conferred by O. 34, R. 5 is a substantive right and it should not be whittled down by any considerations of the judgment-debtor being responsible for the delay in passing the order of confirmation of the sale". We are not required in the present case to come to a decision about the question of delay caused by the judgment-debtor.

12. Mr. Saktinath Mukherjee, learned Advocate appearing on behalf of the respondent, very strongly contends that when an application for setting aside a sale under O. 21, R. 90 is dismissed, the automatic consequence is that the sale becomes confirmed and that being so, it is not at all necessary that a formal order need be passed by the court confirming the sale. In support of his contention Mr. Mukherjee cites before us several authorities. The first case cited has been reported in (1897) ILR 24 Cal 682 (Khetter Nath Biswas v. Faizuddin Ali). In this case the court below set aside the sale upon payment by the applicant of the mortgage due with interest and costs. It was held by this court that "Inasmuch as under S. 312 of the Code of Civil Procedure the auction-purchaser was entitled

to have an order confirming the sale unless the sale were set aside under Section 310A or S. 311 of the Code of Civil Procedure and as the sale was not set aside under either of these sections, the court below had no jurisdiction to set aside the sale upon payment by the applicant of the mortgage money with interest and costs".

13. Mr. Mukherjee next refers to a decision reported in AIR 1925 Cal 510 (Narendra Nath Chatterjee v. Rakhal Das Tarafdar). In this case though the point before their Lordships was whether the High Court has jurisdiction to interfere in revision with an order dismissing an application under O. 21, R. 90 for default, their Lordships held that "The effect of the dismissal of an application under O. 21, R. 90 even for default is to confirm the sale under R. 92 and hence an appeal lies against the order and the High Court has no jurisdiction to interfere with the order in revision".

14. Mr. Mukherjee next refers to a decision reported in AIR 1927 Cal 881 (Mt. Rehela Khatun v. Amburennessa Choudhurani). In this case it has been held by a Division Bench that "The sale certificate is no more than evidence of title. Absence in the record of a sale certificate or of a formal order confirming the sale, does not affect the purchaser's title when in substance and in fact the Court did confirm the sale". In this case there was no formal order by the court confirming the sale and that being so, the facts are similar to the facts of the present case. Reference has also been made by Mr. Mukherjee to a decision reported in AIR 1929 Cal 407 (2) (Ansarali v. Bhim Sankar Dutta Tewari). In this case their Lordships have laid down "When no formal order has been recorded confirming the sale and the application under O. 21, R. 90 has been dismissed for default for non-appearance of both parties to the proceeding, the order of dismissal passed under those circumstances is open to appeal". It has been further held that "It is the disallowing of the application made under O. 21, R. 90 which corresponds to the order refusing to set aside a sale. The fact that a distinct order has not been recorded confirming the sale does not alter the character of the order disallowing an application under O. 21, R. 90."

15. Mr. Mukherjee next refers to a decision reported in AIR 1958 Mad 317 (Veda Goundar v. Arunachalam Chettiar).

It has been held in this case that "Confirmation of sale under O. 21, R. 92 does not require an application by the auction-purchaser. Confirmation is a statutory obligation imposed on the court, if the requirements of O. 21, R. 92 are satisfied". Mr. Mukherjee also draws our attention to the findings of their Lordships in the case reported in AIR 1968 SC 86 (Hukumchand v. Bansilal). Their Lordships found that "Under O. 21, R. 92 the Court was bound to confirm the sale at once when it dismissed the application under O. 21, R. 90". We find that a Privy Council decision reported in (1931) 35 Cal WN 381: (AIR 1931 PC 33) very much helps the respondent. At page 383 it has been observed by Lord Macmillan that "It would be idle to contend that because in this case there was, technically, no confirmation of the sale, it could be set aside. It could not be set aside except on payment of 5% under R. 89. The purchaser has an absolutely vested interest in the property, although there is a divesting power in the Court under Rr. 89 and 90. But if a party fails to avail himself of the appropriate provision the sale shall be confirmed; see R. 92. The fact that in this case a distinct order has not been recorded confirming the sale, is quite immaterial". In order to come to this decision their Lordships relied on the case reported in (1929) ILR 56 Cal 969 at p. 974: (AIR 1929 Cal 407 (2)) (Ansarali v. Bhim Sankar Dutta Tewari). Relying on the decision referred to above and considering the facts and circumstances of the case we negative the contention raised by Dr. Das that an express order for confirmation of sale is absolutely necessary. We also negative the argument advanced by Dr. Das that an application by the auction-purchaser for an order for confirmation of sale is necessary.

16. Dr. Das next contends that even if the order is passed confirming the sale, the sale will not be absolute until the disposal of the appeal. The right to redeem mortgage under O. 34, R. 5 will remain open till the sale becomes absolute. As we have held that the sale has already become absolute after the application under O. 21, R. 90 was dismissed we negative this contention of Dr. Das. We also negative the contention that the sale does not become absolute till the disposal of the appeal.

17. For all the reasons stated above this appeal is dismissed. The order pass-

ed by the court below is confirmed. Considering the facts and circumstances of the case we, however, do not pass any order for costs.

B. C. RAY, J.— I agree,

ORDER

On the prayer of the learned Advocate for the appellant let the operation of the order remain stayed for a period of two weeks from date.

Appeal dismissed.

AIR 1977 CALCUTTA 356

MRS. PADMA KHASTGIR, J.

C. M. Agarwalla, Plaintiff v. Halar Salt and Chemical Works and others, Defendants.

Suit No. 511 of 1959, D/- 18-7-1977.

(A) Torts — Malicious prosecution — Action for — Essential elements.

The generally accepted essential elements in a cause of action for malicious prosecution, in conformity with the malicious decisions are: (1) that the plaintiff was prosecuted by the defendant (2) that the prosecution terminated in his favour, if from their nature they were capable of such termination (3) that there was no reasonable and probable cause for launching such prosecution (4) that the prosecution was malicious, i.e., it was done with ulterior motive and not with the intent of carrying the law into effect.

(Para 4)

(B) Torts — Malicious prosecution — Damages — Suit for — Onus — Malice — Proof of.

In a claim for malicious prosecution the plaintiff can claim damages on three counts:— (a) For damages to person (b) For damages to property (c) For damages to reputation. The burden of proving the case is on the plaintiff and he must go the whole way as there is no half way point of rest and such proof is extremely heavy. The whole principle lying behind for malicious prosecution is that the society as a whole is interested in protecting the individual against unjustifiable and oppressive imputation of criminal charges. If a person has been prosecuted it is to be presumed that some damage to that party has resulted. He may or may not have suffered pecuniary loss but loss to his reputation and mental anxiety in every case is bound to result. A plaintiff may recover damage for the distress which normally results from be-

ing prosecuted for a time without proving that he has suffered any emotional disturbance. Damages of that kind are called general damages. However, the amount of harm to the reputation of the plaintiff and the extent of the emotional disturbance are determined by the gravity of the offence charged against him in criminal proceedings. (Paras 4, 5)

In the instant case the criminal proceedings terminated in favour of the plaintiff, in the sense that the plaintiff was acquitted of the charges brought against him by the defendants. Although the decision of the criminal court is not binding on a Civil Court for the purpose of coming to the conclusion whether the prosecution was malicious or not and the Civil Court will have to go itself in to the question of reasonable and probable cause and also of malice but the acquittal of the plaintiff in the criminal case is a sure proof of the termination of the criminal proceedings in favour of the plaintiff. The plaintiff will have to make out his case independently and the Civil Court has to conduct an independent enquiry as to the presence or absence of reasonable and probable cause. 'Malice' in an action for malicious prosecution does not mean wrongful intention or recklessness but it is construed more narrowly to show that the prosecution was inspired by some motive other than a desire to bring to justice a person whom he honestly believes to be guilty. In case where charges are found to be false and false to the knowledge of the defendants not only lack of reasonable and probable cause is there but also malice may be inferred. As malice is a question of fact on the evidence laid before a court it will have to decide whether there was malice or not. In the instant case it was held that there was no reasonable and probable cause for the defendants to launch the prosecution against the plaintiff and they have been actuated by malice in doing so.

(Paras 6, 12)

(C) Torts — Malicious prosecution — Damages — Assessment of.

In assessing damages the Court to some extent will have to rely on the rules of commonsense over and above that the court will have to consider (1) the nature of the offence which the plaintiff was charged of (2) the inconvenience of the plaintiff in which he was subjected to (3) monetary loss and (4) the status and position of the person prosecuted. Damages

awarded for loss of reputation are in the nature of solatium and not given for punishing the defendant or enriching the plaintiffs. (Para 8)

ORDER:— This suit has been filed by Chouthmal Agarwalla against (1) Halar Salt and Chemical Works, (2) Harjivandas Vithaldas, (3) Jamnadass Madhawji (4) Gordhandass Madhawji Thakkar, (5) Patalia Saratchandra Jethalal and (6) Haridas Dwarkadas for a decree for Rs. 1,00,000, in the alternative an enquiry in respect thereof, costs, injunction and other reliefs on 27th April 1959.

2. The case of the plaintiff is that he carried on business as an importer and exporter in salt, iron and general merchandise, order suppliers in Calcutta for a long time and has good reputation. The plaintiff carried on the said business as a partner of Sri Bajrang Trading and Supply Company at No. 22, Bartala Street, Calcutta.

3. The defendant No. 1 is a firm, inter alia, carrying on business in salt at No. 1, Amratala Lane, Calcutta and the defendants Nos. 2 to 4 are partners. The defendant No. 6 is the Branch Manager of the defendant No. 1. On 26th November 1957 the defendant No. 6 under the instruction and/or advice, directions and/or orders of his masters being defendants Nos. 2 to 5 maliciously without reasonable and probable cause preferred in the Court of the Additional Presidency Magistrate, Calcutta a complaint against the plaintiff under Ss. 406 and 420 of the Indian Penal Code and thereby caused the said Court to issue process against the plaintiff. The defendants Nos. 2 to 5 caused the proceedings to be initiated through the defendant No. 1 and unequivocally ratified and/or admitted the said acts of the defendant No. 6. The plaintiff had to appear before the said court on various days between 27th November 1957 till 25th September 1958 and had to stand in the prisoners' dock as an accused during the trial in the said court along with other criminals. On 25th September 1958 the plaintiff was acquitted under S. 258 of the Code of Criminal Procedure on the ground that there was no mens rea on the part of the accused. It is further the case of the plaintiff that by reason of the aforesaid malicious prosecution and malicious abuse of the process of the Court the plaintiff has been injured in his credit and business reputation and suffered from mental agony and pain. The plaintiff was compelled to

appear in the court from time to time and was thereby prevented from transacting his business for a long time. The plaintiff has examined himself and also examined two other witnesses being plaintiff's witnesses Nos. 2 and 3 to prove that as a result of the said malicious prosecution the plaintiff lost credit and/or confidence of other customers and suppliers and considering him to be a bad man and/or criminal they ceased to do any business with the plaintiff on credit. The plaintiff in paragraph 11 has claimed a total sum of Rs. 1,00,000 towards the damages that he is alleged to have suffered. A written statement was filed on behalf of the defendants denying the claim of the plaintiff and trying to justify their own conduct. The plaintiff in his examination-in-chief stated there were various dealings and transactions between the plaintiff and the defendant for a long time. In the course of such transaction on 9th October 1957 the plaintiff gave 4 cheques in favour of the defendant No. 1. Out of 4 cheques 2 were passed by the bankers for payment and subsequently as the plaintiff found that salt supplied by the defendant No. 1 was short, as such he wrote to the banker stopping the payment in respect of other 2 cheques. Those 2 cheques were for the sums of Rs. 4,537.50 and also for Rs. 3,000. At that time the plaintiff had with the defendant a total sum of Rs. 3,000 in deposit. The defendant No. 1 was holding that sum of Rs. 3,000 to the credit of the plaintiff as a deposit. At the time when the plaintiff issued the said 2 cheques, the plaintiff had an overdraft facility with the bank for a sum of Rs. 70,000. On the day when the plaintiff issued notice stopping payment of the said two cheques the plaintiff had also overdraft facilities with the bank to the tune of Rs. 70,000. That instruction for stoppage of payment was given by the plaintiff on a bona fide ground as the goods supplied by the defendant No. 1 to the plaintiff was short in supply. As such, according to the plaintiff, the plaintiff was entitled to stop payment for the said cheques. The defendant No. 6 under the instruction of defendants Nos. 1 to 5 wrongfully filed the criminal complaint in respect of the said 2 cheques, which were not paid by the bankers. The plaintiff has proved the complaint filed before the Criminal Court which was signed by the defendant No. 6. The said criminal trial lasted for 6 months and the plaintiff had to attend court for more than 20

times. During his visit to the court the plaintiff had to remain there from 11 o'clock in the morning upto 4 o'clock. The plaintiff stated that he had to engage lawyer for 22 days and in fact had to pay Rs. 1,500 to the said lawyer. Although he says that he had receipt for payment to the lawyer he had not been able to find them. Ultimately the plaintiff was acquitted of both the charges on 25th September 1958. He submits that the defendants had no reason whatsoever to start the said criminal proceeding against the plaintiff. The plaintiff deposed that the defendants have started criminal case with the oblique motive and not for any reasonable and probable cause as he has stopped payment of the cheques. The defendant wanted to injure the prestige of the plaintiff in the business community and in the trade. The plaintiff states that he was a regular assessee under the Income-tax Act and he has proved a number of orders paid into the Income-tax Department for the assessment years 1957-60. He has also proved the balance sheet of the fund Bajrang Trading and Supply Company to show that the plaintiff's name appeared under the column of the capital account and also proved the figures lying to its credit as mentioned in the different balance sheets proved by the plaintiff. The plaintiff has given the name of different parties with whom he had business in salt and also proved various bills for large sums of money which had been paid to different parties during the relevant period. Apart from the credit facilities given by Hindusthan Commercial Bank Ltd. to the extent of Rs. 70,000 the plaintiff enjoyed other credit facilities in the market. The plaintiff's case is that because of the institution of the criminal case, his prestige was lowered and as a result the business community refused to give him goods on credit. Amongst the parties who refused credit, the plaintiff mentioned the names of Sri Lakshmi Salt Works Ltd., Imperial Iron and Steel Works, etc. He also proved the different letters written by the parties refusing to give the plaintiff any credit facility because of the said criminal proceedings. The plaintiff examined on his behalf Sri Hrishikesh Chakraborty of Lakshmi Salt Works to prove the letter written by them also to prove that people knew about the said prosecution of the plaintiff as a result whereof the Director of the said company decided not to give any salt to the plaintiff, save and except strictly on cash terms. The plain-

tiff also examined one Satyanarayan Saraf of S. L. Gupta Pvt. Ltd. to prove that because of the criminal proceedings taken against the plaintiff they stopped supplying goods to the plaintiff save and except on cash terms and also proved the letter dated 4th May 1958 written by them to the plaintiff.

4. The Law of Tort in India has not yet been codified and therefore the basis of this branch of law in India continues to remain the rules of English Law which had been imported to India and became part of the Indian Law. In India the litigations in respect of Tort are not very many. One of the branches of the Law of Tort is actions for malicious prosecution and the law for malicious prosecution in India is exactly the same as the Law in England. Foundation of law for action for malicious prosecution lies in the abuse of the process of Court by wrongfully setting the law in motion. The generally accepted essential elements in a cause of action for malicious prosecution, in conformity with the malicious decisions are: (1) that the plaintiff was prosecuted by the defendant (2) that the prosecution terminated in his favour, if from their nature they were capable of such termination (3) that there was no reasonable and probable cause for launching such prosecution (4) that the prosecution was malicious, i.e., it was done with ulterior motive and not with the intent of carrying the law into effect. In a claim for malicious prosecution the plaintiff can claim damages on three counts:— (a) For damages to person (b) For damages to property (c) For damages to reputation.

5. The burden of proving the case is on the plaintiff and he must go the whole way as there is no half way point of rest and such proof is extremely heavy. The whole principle lying behind for malicious prosecution is that the society as a whole is interested in protecting the individual against unjustifiable and oppressive imputation of criminal charges. If a person has been prosecuted it is to be presumed that some damage to that party has resulted. He may or may not have suffered pecuniary loss but loss to his reputation and mental anxiety in every case is bound to result. A plaintiff may recover damage for the distress which normally results from being prosecuted for a time without proving that he has suffered any emotional disturbance. Damages of that kind are called

general damages. However, the amount of harm to the reputation of the plaintiff and the extent of the emotional disturbance are determined by the gravity of the offence charged against him in criminal proceedings. In this particular case the question would have to be considered in view of the facts and principles of law as stated above. In fact was the prosecution in the criminal proceedings, that has been brought, by the defendants against the plaintiff? A prosecutor has been described as a person who is actively instrumental in prosecuting the plaintiff (Halsbury's Laws of England, Vol. 25 p. 339 para. 684). A person may be liable as a prosecutor though the complaint has been filed either by his agent or his employee. Usually a person is liable as a prosecutor if he filed a complaint to a Magistrate. He is also liable as a prosecutor if caused a complaint to be filed either through his agent or employee. Thus, one who personally or by a third person for whose conduct he is responsible under the Law of Agency presents to a Magistrate a petition upon which a warrant of arrest is issued or necessary action is taken by the Magistrate is also held to be the prosecutor. In this particular case, therefore, there is no doubt that the partners, defendants Nos. 2, 3, 4 and 5 of defendant No. 1 through the defendant No. 6 launched the prosecution against the plaintiff. As such they all would be deemed to be the prosecutor in the said criminal proceedings.

6. In this particular case the criminal proceedings terminated in favour of the plaintiff, in the sense that the plaintiff was acquitted of the charges brought against him by the defendants. Although the decision of the criminal court is not binding on a Civil Court for the purpose of coming to the conclusion whether the prosecution was malicious or not and the Civil Court will have to go itself into the question of reasonable and probable cause and also of malice but the acquittal of the plaintiff in the criminal case is a sure proof of the termination of the criminal proceedings in favour of the plaintiff. The plaintiff will have to make out his case independently and the Civil Court has to conduct an independent enquiry as to the presence or absence of reasonable and probable cause. 'Malice' in an action for malicious prosecution does not mean wrongful intention or recklessness but it is construed more narrowly to show

that the prosecution was inspired by some motive other than a desire to bring to justice a person whom he honestly believes to be guilty. In case where charges are found to be false and false to the knowledge of the defendants not only lack of reasonable and probable cause is there but also malice may be inferred. As malice is a question of fact on the evidence laid before a court it will have to decide whether there was malice or not.

7. Now lastly in an action for malicious prosecution a reference has already been made earlier that three types of damages one may suffer because of malicious prosecution. "Damages are defined as the pecuniary compensation which the law awards to a person for the injury he has sustained by reason of the act or default of another whether the act is a breach of contract or a tort or put more shortly damages are the recompense given by process of law to a person for the wrong that another has done to him". (Halsbury's Laws of England, Vol. 2 p. 216 para 383, 3rd Edn.). Punitive damages are intended to be in solatium to the plaintiff and in terrorem to the public. While awarding damages "the wounded feeling and injured pride of a plaintiff" are taken into consideration. A false charge that a person has committed cheating or is guilty of criminal breach of trust is bound to injure his reputation, more so, in a case of a person who is known to the business world. The second type of damages arises due to the injury to the person of the plaintiff. Injury to the person may result because of arrest, i.e., he is deprived of his liberty and also because of what he has to suffer from mental stress. It is however not necessary that a person may have been actually arrested but it is sufficient even if imprisonment is the immediate and necessary consequence of the prosecution.

8. Regarding the third type of damages, i.e., injury to property, a person who is maliciously prosecuted has necessarily to spend some money to defend himself. Where the infringement of right is not followed by any real damage or where a person has to face prosecution the court may award nominal damages. 'Nominal damages' are defined as a sum of money that may be spoken of but that has no existence in point of quantity or a mere peg to hang costs. In assessing damages the Court to some extent will have to rely on the rules of common-

sense over and above that the court will have to consider (1) the nature of the offence which the plaintiff was charged of (2) the inconvenience of the plaintiff in which he was subjected to (3) monetary loss and (4) the status and position of the person prosecuted. "Damages awarded for loss of reputation are in the nature of solatium and not given for punishing the defendant or enriching the plaintiffs."

9. The plaintiff in this case has proved that he has suffered damages not only by defending himself in a criminal court by engaging lawyers and presenting himself for more than 20 times before the court of Metropolitan Magistrate, Calcutta but also he had undergone a great mental stress for being placed along with other criminals in the dock. The plaintiff although has given evidence that he had to engage lawyer and he spent a sum of Rs. 1,500 in defraying his expenses at the Metropolitan Magistrate's Court but also said that he had the receipt for the same although through inadvertence that is mislaid. In this case the plaintiff may not have supported his claim for payment to the lawyer concerned by producing the receipt but in the absence of the same it may be presumed that he must have spent money in engaging lawyers for getting himself defended. He has also claimed damages on account of loss of reputation and loss of profit as he was all the time engaged in court during the period when the said criminal case was going on. As such his commercial interests have been affected. The plaintiff is a partner of a firm of Messrs. Bajrang Trading and Supply Company. So even if the plaintiff had been detained while the criminal case was going on it cannot be said that the normal running of the said partnership firm was hampered or could not be carried on in the absence of the plaintiff during those days.

10. From the trend of decisions it appears in awarding damages the learned Judges in India take conservative attitude and are not inclined to award exemplary damages, save and except in exceptional cases. Where the plaintiff proves want of reasonable and probable cause malice may be inferred although want of probable and reasonable cause is not conclusive evidence of malice. The master is liable in tort where the servant is working within the scope of his authority, that is, within the scope of his employment, commits a wrong. In this case the

prosecution was initiated by the defendant No. 6 with the authority of defendants 1 to 5.

11. So far as special damages as claimed by the plaintiff are concerned I am of the opinion that the plaintiff is entitled to a sum of Rs. 1,500 as per the particulars given under paragraph 11 of the plaint. So far as claim of the plaintiff regarding loss of business is concerned, I am of the opinion that as he is a partner of a partnership firm and he had other partners to look after the business during the days when the criminal trial was going on his absence could not make much difference. Regarding the claim of loss suffered due to mental agony and pain, I think a sum of Rs. 5,000 considering the position of the plaintiff as a reputable businessman of Calcutta would be enough. From the evidence given before me it appears that the dispute between the plaintiff and the defendants was strictly of civil nature arising out of short delivery of the goods by the defendants to the plaintiff and in view of the fact that the defendants had a sum of Rs. 3,000 with them as security deposit made by the plaintiff in respect of the said supplies, the defendants, when the cheques were stopped for payment by the plaintiff, could have adjusted the said claim against the said security money, could have raised a dispute by demand in writing letters and requested the plaintiff to settle up balance amount. Moreover, it was always open for the defendants, if they were really aggrieved to file a civil suit to recover their dues. Instead of doing so or taking up the course as stated above the defendants promptly with an ulterior motive brought charges against the plaintiff under S. 420 and S. 406 which ultimately terminated in favour of the plaintiff.

12. From the facts and circumstances of this case I am of the opinion that there was no reasonable and probable cause for the defendants to launch the prosecution against the plaintiff and they have been actuated by malice in doing so. As a result I hold that the present suit of the plaintiff succeeds. I pass a decree for the sum of Rs. 5,000 as general damage and Rs. 1,500 as special damages and costs, as against the defendants.

Suit decreed.

AIR 1977 CALCUTTA 361**DIPAK KUMAR SEN, J.**

Taherbhoy Feeda Ally and others, Petitioners v. State of West Bengal and others, Respondents.

Matter No. 365 of 1977, D/- 8-7-1977.

Urban Land (Ceiling and Regulation) Act (1976), S. 27 — Transfer — Agreement to sell certain premises providing that the sale would be subject to permission under the Act — In terms of agreement certain amount was paid as earnest and possession of a part of the premises was given to transferee for specific purpose of repairs — Held, there was no transfer. (T. P. Act (1882), S. 54).

In absence of any permission granted by the competent authority there can be no question of any transfer. It is clear from the language of S. 27 itself that without permission of the competent authority no property can be transferred. Section 54 of the T. P. Act also makes it clear that a contract for sale of itself does not create any interest or charge.

(Paras 10, 11, 12, 13)

Cases Referred: Chronological Paras

AIR 1956 Cal 462

8

(1908) ILR 35 Cal 837

10

ORDER:— The six petitioners in these proceedings viz., Taherbhoy Feeda Ally, Yayahbhoy Feeda Ally, Abdullahbhoy Feeda Ally, Salehbhoy Feeda Ally, Dawoodbhoy Feeda Ally and Tayebbhoy Feeda Ally seek to impugn an order No. 27/S/223 of 1977 dated the 6th April 1977 passed by the competent Authority under the Urban Land (Ceiling and Regulation) Act, 1976 (hereinafter referred to as 'the said Act'). The undisputed facts relevant to these proceedings are, inter alia, that the petitioners are owners in possession of premises Nos. 83A and 83B, Park Street (hereinafter referred to as 'the said premises'). Under an agreement in writing dated the 2nd September 1976 the petitioner agreed to sell to Favourite Small Investment Limited, the respondent No. 4 in these proceedings, the said premises for a price of Rs. 8 lakhs on, inter alia, the following terms and conditions:

(a) The sale would be subject to the petitioners obtaining the necessary certificate and/or permission under the said Act;

(b) The petitioners would simultaneously with the execution of the agreement give vacant possession of the entire

ground floor of premises No. 83A, Park Street to the respondent No. 4 who would be authorised to make repairs, alterations and additions therein on the understanding that if the transaction fell through then the said respondent would give back vacant possession of the said portion to the petitioners. In default, the respondent No. 4 would have to pay mesne profits at the rate of Rs. 125 per day.

2. Pursuant to and in terms of the said agreement, a sum of Rs. 1 lakh was paid by the respondent No. 4 to the petitioners as earnest. The ground floor of the said premises No. 83A, Park Street was made over to the respondent No. 4. On the 8th February 1977 an application was made by the petitioners to the First Land Acquisition Collector, Calcutta, the Competent Authority and the respondent No. 3 herein in the prescribed form, for his approval and/or permission as required under S. 27 of the said Act.

3. On the 9th April 1977 the petitioners received the said notice dated the 6th April 1977 from the Competent Authority informing the petitioners, inter alia, as follows:—

"On enquiry it reveals that the applicants already transferred premises Nos. 83A and 83B, Park Street, Calcutta to Favourite Small Investment Ltd. (transferee) by making over possession of the said premises to the transferee on receipt of a sum of Rs. 1,00,000 (Rupees one lac) only on the basis of an agreement executed between them and the transferee, without obtaining prior permission of the Competent Authority, under S. 27 (3) of the Urban Land (Ceiling and Regulation) Act, 1976. The applicants are, therefore, no longer owners of the property and they are not entitled to make the application under S. 27 (2) of the said Act as owners of the property.

"Permission sought in the application is, therefore, refused. Inform the applicants furnishing a copy of this order to them."

4. The petitioners contend that the said order dated the 6th April 1977 is erroneous, without jurisdiction, null and void and not binding on the petitioners on grounds, inter alia, as follows:

(i) The respondent No. 3 exceeded his jurisdiction in passing the said order as there had been no transfer at all of the said premises or any portion thereof to the respondent No. 4 or to anybody else

as contemplated under S. 27 (1) of the said Act.

(ii) The said order having been passed by the respondent No. 3 on the basis of consideration which he is not entitled to take into account under the provisions of the said Act, and without considering the application on its merit under S. 27 (2) of the said Act was mala fide.

(iii) The respondent No. 3 having granted the petitioners no opportunity whatsoever to represent their case before passing the said impugned order acted in violation of the principles of natural justice.

5. A Rule nisi was issued in this application on the 4th May, 1977 calling upon the respondents, namely, the State of West Bengal; the Secretary, Ministry of Land and Land Revenue; the First Land Acquisition Collector, Calcutta and the Competent Authority under the said Act and the said Favourite Small Investment Ltd., to show cause why a writ in the nature of mandamus should not be issued directing the said respondents, their servants, agents and officers to set aside and cancel the said order dated the 6th April 1977 and also to refrain from acting on the basis thereof and/or giving effect to and/or taking any proceedings under and from making any demand on the basis thereof in any manner whatsoever. The said respondents were further directed to show cause why a writ in the nature of certiorari should not be issued setting aside, cancelling or quashing the said impugned order and they were directed to produce or cause to be forwarded to the Registrar of this Court all documents, orders and proceedings relating thereto for the aforesaid purpose. The said respondents were further directed to show cause why a writ in the nature of prohibition should not be issued commanding them not to enforce or give effect to or act in terms of or on the basis of the impugned order or to exercise jurisdiction in any manner in respect thereof.

6. An affidavit affirmed by one Nirmal Chandra Roy on the 9th June 1977 has been filed in these proceedings. The contentions in the petition have been denied in this affidavit.

7. Mr. Jayanta Mitra, learned counsel for the petitioners contended at the hearing that the order was wholly misconceived inasmuch as there had been no transfer of the said premises as has been wrongly held in the said impugned order.

All that happened was that earnest had been paid and a part of the said premises was made over to the respondent No. 4 for the specific purpose of repairs. This was utmost a case of leave and license and not transfer. It was specified that the agreement would be subject to the permission of the Competent Authority under the Act and no title could pass at this stage.

8. Mr. S. Sen, learned counsel for the respondents, contended on the other hand that all the ingredients of a valid transfer were present in the transaction. There was payment of earnest and also a transfer of possession of a part of the property. On these facts read with the agreement it would be deemed that ownership of the property had passed. In support of his contentions Mr. Sen relied upon a decision of this Court in the case of Rabintra Nath Banerjee v. Harendra Kumar Chakravarty, reported in AIR 1956 Cal 462. In this case it was observed in connection with certain proceedings under O. 81, R. 89 of the Code of Civil Procedure by a Single Bench of this Court as follows:

"The language of S. 54 emphasises that 'of itself' a contract for sale does not create any interest of charge on the property. But very often a contract for sale does not stand by itself where there is a part payment of the purchase price or payment of what is called the earnest money. In that event S. 55 (b), Transfer of Property Act would be attracted and it will be treated as though the ownership of the property had passed and there is a charge for part of the purchase money paid."

9. In my opinion, this decision does not advance the case of the respondents to any appreciable extent. All that was held in this case was that after part payment of the purchase price or payment of earnest money the purchaser would acquire a charge on the property which was in the nature of an interest in the property.

10. Section 54 of the Transfer of Property Act makes it quite clear that a contract for sale of itself does not create any interest or charge. In the case of Gobinda Chandra Pal v. Dwarka Nath Pal, reported in (1908) ILR 35 Cal 837 a Division Bench of this Court held that unlike a mortgage, a charge only secured payment of money out of a property and did not operate as a transfer. This case was cited by Mr. Mitra in reply on behalf of the petitioners.

11. Apart from that, it is clear from the language of S. 27 of the Act itself that without permission of the competent authority no property can be transferred. Section 27 of the Act reads as follows:

"27. Prohibition on Transfer of Urban Property.— (1) Notwithstanding anything contained in any other law for the time being in force, but subject to the provisions of sub-s. (3) of S. 5 and sub-s. (4) of S. 10, no person shall transfer by way of sale, mortgage, gift, lease for a period exceeding ten years, or otherwise, any urban or urbanisable land with a building (whether constructed before or after the commencement of this Act) or a portion only of such building for a period of ten years of such commencement or from the date on which the building is constructed, whichever is later, except with the previous permission in writing of the competent authority."

12. It is nobody's case that such permission has been granted and therefore there can be no question of any transfer. There is also the specific clause in the agreement which makes the agreement itself subject to such permission.

13. It appears to me that the impugned order so far as it purports to hold that there has been a transfer of property is misconceived and *ex facie* erroneous.

14. For the reasons stated above the order is set aside and the Rule is made absolute to that extent. In the facts and circumstances of this case there will be no order as to costs.

Rule made absolute.

AIR 1977 CALCUTTA 363

S. A. MASUD AND S. K. MUKHERJEA, JJ.

Bhutoria Trading Co. Ltd., Petitioner v. Allahabad Bank Ltd. and others, Respondents.

A. F. O. D. No. 251 of 1964, D/- 12-11-1976.*

(A) Evidence Act (1872), S. 115 — Estoppel by conduct — Conduct of Plaintiff-company showing authorisation of a person to encash cheque — Whether plaintiff can challenge his authority.

The plaintiff-company allowed its manager to use its seal for the purpose

*(Against judgment and decree of Bijayesh Mukherjee J., D/-18-9-1963.)

of endorsement of various cheques drawn in favour of the plaintiff company. The said Manager encashed certain cheques but did not credit the amount in company's account. Plaintiff sued the Bank for damages on the ground that the Bank was guilty of negligence in giving away money to an unauthorised person.

Held, the plaintiff-company by its conduct represented the Bank that the person encashing the check had authority to act on behalf of the plaintiff as its manager and therefore, plaintiff company was estopped from challenging authority of that person who used company's seal as its manager. (Paras 29, 30)

(B) Negotiable Instruments Act (1881), S. 10 — Payment of bearer cheque to manager of plaintiff company — Held, was in due course.

One J. brought a cheque drawn in favour of the plaintiff company for encashment. The cheque being bearer one and payable to plaintiff on order the Bank encashed the same in good faith and handed over the sum to J who purported to be manager of the plaintiff company. In encashing the said cheque it was proved that Bank was not negligent and that it did it in good faith.

Held, the Bank made the payment of cheque in due course within the meaning of S. 10 of the Act. (Para 31)

Cases Referred: Chronological Paras AIR 1961 SC 993 28

S. K. MUKHERJEA, J.:— This appeal is directed against a judgment and decree of Bijayesh Mukherjee, J. dated September 18, 1963 insofar as by the said judgment and decree the learned Judge dismissed the suit as against Allahabad Bank Ltd., the first defendant, who is a respondent before us. The facts of the case may be briefly stated.

2. In March and April the plaintiff, that is to say, the appellant before us sold and delivered to one W. F. Ducat & Co. Ltd. of 5 Clive Row, Calcutta, diverse quantities of jute for the price of Rupees 57,889-7-0 which became payable by the said buyers.

3. Messrs. W. F. Ducat & Co., Ltd. drew an uncrossed cheque on their bankers, the respondent Allahabad Bank Ltd. for the said sum payable to the plaintiff or order in payment of the said price and made over the same to the defendant No. 2 Jethmall Chandalia, an employee of the plaintiff. In the plaint, the plaintiff claimed that the defendant No. 2 had no authority

to operate on the plaintiff's banking account or to endorse any cheque payable to the plaintiff's order. In paragraph 5 of the plaint the plaintiff further averred that there is a well-known usage and/or practice in the banking business and/or trade and commerce in Calcutta, well known to the defendant at all material times, that a cheque payable to a limited Company cannot be encashed at the counter of the drawee bank and that the same can only be encashed if presented for payment through the bank of the payee.

4. The defendant No. 2 wrongfully, dishonestly, fraudulently and without authority endorsed the said cheque on the back thereof purporting to be for and on behalf of the plaintiff and thereafter presented the same at the counter of the defendant bank.

5. It is contended by the plaintiff that the defendant bank, contrary to the aforesaid custom or usage of the trade, wrongfully and negligently paid the cheque at its counter although the said cheque had not been presented through any bank on behalf of the plaintiff. The cheque was paid under circumstances which afforded reasonable grounds for suspicion and put the defendant No. 1 on enquiry as to the authority of the defendant No. 2 to receive payment of the cheque or use the proceeds thereof in fraud of the plaintiff and deprive the plaintiff of the same.

6. The defendant bank should have known on reasonable enquiry that the defendant No. 2 had no authority to endorse the cheque payable to the plaintiff's order or to encash the same.

7. The bank acted negligently in not making due enquiry as to the authority of the defendant No. 2 to realise the proceeds of the said cheque and had any such enquiry been made, the bank would have ascertained that the defendant No. 2 had no authority to endorse or realise the proceeds of the said cheque.

8. The plaintiff contended that the payment of the said cheque was not made in due course or in the ordinary course of business. The endorsement of the cheque made by the defendant No. 2 was unauthorised, fraudulent and forged.

9. The plaintiff pleaded that the defendants Nos. 1 and 2 had converted the said cheque and the proceeds thereof to their own use as a result whereof the plaintiff has suffered damages.

10. In the alternative, the plaintiff claimed the said sum against the said defendants as moneys had and received by

the said defendants to the use of the plaintiff. An allegation of conspiracy was made by the plaintiff against the defendant No. 2 and the defendant No. 3 K. L. Maheswari, a constituent of the bank who identified the defendant No. 2 before payment was made by the bank. It is important to note that the defendant No. 3 was dismissed from the suit by the plaintiff of his own accord with the result that the allegation of conspiracy or of any act of omission or commission on the part of the defendant No. 3 cannot be sustained.

11. On the basis of the aforesaid allegations, the plaintiff claimed a decree for the sum of Rs. 57,889-7-0 interest up to the date of the institution of the suit, interest on judgment and costs.

12. Written statements were filed by the defendant bank and the defendant No. 3. The defendant No. 2 chose not to defend the suit. As the defendant No. 3 has been dismissed from the suit, we are concerned only with the defence of the defendant bank.

13. In their written statement, the defendant bank denied that the defendant No. 2 had no authority to endorse any cheque payable to the plaintiff's order or to operate on the plaintiff's banking account. The existence of the alleged usage and practice of bankers in Calcutta was disputed. It was also denied that the bank was aware of any such usage or practice. The bank stated, as the fact appears to be, that the defendant No. 2 endorsed the cheque on behalf of the plaintiff by signing on the back thereof as the Manager of the plaintiff, presented the cheque at the counter and received payment. In paragraph 6 of the written statement, the bank denied the allegation of negligence and disputed that it was necessary that the said cheque should have been presented through a bank on behalf of the plaintiff. The bank further denied that there was any circumstance affording any grounds for suspicion to put the plaintiff on any enquiry.

14. In paragraph 7, the defendant stated that it is the usual custom and practice in Calcutta that before making payment across the counter on an order cheque the bank insists on the person receiving payment being identified by a constituent of the bank or some other person known to the bank. In the facts of this case, the defendant No. 2 was identified by the defendant No. 3, a constituent of the bank.

15. In paragraph 9, the bank denied that there was any occasion for any

reasonable enquiry that the defendant No. 2 was duly authorised to endorse any cheque payable to the plaintiff's order, on behalf of the plaintiff or to encash the same or that the bank should have known that the defendant No. 2 was not authorised to endorse the cheque on behalf of the plaintiff or to encash the same.

16. In paragraph 10, the defendant bank denied the allegation of negligence or carelessness. They claimed that the said cheque purported to be endorsed by order on behalf of the plaintiff and the bank paid the cheque in good faith and in due course and/or in the ordinary course of business and as such, the bank was duly discharged by such payment.

17. The bank further contended that the cheque was and/or was purported to be endorsed by or on behalf of the plaintiff in blank or as such was paid to the bearer thereof and by making payment to such bearer, the defendant was duly discharged.

18. In paragraph 12, the bank pleaded estoppel by negligence. It was stated that the plaintiff by his conduct in allowing the defendant No. 2 to have possession and control of the said cheque and in allowing him to sign the same by or on behalf of the plaintiff, the plaintiff is estopped from alleging that the defendant bank had not the authority of the plaintiff to endorse or encash the said cheque. The particulars of the estoppel pleaded by the bank may be set out:

"The said defendant No. 2 was the manager of the plaintiff. The plaintiff allowed and authorised the said defendant to collect, possess and deal with the said cheque. After the defendant No. 2 had taken possession of the said cheque, the plaintiff wilfully did not inform the bank that the defendant No. 2 had no authority to endorse or encash the said cheque which allegation of lack of authority is denied by the bank and thereby impliedly represented to the bank that the defendant No. 2 had the plaintiff's authority to endorse, deal with, or encash the cheque. Relying upon the said representation, the defendant dealt with the defendant No. 2 and paid the said cheque."

19. A further point of estoppel is taken in paragraph 14 of the Written Statement. It reads:

"The defendant bank states that if the defendant No. 2 had no authority to endorse or encash the cheque, which allegations are denied, the said cheque was al-

lowed or caused by the plaintiff to be possessed and dealt with by the defendant No. 2 without reasonable care and caution on the part of the plaintiff and in a negligent manner so as to enable the defendant No. 2 to endorse and/or encash the said cheque and by reason thereof the plaintiff ought not to be permitted to allege that the said defendant No. 2 had no authority to endorse or encash the said cheque."

20. The allegation of conversion was denied by the bank. It was also denied that the bank was liable to the plaintiff for monies had and received by the bank to the use of the plaintiff.

21. In conclusion, the defendant bank alleged that the plaintiff had no cause of action against them and the suit as against them should be dismissed with costs.

22. The parties went to trial on the following issues:—

1. Was the purported indorsement of the cheque in controversy here by the second defendant unauthorised?

2. Is there any usage or practice as alleged in paragraph 5 of the plaint?

3. Is the plaintiff estopped from alleging want of authority for reasons set out in paragraphs 12 to 14 of the written statement?

4. Was the payment of the cheque in controversy here by the first defendant in the ordinary or due course of business?

5. Was the plaintiff the true owner of the cheque in controversy?

6. Have the first and the second defendants converted the cheque as alleged?

7. What relief, if any, is the plaintiff entitled to?

23. One of the main issues which has to be answered is on the question of existence of the trade usage pleaded in paragraph 5 of the plaint. The case is that the usage demands that a cheque payable to a limited Company cannot be cashed at the counter of the drawee Bank and that the same can only be passed for payment through the Bank of the payee. It is clear that the usage on which the plaintiff relies is an unqualified one. The contention is that no cheque payable to a limited Company made payable to order crossed or uncrossed or payable to bearer cannot be paid on presentation but must be encashed through the payee's bank. The date of the cheque in the suit is 1st April 1955. The question is, did such a practice exist at the material time? Oral as well as documentary evidence has been adduced

on this question on either side. The documentary evidence consists of Ext. 'C' read with CI, Ext. 'D' read with 'D' I, Exts. 'H' and 'I' and Exhibit '9'. Exhibit 'C' is an uncrossed order cheque dated May 20, 1955 payable to Bhutoria Estate Ltd. for Rs. 10,000/- drawn on the defendant Bank. It appears that the cheque was endorsed and presented by B. Bhutoria Manager of the payee Company. The cheque was returned by the defendant Bank for reason No. 19, the reason given being that the cheque drawn in favour of a Limited Company should be presented through a Bank or payee's identification required. In Exhibit CI, the reason for return given on the return slip are all printed upto item No. 18. But reason No. 19 appears in manuscript. On a scrutiny of the hand-writing it appears that there is a conjunction between the words 'presented through a Bank' and 'payee's identification required' the conjunction is not very legible. It may be either the conjunctive 'and' or the disjunctive 'or'. We prefer to read the conjunction as 'or' not merely because in our opinion, it reads as such, but also because that reading is reasonable. It is universally accepted that if a cheque drawn in favour of a limited Company is presented through a bank, no further identification of the payee is required. It will be therefore absurd to suggest that even if a cheque is presented through a bank the payee's identification will have to be established. It is interesting to note that Item No. 19 on the cheque return slip is in handwriting and not in print. It only shows that it is likely to be a later addition made at the discretion of the Bank. Even on the basis of that practice, it cannot be said that in the present case there has been any departure from such practice. The cheque in question, that is to say, Ext. 'B' was not presented through a Bank but the payee, that is to say, the defendant No. 2 was identified by the defendant No. 3. Moreover Ext. 'C' is of 28th May 1955. A custom might have sprung up into existence subsequently. In any event Ext. 'C' by itself does not prove any trade custom. At the best, it indicates that Allahabad Bank had adopted on a subsequent date, the practice of returning a cheque for the reason given in item No. 19 of the cheque return slip. Ext. 'D' again is an uncrossed order cheque dated May 23, 1955 payable to Bhutoria Estate Ltd. The cheque is for Rs. 7,000/-. The cheque was endorsed and presented by the self same Bhutoria, the Manager of

the payee Company. The cheque was returned by the Central Bank for the reason given in item No. 21 of the cheque return slip, the reason being that the cheque payable to a Limited Company needs to be presented through a Bank. It is interesting to note that here also the reason given in item No. 21 is in handwriting although all the other items being items Nos. 1 to 20 are in print. This might be treated as evidence of the fact that the Central Bank at its discretion added reason No. 21 for returning a cheque unpaid. It may be accepted that on 23rd May 1955 Central Bank adopted the practice of not paying a cheque payable to a limited Company unless it was presented through a Bank. It does not follow that the practice prevailed on 1st April, 1955 even in the Central Bank. Ext. 'D' and 'D' I do not establish the existence of the practice pleaded by the plaintiff on 1st April 1955. Coming to Exts. 'H' and 'I' it will be seen that the cheque in question is of 13th February 1963 drawn on National Grindlays Bank Ltd. payable to a limited Company or bearer for Rs. 500/- only. The cheque was returned by the Bank with the note "please present this cheque through your Banker." This ext. is totally irrelevant for our present purpose because it came into existence years after Ext. 'B', and also because it merely establishes that in February 1963 National Grindlays Bank Ltd. adhered to a particular practice. It is no evidence of any general trade usage pleaded in the plaint. Ext. '9' is a cheque for Rs. 3,000/- dated October 4, 1962 drawn on the Eastern Bank Ltd. payable to a Limited Company or bearer. It appears that the cheque was paid at the counter in cash. This Ext. again is of little value for the purpose of the present enquiry. As it is of 1962 and is made payable to bearer it only proves that in 1962 cheques payable to a limited Company or bearer used to be paid on presentation by the Eastern Bank Ltd.

24. As regards oral evidence on this issue the plaintiff produced a number of witnesses. Allen Alexander, an Assistant Accountant of the National and Grindlays Bank deposed that he came to India on October 2, 1960. It is clear that he could not have given any evidence from his personal knowledge on the existence of the trade usage claimed by the plaintiff in 1955. The plaintiff's sixth witness Desikan, Head Assistant in the Accounts Department of the Bank of India, Calcutta appears to have come to Calcutta in

1962 and was therefore hardly competent to speak from his personal knowledge on the question of existence of the said trade usage in 1955. Likewise Harding, a witness of the defendant Bank joined the Calcutta office of the Eastern Bank in August 1962 when he came to India. He, again, was not competent to speak on the state of affairs in 1955 so far as trade usage is concerned. Pathak, plaintiff's second witness who had been working in the United Commercial Bank simply said that he would not have paid any uncrossed order cheque in favour of a limited Company on the counter because there is a convention amongst the banks, though the convention is not accepted by all the banks that such cheques are not to be paid at the counter. Chakraborty, the plaintiff's third witness who had been working in the Central Bank since 1935 spoke of many exceptions to the general rule that cheques in favour of a limited Company are not paid across the counter. The substance of his evidence is that an uncrossed order cheque payable to a limited Company may be paid at the counter after the Bank is satisfied that the endorsement on the back of the cheque is verified by the payee's Bankers or if the person endorsing his signature on behalf of the limited company who is solvent and respectable, assures the bank in writing that the endorser is known to the bank and the cheque has been signed in the bank's presence or if the cheque is endorsed by an agent and the Company's banker endorsed the signature of the agent. He then added that if the limited company insists on payment in cash, the drawer of the cheque is contacted and after the drawer signs on the back of the cheque authorising the Bank to pay the bank will pay at the counter. The learned judge has pointed out in his judgment that in course of his evidence-in-chief Chakravarty examined the cheque in controversy and expressed the opinion that the payment made by the defendant in the present case was a payment made in due course.

25. Jati Ranjan Roy, the plaintiff's fourth witness who was an Assistant Accountant of the Mercantile Bank Ltd. in its Calcutta office deposed that he should have paid a cheque payable to a limited Company at the counter after the drawer on being contacted gave him fresh instructions to that effect in writing and as a matter of fact, he did make such payments on two or three occasions. All that he wanted to be sure

of was confirmation in writing by the drawer of the cheque having been drawn in favour of a limited company or bearer and the endorsement being in fact the endorsement of the payee. In course of his evidence, he deposed that in encashing or not encashing the cheque in favour of a limited company at the counter, the officer dealing with the cheque will go by his subjective satisfaction and also by relevant rules or instructions by which he is governed. In answer to questions 274 to 276 he admitted that it is impossible to postulate a single uniform practice throughout Calcutta. On his attention being drawn to the trade practice pleaded by the plaintiff he accepted the plaintiff's contention in substance, but made a reservation that in special circumstances the practice could be departed from. Nanda Kishore Ghose, the fifth witness of the plaintiff was the Chief Accountant of the Bank of India. He deposed that an uncrossed cheque in favour of a limited company cannot be paid across the counter. The Bank has nevertheless a discretion to depart from the practice in appropriate circumstances. He admitted that on rare occasions payment has been made at the counter in cash. Moreover on the strength of a letter from the payee that the Bank can pay to the bearer, such a cheque may be paid across the counter. Thirdly, if the Bank is satisfied that the person presenting the cheque and signing on the back of the cheque is authorised to sign on behalf of the limited company, payment will be made at the counter. Moreover, if the cheque is for a small sum, payment may be made across the counter in exercise of the Bank's discretion. In answer to question 128 Ghose said that there is no general custom in the matter and it is for every bank to decide whether or not it will exercise its discretion in a particular case.

26. The learned judge on an analysis of the evidence has rightly concluded that no general trade practice as alleged by the plaintiff in paragraph 5 of the plaint has been established by the evidence oral or documentary, adduced in this case. In our opinion, the evidence is pitifully inadequate, amorphous, occasionally contradictory and falls far short of the standard required to establish a general trade practice common to all the banks in Calcutta. Oral as well as documentary evidence clearly indicates that individual banks exercise their discretion in regulating their own business practice. There

exercise their discretion in the manner they think best. In the light of the evidence, we have no hesitation in holding that the trade practice alleged in paragraph 5 of the plaint has not been proved and issue No. 2 must therefore be answered in the negative.

27. The first issue raised the question whether Jethmall the defendant No. 2 had the authority to endorse the cheque in controversy on behalf of the plaintiff. In this connection it is relevant to refer to S. 89 of the Indian Companies Act 1913 which was in force at the material time. The Section provides that

“a bill of exchange.....shall be deemed to have been endorsed on behalf of the Company if.....endorsed in the name of by or on behalf or on account of the Company by any person acting under its authority, express or implied”.

The learned Judge found on scrutiny that the minutes of proceedings of certain meetings and for that matter, the minute book produced by the company, were mutilated and contained interpolations. In fact, he disbelieved the minutes and the minute book. The reasons given by the learned Judge for holding that the minutes are not authentic are unexceptionable. In fact the learned Judge has gone to the length of observing that it is possible that if the genuine minute book were produced it might have been found that authority was expressly conferred on Jethmall to endorse cheques and bills of exchange on behalf of the plaintiff. The learned Judge also criticised the plaintiff's failure to produce the statutory register, returns and notifications contemplated in S. 87 of the Companies Act of 1913. These books and documents ought to have settled the point whether Jethmall was the Manager at the material time. The learned Judge has also commented on the failure of the plaintiff to produce the relevant Articles of Association. He has rightly remarked that the position of Jethmall in the plaintiff Company and the scope of his authority were peculiarly within the knowledge of the plaintiff and therefore the onus was on the plaintiff to satisfy the Court that Jethmall was not the Manager as he claimed to be, on the basis of the endorsements on the cheque and that he was not competent to endorse the cheque. The learned Judge has alluded to and analysed the evidence in great detail and with meticulous care. To avoid prolixity and repetition, we do not propose to analyse the evidence on this question over

again. It is abundantly clear in the light of the entire evidence that whatever might have been the designation of Jethmall, he was the life and soul of the jute business of the plaintiff company and he represented the plaintiff for the purpose of that business in every aspect. It is true that Malchand's evidence is that Jethmall in conducting the business of the plaintiff company did merely as he was told by Malchand. But as the learned Judge has pointed out, Malchand betrays a lamentable lack of knowledge of the business of the plaintiff company and it is therefore safe to assume that Jethmall, in doing whatever he did, acted on his own initiative on behalf of the Company. Malchand's evidence is that in 1955 the duties of Jethmall were to purchase and sell jute as well as to make out bills and deliver the bills to the parties. When the bills were issued, he contacted the parties, collected cheques from them and deposited the cheques so collected in the account of the plaintiff. He further added that he did all these important things not on his own but in accordance with Malchand's instructions. The learned Judge has given reasons for disbelieving the evidence that Jethmall did not act on his own but under instructions of Malchand. In fact Malchand admitted that if Jethmall had deposited the cheque in question in the banking account of the plaintiff company it would have been perfectly in order. The evidence of Ghose of W. F. Ducat and Company Ltd. may be treated as evidence of an independent character because Ducat is not a party to the suit and the bona fides of Ducat in paying the price of jute by the cheque has not been called in question. Ghose deposed that he knew only Jethmall of the plaintiff company at the relevant time and no other person. In answer to Question 15 he said that Jethmall “used to come to our office occasionally—often to give offers and also to close business, receive payments, settling claims all concerning the transactions.”

He also deposed that the claims in respect of four bills (Ext. 5) on the basis of which the cheque in the suit was paid, were settled by Jethmall. It has also been established that Jethmall signed all the four bills in Ext. 5. Dudhoria an Assistant of an underbroker of W. F. Ducat and Company is another independent witness. The trend of his evidence is also that Jethmall was all in all in the plaintiff's Jute business. The learned Judge has relied on answers to Questions 18 and 19 put to Dudhoria. The substance of his

evidence is that Jethmall represented the plaintiff Company in all transactions in a complete measure. The learned Judge, in our opinion, was justified in finding as a fact upon the whole of the evidence that appearances are very much in favour of Jethmall having been the Manager of plaintiff Company at the relevant time. We are also in agreement with the learned Judge when he says that "even if it be assumed that that is not a safe conclusion to come to, there can be no running away from the fact so patent upon evidence that he was at or about the relevant time a big person in B.T.C.'s organization drawing the pay and occupying the position, of the manager.

28. Apart from the question whether Jethmall was in fact the Manager of the plaintiff Company as he represented to be, by the endorsement on the back of the cheque, there are good reasons why the plaintiff Company should not be permitted to allege that he was not. It is not in dispute that the rubber stamp inscriptions on the back of Ext. 'B' viz., 'Bhutoria Trading Co. Ltd., and 'Manager' were produced by use of the genuine seal, that is to say, of the rubber stamp in the custody, control and possession of the plaintiff Company. The plaintiff Company, obviously, by permitting Jethmall to use those rubber stamps for the purpose of endorsement on the back, represented to the defendant bank that Jethmall was, in fact, the Manager and had the authority to make the endorsement on the cheque on behalf of the plaintiff Company. There is no evidence that the relevant rubber stamps were procured by Jethmall dishonestly for use or that Jethmall fraudulently obtained possession of the rubber stamps in spite of exercise of due care and caution on the part of the plaintiff Company. In our opinion, acquiescence on the part of the plaintiff Company in the use of the relevant rubber stamps by Jethmall without any objection on the part of the plaintiff Company makes it clear that Jethmall was the Manager and had the implied authority to endorse the cheque for and on behalf of the plaintiff Company. It was faintly argued that as the word 'for' or 'on behalf of' does not appear on the body of the endorsement, the plaintiff company is not bound to its banker by the endorsement made on the back of the cheque. The objection is of no substance. The endorsement was made, so to say, by the plaintiff company itself by the pen of its manager, Jethmall and

the absence of the words 'for' and 'on behalf of' is a matter of no consequence. In this connection reference may be made to a decision of the Supreme Court in *Oriol Industries v. Bombay Mercantile Bank* AIR 1961 SC 993 where it was held that the "law in regard to the company's power to issue negotiable instrument has to be found in the relevant provision of the Companies Act itself and the principle enunciated in S. 89 of the Companies Act 1913 cannot be extended to the claim made by the Company against its bank on the ground that the cheque which the bank accepted and honoured was defective in that it did not comply with the requirements of S. 89 and could not have been enforced against it."

29. An issue of estoppel was raised on behalf of the defendant bank on the grounds set out in paragraphs 12 to 14 of the written statement. In paragraph 12 it is pleaded that the plaintiff is estopped from relying on Jethmall's lack of authority because of its conduct in allowing Jethmall to possess, control, and endorse the cheque, in wilfully not informing the defendant bank of Jethmall's lack of authority thereby impliedly representing to the defendant bank the existence of its authority and in not taking reasonable care or precaution to obviate the exercise of authority by Jethmall to endorse the cheque thereby enabling Jethmall to encash the cheque and realise the proceeds thereof.

The learned Judge has disposed of this issue by saying that as he found as a matter of fact that Jethmall had the authority to endorse the cheque and realise the proceeds thereof, the issue did not arise. Even then, he answered the issue in the negative. The learned Judge said in his judgment "again, BTC never holds out Jethmall before the defendant bank as its Manager, so the plea of estoppel appears to be misconceived one". With utmost respect, the learned Judge ought to have pointed out that by permitting Jethmall to use the seal of the plaintiff's Manager, or in other words, by making the seal available to Jethmall thereby enabling him to use it for the purpose of endorsement of the cheque, the plaintiff impliedly made representations to the bank on the basis of which the bank paid the cheque. The plaintiff represented to the Bank that Jethmall was the plaintiff's Manager. The rubber stamp of the Company, that is to say, the seal of the Company was

also made available to Jethmall which he used in endorsing the cheque. Therefore the plaintiff, by its conduct, represented to the Bank that Jethmall had authority to act on behalf of the plaintiff Company as its Manager.

30. In these circumstances, we hold that in any event, the plaintiff is estopped by its conduct from challenging the authority of Jethmall to endorse the cheque and realise the proceeds. We, therefore, answer the third issue in the affirmative.

31. The fourth issue was framed in the following terms:

"Was the payment of the cheque in controversy by the first defendant made in the ordinary or due course of business?"

The expression "payment in due course" has been defined in S. 10 of the Negotiable Instruments Act to mean payment in accordance with the apparent tenor of the instrument in good faith and without negligence to any person in possession thereof, under circumstances which do not afford reasonable ground for believing that he is not entitled to receive payment of the amount therein mentioned. It can hardly be questioned that the payment by the defendant bank of the cheque in question has been made by the defendant bank in accordance with its apparent tenor. The cheque is an uncrossed cheque payable to the plaintiff or order. The cheque was endorsed by the plaintiff through its Manager. The fact that Jethmall is the Manager is borne out by the seal of the Company which is unquestionably an authentic seal. The seal of the Manager is also equally authentic. That the payment was made in good faith has not been disputed for all practical purposes. There is not a grain of evidence before the Court from which it remotely appears that the payment was not made in good faith. Now that the entire evidence is before the Court, the question of onus to prove good faith loses much of its importance. No negligence has been proved against the bank. The defendant bank insisted on identification of Jethmall and Jethmall was in fact identified by Kishanlal Maheswari a constituent of the Bank the defendant No. 3. The defendant bank therefore took all reasonable precautions even though the circumstances in which the cheque was presented for payment did not afford any reasonable ground for believing that Jethmall was not entitled to receive pay-

ment of the amount mentioned therein. The plaintiff having failed to prove the trade practice which he alleged and the bank having paid the cheque, in accordance with the apparent tenor of the instrument, in good faith, and without negligence, to Jethmall who was in possession thereof the defendant is entitled to succeed. There were no circumstances which afforded any reasonable ground for believing that he was not entitled to receive payment of the cheque. It must be held that the bank made the payment in due course. The learned Judge, in our opinion, has rightly pointed out that payment in due course is necessarily payment in the ordinary course.

32. Sub-section (1) of S. 85 of the Negotiable Instruments Act provides:—

"Where a cheque payable to order purports to be endorsed on behalf of the payee the drawee is discharged by payment in due course."

33. In view of the aforesaid provision, it must be held that the defendant bank has been discharged by payment of the cheque in due course.

34. With regard to the fifth issue there is no controversy before us that the plaintiff was the true owner of the cheque in question nor is there any controversy that Jethmall had the authority to receive the cheque from W.F. Ducat and Co. Ltd. on behalf of the plaintiff Company and that he received the cheque. As regards the sixth issue, we hold that the defendant bank had not converted the said cheque. The learned judge has held and rightly held, in our opinion, that Jethmall the defendant No. 2 converted the said cheque. No appeal or cross-objection has been preferred by Jethmall and the finding of the learned Judge against Jethmall stands. Be that as it may, in agreement with the learned Judge we hold that Jethmall converted the said cheque and is liable in respect of the said act of conversion. In view of the manner in which we have answered all other issues, we must hold in agreement with the learned Judge, that the plaintiff is not entitled to any relief as against defendant bank. In the view we have taken the appeal fails and is dismissed with costs. The case is certified as fit for employment of two counsel.

MASUD, J.:— I agree.

Appeal dismissed.

AIR 1977 CALCUTTA 371

= 1977 CRI. L. J. 1499

FULL BENCH**SANKAR PRASAD MITRA, C. J.****N. C. MUKHERJI AND B. C. RAY, JJ.**Gobinda Chandra Bhowmick, Petitioner
v. The State of West Bengal, Respondent.Full Bench Reference No. 1 of 1976, D/-
30-3-1977.

Criminal P. C. (1974), Ss. 190 and 209 — Juvenile offender — Magistrate taking cognizance without any objection from him, that he is a juvenile offender and as such Magistrate is not a competent court within S. 6, West Bengal Children Act, 1959 — Magistrate proceeding with case and committing him along with other adult accused — Order of commitment cannot be challenged subsequently — Sessions Judge having assumed jurisdiction on basis of commitment — There is no illegality in assuming jurisdiction — Section 3, W. B. Children Act does not apply to such a case when no proceeding was started under that Act. (West Bengal Children Act (30 of 1959), Ss. 3 and 6).

(Para 10)

Cases Referred: Chronological Paras
(1976) 1 Cal LJ 224 3, 9

C. R. Das, Anath Bandhu Pal and Miss Pranati Banerjee, for Petitioner; Mukti Prasanna Mukherjee, for the State.

SANKAR PRASAD MITRA, C. J.:

This Bench has been constituted pursuant to a reference under Chap. VII of the Appellate Side Rules by a Division Bench consisting of Mr. Justice P. K. Chanda and Mr. Justice Sudhamay Basu.

2. The question referred to us is as follows:—

"For the purpose of determining whether a person is a child or not within the meaning of S. 28 of the West Bengal Children Act, 1959, is the age to be determined with reference to the date of the commission of the offence or when the person is brought before the Court or with reference to some other date?"

3. In Criminal Appeal No. 470 of 1974, (Madan Pradhan v. The State) reported in 1976 (1) Cal LJ 224 Mr. Justice P. C. Barooah sitting with Mr. Justice H. N. Sen has held that if a person be a child "on the date of the commission of the offence for which he was convicted" his trial along with an adult is "clearly without jurisdiction being in contravention of

the specific provision of S. 28 (1) of the Act".

4. The other Division Bench of Mr. Justice P. K. Chanda and Mr. Justice Sudhamay Basu was unable to agree with this view. According to their Lordships it is the date of trial and not the date of commission of offence that is relevant.

5. Our difficulty is that in view of the facts of the instant case the answer that we may give to the question referred to us would be academic.

6-8. The case of the petitioner is that on the date when the alleged offence took place the petitioner was below 18 years of age. The petitioner was born on the 13th of April, 1954 as appears from an affidavit sworn by the petitioner's father before the learned Additional Sessions Judge. The alleged incident took place on 8th of September, 1971. It was contended before the learned Additional Sessions Judge that as the petitioner was below 18 years of age at the time when the offence was alleged to have been committed by the petitioner along with others, the petitioner could (not) be tried along with other adult offenders. 'Child' has been defined in S. 2 (d) which reads as follows:—

"Child" means a person who has not attained the age of 18 years. Section 2 (h) defines 'juvenile delinquent' which is as follows:—

"Juvenile delinquent" means a child who has been found to have committed an offence.

9. The facts of the present case are completely different from the facts in Madan Pradhan v. State of West Bengal, 1976 (1) Cal LJ 224. In that case it appeared from the order-sheet of the learned Magistrate that the learned Magistrate had seen the medical report to the effect that the appellant was a minor. The learned Magistrate passed an order directing the Investigating Officer to split up the case for submission to the Central Children's Court, Calcutta. It further appeared that this order of the learned Magistrate was overlooked or disregarded and no step for splitting up of the trial was taken by the prosecution. This point was again agitated at the time when the question of committal arose. The learned Magistrate however committed the appellant and the other accused to the Court of Session and overruled the contention holding that the West Bengal Children Act being a State Act would not apply to the present case in view of S. 27 of the Cr. P. C., 1973. In the present case we

find from the order-sheet that the accused was produced before the learned Magistrate on 25th of July 1972. At that time it was not contended before the learned Magistrate that as the petitioner was a juvenile delinquent he should be dealt with according to the provisions of the West Bengal Children Act, 1959. The learned Magistrate proceeded with the case and framed charge against the petitioner under S. 304, I. P. C. and S. 27 of the Arms Act on October 19, 1973 and by his order of the same date committed the petitioner along with another accused to the Sessions Court. The learned Sessions Judge received commitment on November 5, 1973. He took cognizance and fixed the 30th November, 1973 for trial. It was only on the 30th November, 1973 that an objection was taken on behalf of the petitioner that he was a child as defined in S. 2 (d) of the West Bengal Children Act, 1959 and a juvenile delinquent as defined in S. 2 (h) and as such the learned Magistrate who committed the petitioner to the Court of Session had no jurisdiction to commit. The learned Additional Sessions Judge was of opinion that he assumed jurisdiction on commitment and if the petitioner so desired the petitioner might move the Hon'ble High Court to quash the commitment. Against the above order of the learned Additional Sessions Judge the petitioner has come to this Court.

10. Section 6 provides that "When a child is brought before a Magistrate or Court not empowered to pass an order under this Act, such Magistrate or Court shall forward the child to the nearest juvenile court or other court or Magistrate having jurisdiction". We are of opinion that as the point that the petitioner is a juvenile delinquent was not raised before the learned Magistrate, the learned Magistrate was right in taking cognizance and proceeding with the case and as such his order of commitment cannot be challenged. We are also of the opinion that the Sessions Judge assumed jurisdiction on commitment and that being so, it cannot be said that there was any illegality in assuming jurisdiction. Section 3 of the West Bengal Children Act, 1959 provides:

"Notwithstanding anything to the contrary contained in this Act, if during the course of any proceeding under this Act a child attains the age of 18 years, the proceeding may be continued and orders may be made under this Act in respect of him as if he was child".

In our opinion S. 3 has no application to the facts of the present case as no proceeding was started under the West Bengal Children Act. In the application under Ss. 435, 439 and 561-A of the Criminal P. C. on which the present Rule was issued the petitioner did not pray that the order of commitment should be quashed. The only prayer made before this Court is that the petitioner should be segregated from the trial of the other two accused persons and that the petitioner should be tried according to the provisions of the West Bengal Children Act, 1959.

11. In view of the observations made above and considering the facts of the instant case the answer that we may give to the question referred to us would be academic and as such we refrain from doing so. The matter is referred back to the Division Bench for disposal.

N. C. MUKHERJI, J.:— I agree.

B. C. RAY, J.:— I agree.

Answered accordingly.

AIR 1977 CALCUTTA 372

N. C. MUKHERJI AND B. C. RAY, JJ.

Mira Rani Dey, Petitioner v. Namita Goswami and others, Respondents.

F. M. A. No. 244 of 1975, D/- 21-7-1977.

(A) Civil P. C. (1908), O. 5, Rr. 15, 17— Substituted service — Husband and wife co-defendants — Summons issued to both on address where they lived together — Wife remaining inside house not accessible to process server for service — Summons tendered to husband were refused — Process server affixing summonses by hanging them to front of house — Summons held was duly served on wife also. (Case law discussed). (Para 5)

(B) Civil P. C. (1908), O. 9 R. 13 — Ex parte decree, setting aside of — Decree ex parte against one defendant but not against another who was present — Appeal filed by other defendant dismissed for non-prosecution — Person against whom there was ex parte decree is not barred from proceeding with application under O. 9, R. 13. AIR 1974 SC 1380; (1911) 15 Cal WN 798, Rel. on. (Para 6)

(C) Limitation Act (1963), Art. 123 — Date of knowledge of passing of ex parte decree — Husband and wife living in same house — Husband found looking after interests of wife in litigation — De-

cree passed ex parte against wife but on appearance against husband — Husband filing appeal — Notice of Rule served on wife bearing her signature on acknowledgment form — Although acknowledgment form of registered letter may not give address of the receiver yet signature of receiver establishes date when she got knowledge of ex parte decree and limitation would start running from that date. AIR 1963 Mad 198 and AIR 1968 SC 1384, Ref. (Para 8)

Cases Referred: Chronological Paras

AIR 1974 SC 1380	6
AIR 1968 SC 1384	7
AIR 1967 Bom 310	6
AIR 1967 Delhi 28	4
AIR 1963 Mad 198	7
AIR 1962 Ker 266	4
ILR (1955) 1 Cal 119	4
AIR 1952 Cal 781	4
AIR 1940 Mad 213	5
AIR 1931 Cal 546: 35 Cal WN 332	5
AIR 1924 Cal 830: 28 Cal WN 795	6
AIR 1921 Cal 638: 26 Cal WN 359	4
AIR 1916 Cal 161 (2): 20 Cal WN 163	4
AIR 1916 Cal 600: 21 Cal LJ 653	5
(1911) 15 Cal WN 798	6

Saktinath Mukherjee and Tarun Chatterjee, for Petitioner; Hari Narayan Mukherjee (for Nos. 1-5), Mrinal Kanti Ray (for No. 6) and S. P. Roy Choudhury (for No. 9), for Respondents.

N. C. MUKHERJI, J.— This appeal is directed against an order passed on 30th July, 1974 by Sri S. B. Putatunda, Subordinate Judge, 4th Court, Alipore, in Miscellaneous Case No. 42 of 1973 arising out of Title Suit No. 35 of 1968 dismissing the appellant's application under O. 9, R. 13 of the Code of Civil Procedure.

2. The facts of the case may briefly be stated as follows:—

The appellant filed an application under O. 9, R. 13 of the Code alleging that the summons of Title Suit No. 35 of 1968 was never served upon her and prior to 9-11-73 she had no knowledge of the suit and of the decree passed therein. It was only when on the evening of 9-11-73 one Sri Subodh Chandra Mukherjee along with others came to her house and told her that he had been appointed Receiver in the suit. The petitioner thereafter engaged one learned Advocate on 10-11-1973 to make enquiries in respect of the suit. After filing an information slip and on personal inspection of the record the learned Advocate came to know that the plaintiff in collusion with the pro forma

opposite parties brought the suit and by practising fraud managed to obtain a fraudulent and collusive decree. The further case of the petitioner is that the plaintiff in collusion and conspiracy with the pro forma opposite parties and the process server procured a fraudulent return of service of summons upon the petitioner. That the summons was never served. That the process server never came to the residence of the petitioner on 29-5-68 or on any other date. That since 1967 the petitioner is not on good terms with her husband, who was defendant No. 1 in the suit and opposite party No. 6 in the present proceeding. It is also alleged that the defendant No. 1 in collusion and conspiracy with the plaintiffs made a sham show of contest to facilitate the passing of the decree in the suit. That had the petitioner been served with the summons, she would have contested the suit and that the petitioner had suffered irreparable loss because of the collusive decree passed ex parte against her.

3. Opposite parties Nos. 1 to 5 and 7 oppose the application. It is stated that the summons was duly served upon her and she had full knowledge of the suit and the decree. On the date of the service of summons the petitioner was residing with her husband at the premises where summons was served. All other allegations in the application have been denied. It is asserted that the suit was very much contested by the petitioner's husband up to the Hon'ble High Court and after repeated failures the petitioner has been set up by her husband with a view to harass the opposite parties. The Hon'ble High Court found that the petitioner's husband Sitanath Dey mismanaged the estate and mis-appropriated a large amount belonging to the estate. The learned Subordinate Judge considered the facts and circumstances of the case and the evidence on record and held that the summons was duly served upon the petitioner. He further found that she had knowledge of the suit and of the decree long before 9-11-73 and as such the application under O. 9, R. 13 is hopelessly barred by limitation. In that view of his finding the learned Subordinate Judge dismissed the application. Being aggrieved Mira Rani Dey has come up to this Court in appeal.

4. Mr. Saktinath Mukherjee, learned Advocate appearing on behalf of the appellant, contends that in the present case it must be held that the summons

was not at all served on the appellant. Even assuming though not admitting that the summons addressed to the appellant was tendered to the husband and the husband refused to accept the same and on his refusal the summons was served by affixation even then it cannot be said that it was good service. Mr. Mukherjee submits that in the absence of an instrument in writing the husband cannot be considered to be an agent of the wife and as such the husband cannot be said to have been authorised to receive the summons on behalf of his wife. Mr. Mukherjee submits that the report of the process server and his evidence very clearly show that no attempt was made by the process server to see whether the petitioner was at the relevant time at her house. Without making such enquiry, it was illegal on the part of the process server to tender the summons to the petitioner's husband. If it is proved in this case that the process server never tendered summons to the petitioner and even assuming that the same was tendered to her husband even then for the fact that the husband cannot be considered to be an agent of the wife it must be said that the summons was not served on the petitioner. Mr. Mukherjee submits that before service can be made by affixation certain conditions must be fulfilled. In this connection Mr. Mukherjee referred to a decision reported in AIR 1952 Cal 781 (Tripura Modern Bank Ltd. v. Bansen and Co.). It has been held that "Service by affixation can only be made under the following circumstances: (a) Where the defendant is personally found but refuses to sign the acknowledgment. (b) Where the defendant cannot be found personally but where persons who can be served on his behalf are found, but they refuse to sign the acknowledgment. (c) In the case, however, of an adult male member of the defendant's family residing with him, no attempt to serve upon him can be made at all, unless the defendant was not likely to be found at his residence within a reasonable time". Mr. Mukherjee contends that the report of the process server and his evidence in Court clearly show that the process server does not say that the petitioner was not at her residence. He also does not say that he made any attempt to tender the summons on her. He only says that as she was not present he offered the summons to her husband who refused to sign and then he served summons by hanging the same in the premises. Mr. Mukherjee

submits that the service effected in the manner as stated above cannot be treated as valid and legal service. In support of his contention that in the absence of an instrument in writing the husband cannot be held to be the agent of his wife, Mr. Mukherjee refers to a decision reported in AIR 1962 Ker 266 (Kunhibi v. The Land Acquisition Officer, Kozhikode). In support of his contention that the provisions of the Code have not been complied with in the matter of service Mr. Mukherjee refers to decisions reported in 20 Cal WN 163: (AIR 1916 Cal 161 (2)) (Kali Kumar v. Aslam) and 26 Cal WN 359: (AIR 1921 Cal 638), (Dharam Chand v. Kanak Sarkar). In the former case it has been held that if the defendant is not found, proper enquiries should be made to find out when and where the defendant is likely to be found and proper effort should be made to find the defendant in the place where he ordinarily resides or carries on business. In the latter case notice was served on the defendant's son. The courts below thought that the service was sufficient compliance with the requirements of O. 5, R. 15 of the Code as the son was presumed to have duly brought it to the notice of the defendant. It was held by this Court that "This consideration should not have been weighed with the Court. It has to be definitely found that the defendant could not be found after reasonable and diligent enquiries and the person on whom the notice was served was an adult male member residing with him". Mr. Mukherjee further submits that O. 5, R. 14 of the Code has no application unless it is shown that O. 5, R. 12 of that Code cannot be complied with. In support of his contention he refers to a decision reported in ILR (1955) 1 Cal 119 (Bengal Chand Co. v. Durga Sankar Gouri Sankar). Mr. Mukherjee submits that the report of the process server will show that though the petitioner was at the time of service of the summons at the house but as she did not come out in presence of the process server, the summons was served by affixation. Mr. Mukherjee states that the petitioner being admittedly in her house it was incumbent on the part of the process server to make attempts for tendering the summons to her. Nothing having been done in that regard the service by affixation in the circumstances stated above must be held to be not a valid service. Mr. Mukherjee then draws our attention to Order No. 12 dated 21st of June, 1968

in Title Suit No. 35 of 1968. The order runs as follows:—

"..... Summons duly served upon the defendants 2 and 5. Summons of defendants Nos. 1 and 3 served by hanging. Summons of defendant No. 4 not yet received after service. The defendants Nos. 1 and 2 appear separately and pray for time to file written statement. Prayers are allowed. To 18-7-68 for filing written statement. To 4-7-68 for order awaiting service return of summons of defendant No. 4....."

The above order shows that the learned court did not comply with the provisions of O. 5, R. 19. Order 5, R. 19 lays down that "Where a summons is returned under R. 17, the Court shall, if the return under that rule has not been verified by the affidavit of the serving officer, and may, if it has been so verified, examine the serving officer on oath, or cause him to be so examined by another Court, touching his proceedings, and may make such further inquiry in the matter as it thinks fit; and shall either declare that the summons has been duly served or order such service as it thinks fit." In this case the learned court after taking into consideration the manner in which the summons was served by affixation ought to have held that it was not a good service and ought to have issued an order for fresh service. At least Mr. Mukherjee submits that there is nothing to show that the learned court was satisfied that the summons was duly served upon the defendant No. 3. In this connection Mr. Mukherjee refers to a decision reported in AIR 1967 Delhi 28 (Punjab Oil Expellers Co., Ghaziabad v. M/s. Madan Lal Nanda and Sons. It has been held that the provisions of the Code impose an obligation on the Court to satisfy itself after taking the process server's affidavit or statement and after further enquiry as may be necessary, that reasonable efforts were made without success to serve the defendant personally and then declare whether summons was duly served.

5. On the point whether in the present case there has been a valid service or not Mr. Roy Choudhury refers to a decision reported in 21 Cal LJ 653: (AIR 1916 Cal 600) (Khiroda Sundari v. Nabin Chandra). In this case it was held that "Where it is impossible for the serving officer to obtain access to the person to be served, either by reason of the custom of the country or for any other reason,

the case is covered by the description in R. 17 'where the defendant cannot be found by the serving officer'." In the present case it came to the knowledge of the process server that the defendant No. 3 was at the relevant time in her house. But as it was not possible for the process server to tender the summons to defendant No. 3 it was offered to her husband who was none else than the main defendant in the suit being defendant No. 1 and whose summons was also tendered to him and on refusal to accept even his own summons the process server served the summons of the defendant No. 1 and the defendant No. 3 by hanging. In such circumstances, Mr. Roy Choudhury submits that it must be held that it was good service. In support of his contention Mr. Roy Choudhury relies on a decision reported in 35 Cal WN 332: (AIR 1931 Cal 546) (Sarat Chandra v. Joy Sankar). In this case "The service was effected by tendering a copy of the notice to brother of the defendant concerned, who was also another defendant in the suit and an adult and was living in the joint family dwelling-house and when he refused to accept the copy of the notice so tendered it was served by affixing it on the outer door of the cutchery ghar in the outer apartment. In those circumstances, the service of notice at the joint family dwelling-house by putting it up on the outer door of the house was held to be sufficient." With regard to the point raised by Mr. Mukherjee that the court on 21st of June 1968 did not record any order to the effect that the summons was duly served, Mr. Roy Choudhury submits that though it is desirable that all courts should observe the mandatory provision in O. 5, R. 19 and either declare that the summons has been duly served or order such further service as it thinks fit, yet the absence of such an express declaration will not involve as a necessary consequence a finding that a summons has not been duly served. This view has been expressed in a case reported in AIR 1940 Mad 213 (Venkata Rayanim v. China Bapanna). The appellant wanted to make out a case in the court below that she had strained relationship with her husband and that it was her husband who in collusion with the plaintiff made a sham show of contest in the suit and caused an ex parte decree to be passed against her. On going through the evidence we find that it has not at all been established that the appellant had strained relationship with her

husband, rather it is the admission of the wife that her husband used to look after her other case. It is the admitted position that both the husband and the wife are living together in the same house. The husband very much contested the suit not only in the court below but also up to this Court. It may be mentioned in this connection that it is only after the Receiver was appointed and after the Receiver went to the house of the appellant and her husband on 9-11-73 the appellant filed the present application on 26-11-73 stating that she had no knowledge prior to 9-11-73. It may be mentioned that the suit was filed on 21-5-68 and it was decreed on contest against the defendant No. 1 on 29-9-70. The defendant No. 1 filed an appeal to this Court being F. A. No. 223 of 1971 which was dismissed for non-prosecution on 17-5-73. We have taken into consideration the fact that there was no written authority by the wife to the husband authorising to accept the summons on her behalf. But considering the fact that the process server could not serve the summons to the appellant as she was inside the house and the summons of the appellant and that of her husband (who is defendant No. 1) were tendered to the husband and on husband's refusal the same was served by affixation and that on the date fixed the husband appeared in the court and prayed for time to file written statement, we are of the opinion that the summons was duly served upon the appellant.

6. Mr. Roy Choudhury raises a point to the effect that there was an appeal in this Court against the decree and as the said appeal was dismissed the appellant cannot after the disposal of the appeal by this Court proceed with the application under O. 9, R. 13. Mr. Roy Choudhury contends that the decree of the trial court merged with the decree of the appellate court and as such the said decree cannot be challenged by an application under O. 9, R. 13 of the Code. Mr. Roy Choudhury in support of his contention refers to a decision reported in 28 Cal WN 795: (AIR 1924 Cal 830) (Kalimuddin Ahmed v. Esabakuddin). At page 801 (of Cal WN): (at pp. 834-835 of AIR) of the said report it has been held that "When the ex parte decree has been confirmed or otherwise disposed of on appeal the Court which passed the ex parte decree has no longer any power to entertain an application to set it aside,

even though the application has been made before the appeal was filed". Mr. Roy Choudhury also relies on a decision reported in AIR 1967 Bom 310 (Kantilal v. Chiba Bava Bhandari) where it has been held that even when an appeal is dismissed summarily under O. 41, R. 11 of the Code an application under O. 9, R. 13 is not competent since the decree of the trial court merged with that of the appellate court. Mr. Mukherjee submits that in this case it may be mentioned that the appellant Mira Rani Dey did not prefer any appeal against the ex parte decree. It was only Sitanath Dey against whom the decree was passed on contest preferred an appeal and that being so, it cannot be said that Mira Rani cannot proceed with her application under O. 9, R. 13. On this point Mr. Mukherjee first relies on a case reported in (1911) 15 Cal WN 798 (Intu Meah v. Dar Baksh Bhuiyan). In this case it has been held that "Where a decree was passed against several defendants against some of whom it was ex parte, and a defendant who appeared unsuccessfully appealed against that decree, the Court passing the decree has jurisdiction to set aside the ex parte decree as against a defendant who had not appealed." Mr. Mukherjee also relies on a Supreme Court decision reported in AIR 1974 SC 1380 (M/s. Gojer Brothers (Pvt.) Ltd. v. Ratan Lal Singh). In paragraph 12 of the said report while discussing on the question of merger their Lordships observed: "The principle, therefore, that there is no decree as such of the appellate court if it dismisses the appeal for default of appearance or for want of prosecution or on the ground that the appeal has abated or is withdrawn or that the appellant has failed to furnish security for costs as provided in O. 41, R. 10 of the Code of Civil Procedure, can have no application to the instant case". On a careful consideration we accept the contention of Mr. Mukherjee and hold that simply because the defendant No. 1 preferred an appeal to this Court and that appeal was dismissed for non-prosecution it cannot be held that the defendant No. 3 cannot proceed with her application under O. 9, R. 13.

7. On the point of limitation the court below has found that the defendant No. 3 had knowledge about the suit and the decree much before 9-11-73 and that the application is barred by limitation. Mr. Mukherjee submits that even assuming that the defendant had knowledge of the

suit, for the application of Art. 164 of the Limitation Act it is necessary to ascertain when the defendant applying for setting aside the ex parte decree had knowledge of the decree. Mere knowledge of the date of the suit would not be enough for that purpose. Mr. Mukherjee further contends that the expression "knowledge of the decree" in Art. 164 means knowledge of the particular decree which is sought to be set aside. No doubt the onus is on the defendant to show that the application is within time and that he had knowledge of the decree within 30 days of the application. If the defendant produces some evidence to show that the application is within time, it is for the plaintiff to rebut this evidence and to establish satisfactorily that the defendant had knowledge of the decree more than 30 days before the date of the application. In support of his contention Mr. Mukherjee relies on AIR 1963 Mad 198 (Richai Ammal v. Vellaya Thevar) and AIR 1967 SC 1384 (Panna Lal v. Murari Lal).

8. Mr. Harinarayan Mukherjee, learned Advocate for the respondents, submits that the interests of the defendant No. 1 and the defendant No. 3 are not adverse in any way that the two defendants are sailing in the same boat. It is in evidence that Sitanath Dey, husband of Mira Rani Dey, used to look after her property and litigation. It has also been established by evidence that they have been residing in the same house. Mr. Mukherjee relies very much on Ext. B, a notice, in Civil Rule No. 572 (F) of 1971 in connection with the First Appeal filed by Sitanath Dey. Mr. Mukherjee places before us the record of the said Rule and we find that the said Rule was served upon Mira Rani Dey by registered post. On the acknowledgment form there is signature of one Mira Rani Dey. It appears that Mira Rani received the registered notice on 18-6-71. It has been contended by Mr. Saktinath Mukherjee that this acknowledgment is not part of the present record and as such this ought not to have been placed before us and secondly in the acknowledgment form there is no address of Mira Rani Dey and that being so, it cannot be said definitely that the appellant received the registered letter containing the notice of the Rule on 18-6-71. It is true that there is no address in the acknowledgment form. Generally, addresses are given on the envelopes and the post cards which are registered. It is not unusual that in the acknowledgment

forms address of the addressee remains blank. But it is seen that the address of the sender has been correctly given. For all the reasons stated above we find that Mira Rani Dey had knowledge of the decree much before 9-11-73 and the application having been filed on 23-11-73 it is barred by limitation.

9. This appeal thus fails and is dismissed on contest. We, however, do not pass any order for costs. Let the records go down immediately.

B. C. RAY, J.:— I agree.

Appeal dismissed.

AIR 1977 CALCUTTA 377

T. K. BASU, J.

Arvind Kumar Dhanuka, Petitioner v. Board of Trustees and others, Respondents.

Matter No. 1103 of 1976, D/- 18-7-1977.

Major Port Trusts Act (1963), Ss. 49, 52 — Board of Trustees fixing rate for lease of its land under S. 49 — Rate approved by Central Govt. and published in Gazette under S. 52 — Board of Trustees cannot plead that rate fixed was reserved or minimum and that it could lease land to higher bidder.

Having prescribed a particular scale of rent for a particular plot in the exercise of its statutory powers, the Board of Trustees have no right, authority or jurisdiction by virtue of notifications or circulars to treat that scale of rent as the reserved rent or minimum rent and invite tenders for higher rents and offer it to the highest bidder. To allow the Board of Trustees to do so, would clearly enable them to deviate from the exercise of statutory powers which have already been exercised. (Para 10)

P. K. Das, for Petitioner; R. C. Deb, for Respondents.

ORDER:— The petitioner is an unemployed Commerce Graduate who intends to start a new business on a plot of land which is the subject-matter of this application. The matter arises in the following manner.

2. At all material times prior to February, 1975, the port of Calcutta was governed by the Calcutta Port Act, 1890. However with effect from the 1st February, 1975, the port of Calcutta came to be governed by the Major Port Trusts

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Act, 1963 (hereinafter referred to as the Act). By virtue of S. 133 (2B) of the Act all the provisions with which we are concerned in this application came to be applicable to the port of Calcutta and the old Act of 1890 ceased to be applicable. Sections 49 and 52 of the Act with which we are concerned and in so far as is material for our purpose may be set out herein below:

"49. (1) Every Board shall, from time to time, also frame a scale of rates on payment of which and a statement of conditions under which any property belonging to, or in the possession or occupation of the Board, or any place within the limits of the Port or the Port approaches may be used for the purposes specified hereunder:

(a)

(b)

(c) leasing of land or sheds by owners of goods imported or intended for export or by steamer agents;

(d) any other use of land, building, works, vessels or appliances belonging to or provided by the Board.

(2) Different scales and conditions may be framed for different classes of goods and vessels.

52. Every scale or rates and every statement of conditions framed by a Board under the foregoing provisions of this Chapter shall be submitted to the Central Government for sanction and shall have effect when so sanctioned and published by the Board in the Official Gazette."

By a notice dated the 8th November, 1976, the Board through its Land Manager issued an advertisement which appeared for the first time in the Amrita Bazar Patrika of 11th November, 1976. The respondent No. 1 notified that sealed offers quoting the rate of rent in the prescribed form were invited for the lease of certain plots. The notice prescribed the procedure for making the application and also reserved the right to reject any or all offers without assigning any reason whatsoever.

3. Pursuant to the said notice dated 8th November, 1976 the respondent No. 1 through its Land Manager issued a circular in cyclostyled form inviting sealed offers for lease of various plots including the plot No. 17 in Sonapur Road measuring an approximate area of 788.747 sq. metres. In the circular, a sum of Rs. 50 was mentioned as the reserved rent per 100 sq. metres for the same offer.

4. The petitioner, pursuant to the said notice and the circular, obtained the requisite application form and in answer to the item regarding the rate of rent the petitioner in the form stated that Rs. 50 was the maximum rate which the Port Trust was entitled to realise in respect of the plot.

5. The controversy in the present Rule arises because according to the petitioner, in terms of the provisions contained in S. 49 of the Act the respondent No. 1 has framed a scale of rates in accordance with the provisions of the Act. Such scale of rates was published in the Calcutta Gazette in terms of S. 52 of the Act. This position is not disputed by the respondents. It is not disputed either that in so far as the plot No. 17 Sonapur Road with which we are concerned the scale of rent has been fixed at Rs. 50 per 100 sq. metres.

6. The sole question to be decided is that having prescribed the scale of rent at Rs. 50 for this plot in question in terms of the statutory powers contained in the Act, is it open to the respondents now to treat Rs. 50 as reserved rent as they have purported to have done in terms of the impugned notice and the impugned circular? In other words, is it now open to the respondents to invite offers for bid above Rs. 50 per 100 sq. metres in respect of the offer in question and offer it to the highest bidder? It has been alleged in the petition that the respondents have received several offers of higher rates of rent and are threatening to allot the plot to the highest bidders.

7. I may mention that originally a blanket injunction was issued by Masud, J. (as he then was) at the time of the issue of the Rule restraining the operation of the entire notice and circular. This order was however modified on the 22nd December, 1976 by S. K. Mukherjee, J. (as his Lordship then was) only to plot No. 17, Sonapur Road which is item No. 14 in the relevant circular and for which the petitioner made the offer as aforesaid.

8. Mr. R. C. Deb appearing on behalf of the respondents contends that the Board has issued certain directive principles one of which is that the scale of rents which have been already fixed are to be treated as reserved rents.

9. Mr. P. K. Das, learned counsel for the petitioner contends that having prescribed the scale of rents in exercise of statutory powers, it is not open to the

respondents whose powers are circumscribed by the statute to treat them as reserved or minimum rents and accept leases at a higher scale by virtue of certain directive principles. To do so would be to override the exercise of statutory powers which have already been done.

10. After giving my anxious consideration to the entire matter, I am of the opinion that the contention of the petitioner should succeed. In other words, it must be held that having prescribed a particular scale of rent for a particular plot in the exercise of its statutory powers, the respondents now have no right, authority or jurisdiction by virtue of notifications or circulars to treat that scale of rent as the reserved rent or minimum rent and invite tenders for higher rents and offer it to the highest bidder. To allow the respondent to do so, in my view would clearly enable them to deviate from the exercise of statutory powers which have already been exercised in the present case. This contention of the petitioner therefore succeeds.

11. In the result, this application succeeds and the Rule is made absolute. There will be a Writ in the nature of mandamus directing the respondents to forthwith, recall, cancel and/or withdraw the impugned notice dated 8th November, 1976 and the circular bearing the same date and issued thereunder, only in so far as the plot No. 17, Sonapur Road which appears as item No. 14 in the said circular is concerned. I make it clear however that this order does not affect any other plot notified in the said notice or in the said circular.

12. The respondents would however be at liberty to proceed according to law.

13. There will be no order as to costs.
Petition allowed.

AIR 1977 CALCUTTA 379

DIPAK KUMAR SEN, J.

B. K. Dhar Pvt. Limited, Petitioner v. Calcutta Metropolitan Development Authority, Respondent.

Matter No. 132 of 1976, D/- 24-6-1977.

Constitution of India, Art. 226 — Mandamus writ of — Conditions and terms of tender ignored by authority which was bound to scrutinise them before accepting one — Tender of person who did

not fulfil all terms and conditions accepted — Person whose tender is ignored will have justifiable grievance to request for mandamus although he cannot as of right claim that contract should be awarded to him.

For performance of certain work tenders were invited. Both 'A' and 'B' submitted their tenders in requisite form — A's tender which was complete in all respects and complied with the terms and conditions laid down, was ignored by the authority concerned and tender of 'B' whose tender did not fulfil all the conditions was accepted. On a writ petition by 'A', it was held, that grievance of 'A' was not entirely unjustified. A public authority should not put itself in a position where allegations against him can be made and allow them to go uncontroverted. Although 'A' has no right to get the contract awarded to him, yet as the contract given to 'B' was almost completely executed, to avoid unnecessary complications 'A' was awarded costs only. (1970) 1 Andh WR 342; AIR 1954 SC 592; AIR 1968 SC 718; AIR 1973 SC 205; AIR 1973 SC 303, Rel. on.

(Paras 21, 22, 23)

Cases Referred : Chronological Paras

AIR 1975 SC 266	19
AIR 1973 SC 205	15
AIR 1973 SC 303 : 1973 Lab IC 191	17
(1970) 1 Andh WR 342	14
AIR 1968 SC 718	14
AIR 1954 SC 592	14, 16

D. K. De, for Petitioner.

ORDER:— The facts which are not in dispute in these proceedings may shortly be stated as follows:—

On or about the 18th Oct. 1974, the Calcutta Metropolitan Development Authority incorporated under the Calcutta Metropolitan Development Authority Act, 1972, the respondent No. 1 herein, invited public tenders for construction of all civil works and supply and erection of mechanical and electrical equipments for a water treatment plant of 273 MLD capacity at Garden Reach. It was intimated that tenders should be submitted between the 11th November and the 6th Dec., 1974 and the "tender papers" containing, inter alia, the notice of invitation, specifications and other terms and conditions in detail would be available for inspection after the 11th Nov., 1974 and also for purchase at a price of Rs. 700 per set. It was declared that no one would be permitted to submit a tender who had not successfully

completed and commissioned an integrated water treatment plant of the minimum capacity of 45 MLD; or who could not furnish a solvency certificate from a nationalised bank in his favour for at least Rs. 10 lacs.

2-3. It was indicated further that each tender should consist of three parts consisting of respectively, qualification of the tenderers both financial and technical, technical particulars of the proposed plant subject to negotiation for variation in design and otherwise and Schedule of prices. The tender of tenderer who would not strictly adhere to the outlined procedure it was declared would be summarily rejected.

4. B. K. Dhar Private Limited, the petitioner herein, submitted a tender for the said works and furnished the required earnest money.

5. After Parts I and II of the tender were opened only two tenders it is alleged were found to be acceptable in terms of the invitation. The said tenders were those of the petitioner and one Central Engineering Syndicate, the respondent No. 2 herein.

6. Though on the 19th Sept., 1975 Part III of the tender was opened the matter was not finalised by the respondent No. 1 for a long time. At the request of the respondent No. 1 the petitioner kept its offer open until the 31st Jan., 1976. On or about 14th Jan., 1976, the respondent No. 1, issued a letter of intent or acceptance of tender in favour of the respondent No. 2.

7. The petitioner being aggrieved thereby has sought to impugn the acceptance of the tender of the respondent No. 2 by the respondent No. 1 in the present application.

8. It is alleged in the petition inter alia that the petitioner has extensive experience in the construction and commissioning of water treatment plants all over India. It is alleged further that at the time of submitting its tender the petitioner believed that the invitation had been made bona fide and that the respondent No. 1 a statutory authority would conform to its own directives, representations or assurances. The respondent No. 1 however, contrary to its instructions and directives and in violation of the terms and conditions of the said invitation and of the other documents of tender extended certain special dispensations to the respondent No. 2 in

respect of its defective tender in preference to the petitioner as follows:—

(a) On the 19th Sept., 1975 the respondent No. 1 permitted the respondent No. 2 to withdraw certain alternative tenders which were offered with their main tender though this was not permissible under the terms and conditions.

(b) The respondent No. 2, it is alleged never completed or commissioned any integrated water treatment plant of the minimum stipulated capacity.

(c) The respondent No. 2 failed to submit with part 1 of its tender any Bank certificate of its solvency as required.

(d) The design submitted by the respondent No. 2 for certain parts of the plant, viz., circular clarifiers, fell below the minimum requirements as laid down in the technical specifications of the tender.

(e) Part III of the tender of the respondent No. 2 contained conditional or variable rates of prices contrary to the terms and conditions.

9. By its letters, including those dated the 30th October, 1975 and the 17th Feb., 1976, addressed to the respondent No. 1 the petitioner complained of the aforesaid violations of the instructions, and directives and terms and conditions of the invitation.

10. It is alleged that the respondent No. 1 was discriminating in favour of the respondent No. 2. For the setting up of a water treatment plant at Howrah, with lesser financial commitment it is alleged that respondent No. 1 made it obligatory that earnest money of Rs. 50,000 should be furnished and allowed no deduction as in the instant case. Applications from other intending tenderers were rejected and tender papers were withheld from them on the ground that their qualifications were inadequate whereas the respondent No. 2 was issued with tender papers in spite of the fact that it was similarly disqualified.

11. The petitioner contends that the respondent No. 1 was bound to adhere to the mandatory terms and conditions laid down in the tender documents and could not legally award a contract contrary thereto.

12. The act of the respondent No. 1 in issuing a letter of intent or acceptance of tender and/or in awarding the contract to the respondent No. 2 is alleged to be illegal, unauthorised and liable to be set aside on the following amongst other grounds:

(a) The respondent No. 1 as a statutory authority could not legally travel beyond its own directives, notifications or conditions.

(b) The respondent No. 1 having made representations or given assurances that certain conditions or terms of its 'tender documents' were mandatory and/or would be carried out and your petitioner having acted on the basis thereof the respondent No. 1 could not operate in breach of any of the said conditions or terms.

(c) The discrimination shown by the respondent No. 1 in favour of the respondent No. 2 was unauthorised and illegal.

(d) The attempts to award the contract to the respondent No. 2 were mala fide and in abuse of statutory powers.

13. On the 26th Feb., 1976, a Rule Nisi was issued calling upon the respondents to show cause why a writ in the nature of mandamus should not be issued directing the respondent No. 1 to cancel or withdraw any letter of intent or letter of acceptance of tender or any document awarding a contract pursuant to the invitation to tender issued on the 10th Oct., 1974 in favour of the respondent No. 2 and also why appropriate directions should not be given to the respondent No. 1 to act according to law.

14. No affidavits have been filed by the respondents in opposition to the petition. At the hearing Mr. D. K. De, learned counsel for the petitioner, cited several decisions in support of the contentions made in the petition. The first decision cited was in the case of S. Raman Goud v. Government of Andhra Pradesh reported in (1970) 1 Andh WR 342. The facts in this case were that the appellant was the highest bidder in respect of a certain portion of a bamboo forest in a public auction held by the Forest Department. Pursuant to the conditions of sale as laid down the appellant deposited one-third of the amount of his bid. The bid was not confirmed as was required under the terms and conditions, but a Committee consisting of a Collector, the Deputy Registrar of Co-operative Societies and the District Forest Officer by their decision allotted the said portion of the bamboo forest to a Co-operative Society instead of the appellant. On these facts a Division Bench of the Andhra High Court followed the decision of the Supreme Court in the cases of Guru-

swamy v. State of Mysore, reported in AIR 1954 SC 592 and Union of India v. Anglo-Afghan Agency, reported in AIR 1968 SC 718 and held that the respondents viz., the Forest Officers had ignored the provisions of the conditions of sale and that the appellant had a right under such terms and conditions to have his highest bid considered by the District Forest Officer for confirmation. A writ was issued accordingly in favour of the appellant.

15. The next decision cited by Mr. De was in the case of District Forest Officer, South Kheri v. Ram Sanahi Singh reported in AIR 1973 SC 205. This was also a case of public auction where the right to cut timber for a fixed period for certain forest lots was purchased on a bid. Thereafter a portion of such lots was cancelled by the Divisional Forest Officer. The successful bidder moved an application under Art. 226 of the Constitution.

16. On these facts the Supreme Court held that the Divisional Forest Officer who cancelled a particular lot allotted to the successful bidder was a public authority and by his acts the Divisional Forest Officer by-passed an order of a subordinate authority. It was held that the successful bidder had been deprived of a valuable right. The Supreme Court followed its earlier decision in Guruswamy's case (AIR 1954 SC 592) (supra) and held that though the order was administrative and not quasi-judicial yet the same had to be made in consonance with the rules of natural justice inasmuch as it affected the right of the successful bidder which was a right to property. The order of the Divisional Forest Officer was set aside by the Supreme Court.

17. The last case cited by Mr. De was Union of India v. K. P. Joseph, reported in AIR 1973 SC 303 where the Supreme Court laid down as follows:

"To say that an administrative order can never confer any right would be too wide a proposition. There are administrative orders which confer rights and impose duties. It is because that an administrative order can abridge or take away rights that we have imported the principle of natural justice."

18. On the strength of these decisions Mr. De contended that the contract awarded in favour of the respondent No. 2 should be cancelled.

19. Learned counsel for the respondents, on the other hand, has contended that the only right which the petitioner could claim was that his tender should be considered by the appropriate authority. In the instant case it was so done. It was further contended that no person had a right to insist that a Government or a statutory authority must enter into a contract with it. All that a person could claim was equal terms to bid for a contract. In support a decision of the Supreme Court in the case of *M/s. Erusian Equipment and Chemicals Ltd. v. State of West Bengal*, reported in AIR 1975 SC 266 was cited.

20. It was also stated from the bar that the contract which had been awarded in favour of the respondent No. 2 had been almost fully performed and that the Rule has become infructuous.

21. On the facts and circumstances alleged in this petition it appears to me that the grievance of the petitioner is not entirely unjustified. The allegations in the petition have not been controverted by the respondents. The respondent No. 1, a public authority, should not put itself in a position where such allegation can be made against it and go uncontroverted.

22. But, on the other hand, the contentions of the respondents that the petitioner has no right to be awarded a contract is also of equal force. The contract was awarded on the 14th Jan., 1976 and an interim order which was passed in favour of the petitioner was vacated. As a result of this the respondent No. 2 has proceeded with the contract and must be held to have altered its position to its detriment and cancellation of the contract awarded in its favour at this stage would lead to unnecessary complications.

23. In this view of the matter I discharge the Rule which has been issued in the instant case. The costs of this application, however, will be paid by the respondent No. 1 to the petitioner. Learned counsel for the petitioner submits that a sum of Rs. 20,000 had been deposited with the respondent No. 1 by way of security. The petitioner will be at liberty to withdraw the said sum from the respondent No. 1.

Rule discharged.

AIR 1977 CALCUTTA 382

T. K. BASU, J.

Pannalal Gupta, Petitioner v. The Commissioner of Police and others, Respondents.

Matter No. 735 of 1976, D/- 21-6-1977.

Constitution of India, Art. 226 — Writ petition challenging order of Police Commissioner refusing licence under S. 39 of Calcutta Police Act — Allegation that Commissioner acted unreasonably and arbitrarily — Allegation not properly answered with relevant reasons by Commissioner either on affidavit or otherwise — Impugned order must be quashed — Matter sent back to Commissioner for reconsideration in accordance with law.

(Para 6)

Cases Referred: Chronological Paras
AIR 1961 SC 705 4

ORDER:— In this application the petitioner Pannalal Gupta challenges an order whereby the Deputy Commissioner of Police acting on behalf of the Commissioner of Police, Calcutta, has refused to grant police licence under S. 39 of the Police Act, 1866, in respect of a boarding house belonging to the petitioner and situated at 4, Sudder Street, Calcutta.

2. In the petition the petitioner has specifically challenged the order as being arbitrary and has also stated that the respondent has failed to apply his mind on the question of grant of licence of the petitioner in the application.

3. In spite of such specific challenges being thrown, the affidavit-in-opposition filed by the Deputy Commissioner of Police, who had passed the impugned order, does not disclose any reason which impelled him to refuse the licence in the instant case. There is in the affidavit a statement in which he craves reference to certain records. No records have been however produced before me at the time of hearing of this application. Therefore, in my view, the challenge thrown by the petitioner has not been answered by the respondent either on affidavit or otherwise.

4. The learned Advocate appearing on behalf of the petitioner draws my attention to a decision of the Supreme Court in the case of *Kishan Chand Arora v. Commissioner of Police, Calcutta* reported in AIR 1961 SC 705. My attention has been drawn to a portion of para-

graph 5 of the judgment which runs as follows:—

"Therefore, the fact that no hearing is required to be given by the Commissioner before he decides to grant or refuse a licence would not make the provision as to licensing in the circumstances of this case unreasonable restrictions on the fundamental right of carrying on a trade. For the same reasons it cannot be said that because the reasons for refusal are not communicated to the person applying that would make the licensing provision unconstitutional. The person applying knows that under the law there are three conditions (already set out above) which the Commissioner has to consider in granting or refusing the licence. If he thinks that he fulfils the three conditions and the Commissioner has acted unreasonably in rejecting his application he is not without a remedy; he can apply to the High Court under Art. 226 and compel the Commissioner to disclose the reasons for refusal before the Court and if those reasons are extraneous or are not germane to the three matters arising under S. 39, the High Court will compel the Commissioner to act within the scope of S. 39."

5. In my view, in the facts of the instant case it is exactly what the petitioner has done. He has thrown a challenge that the Commissioner has acted unreasonably and arbitrarily and the challenge has not been properly answered with relevant reasons by the Commissioner either on affidavit or otherwise.

6. In that view of the matter, I am of the opinion that the impugned order should be quashed and the matter be sent back to the Commissioner for reconsideration in accordance with the law. I, therefore, quash the impugned order dated the 16th July, 1975, and send the matter back to the appropriate respondents for reconsideration. In reconsidering the petitioner's application the appropriate respondents are directed to give him a hearing before passing the order. I am giving this direction in the interest of justice although strictly speaking, a hearing may not be required under the law, I make it clear, however, that after the hearing of the petitioner if the appropriate respondent is satisfied that there are cogent reasons for refusing the licence as prayed for, he will be at liberty to do so.

7. The Rule is disposed of on the above terms. There will be no order as to costs.

Order accordingly.

AIR 1977 CALCUTTA 383

T. K. BASU, J.

Smt. Gulab Kanwar, Petitioner v. The Director, Enforcement and others, Respondents.

Matter No. 780 of 1976, D/- 4-7-1977.

(A) Constitution of India, Art. 226 (3) — Expression 'any other remedy' — Notice issued by Enforcement Director for alleged violation of Foreign Exchange Regulation Act — Right to show cause against notice is not "any other remedy" — Petition is maintainable.

The provisions of Art. 226 (3) seem to prescribe that no petition for redress of any injury should be entertained in a case where the petitioner has what has been known as "alternative remedy" for the redress of his grievance. The alternative remedy as the expression itself suggests must be some other remedy other than that of contesting the proceeding itself. Such other remedy as is well known is usually in the form of rights of appeal or revision as provided for in various statutes. Such remedy in appropriate cases may also be the right of filing a suit but the expression "any other remedy" cannot possibly mean the right of the petitioner to show cause against the impugned notices. (Para 11)

(B) Constitution of India, Art. 226 (1) (b) and (1) (c) — Substantial injury and substantial failure of justice — Compelling petitioner to appear before the authorities in response to notices held to be initially void would cause substantial injury to petitioner and substantial failure of justice — Petition for withdrawing impugned notices held maintainable.

Matter No. 486 of 1975, D/- 18-1-1977 (Cal), Applied. (Para 9)
Cases Referred: Chronological Paras (1977) Matter No. 486 of 1975, D/- 18-1-1977 (Cal) 1, 3, 7, 8, 9, 13

ORDER:— In this application the petitioner challenges two notices dated the 13th February, 1975 and the 4th August, 1976 respectively issued by the Enforcement Directorate on the basis of violation of certain provisions of the Foreign Exchange Regulations Act, 1947/73. Two

similar notices in identical terms one bearing the same date and other a different one were challenged before me in the case of Saroj Kumar Bhotika v. The Director, Enforcement Directorate, Cabinet Secretariat, Deptt. of Personnel & A. R. Govt. of India being Matter No. 486 of 1975.

2. By my judgment dated 18th January, 1977, I struck down the said two notices on the grounds fully set out in my judgment.

3. Mr. Noni Coomar Chakraborty, learned Advocate appearing on behalf of the respondents does not dispute that so far as the merits of the present petition are concerned they are fully covered by my judgment in Matter No. 486 of 1975 and the Rule should be made absolute on that ground. He however submitted that in view of the provisions of the amended Art. 226 of the Constitution of India as introduced by the Constitution (Forty-second Amendment) Act, 1976 the present petition is not maintainable and I should hold it to be so.

4. In order to appreciate the contentions of Mr. Chakraborty it would be useful to set out the relevant provisions of the amended Art. 226 which are as follows:—

"226 (1) Notwithstanding anything in Art. 32 but subject to the provisions of Art. 131-A and Art. 226-A, every High Court shall have power throughout the territories in relation to which it exercises jurisdiction to issue to any person or authority, including in appropriate cases, any Government, within those territories directions, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, or any of them,—

(a) for the enforcement of any of the rights conferred by the provisions of Part III; or

(b) for the redress of any injury of a substantial nature by reason of the contravention of any other provision of this Constitution or any provision of any enactment or Ordinance or any order, rule, regulation, by-law or other instrument made thereunder; or

(c) for the redress of any injury of any illegality in any proceedings by or before any authority under any provision referred to in sub-cl. (b) where such illegality has resulted in substantial failure of justice.

(2)

(3) No petition for the redress of any injury referred to in sub-cl. (b) or sub-

cl. (c) of Cl. (1) shall be entertained if any other remedy for such redress is provided for by or under any other law for the time being in force."

Relying on the above provisions of amended Art. 226 of the Constitution of India, Mr. Chakraborty submitted that in the present Rule there is no allegation that any of the fundamental rights guaranteed by Part III of the Constitution of India has been violated. As such the case does not come under the provisions of Art. 226 (1) (a). It must therefore come either under Art. 226 (1) (b) or Article 226 (1) (c).

5. It was submitted by Mr. Chakraborty that in order that the case may come under Art. 226 (1) (b) there must be an injury of a substantial nature before the petitioner can maintain the present application. It was submitted that in the instant case there was no injury of any substantial nature. All that had happened is that the Foreign Exchange Authorities had decided that a prima facie case existed for an adjudication and had issued a show cause notice. It was entirely open for the petitioner to appear before the Authorities and show cause that they had not committed any offence as alleged in the show cause notice. Therefore I should hold that there has been no substantial injury caused to the petitioner at the present stage.

6. Similarly, it was submitted that in order to bring the petitioner's case under the provisions of Art. 226 (1) (c) there must be a substantial failure of justice. As merely a notice to show cause has been issued and nothing more has happened I should hold that there has been no substantial failure of justice.

7. I am unable to accept these contentions of Mr. Chakraborty. These contentions of Mr. Chakraborty would be of considerable substance but for my decision in the case of Saroj Kumar Bhotika v. The Director, Enforcement Directorate (Matter No. 486 of 1975) in which the judgment was delivered by me on the 18th January, 1977. As I have already indicated, I held in that judgment that even taking the allegations in the notice to be correct they do not disclose violation of any of the provisions of the Foreign Exchange Regulations Act of 1947 or 1973. I have further held that the charge contained in the notice has no nexus whatsoever with any of the provisions of the Foreign Exchange Regulations Act the object of which is the

preservation and conservation of foreign exchange for the benefit of the country. In that view of the matter, I have held that the impugned notices are entirely without jurisdiction and void.

8. As I have already indicated, Mr. Chakraborty did not dispute that my findings with regard to the notices which are impugned in the Saroj Kumar Bhotika's case (Matter No. 486 of 1975) (Cal) must apply with equal force to the notices impugned in the present case. This is because the notices challenged in the present rule are identical and word for word the same. In fact these notices are part of a bunch of notices which were sent to various persons who had purchased shares in a Company known as Oriental Carpet Manufacturing Ltd.

9. That being the position, the question arises as to whether the petitioner in the present case should be compelled to go before the authorities and show cause as called upon by those notices. In view that I have taken in Saroj Kumar Bhotika's case (Matter No. 486 of 1975) (Cal) the notices by which the proceedings are sought to be initiated are void as being without jurisdiction. That being the position, there is no valid initiation of any proceeding under the Foreign Exchange Regulations Act in the eye of law in view of my findings mentioned above. In that state of affairs, in my view, it will be unjust to compel the petitioner to appear before the authorities in respect of the proceedings which I have held to be initially void. To compel the petitioner to do so would in my view cause substantial injury to the petitioner within the meaning of Art. 226 (1) (b) of the Constitution of India. Similarly to compel the petitioner to appear before the authorities in pursuance of a void notice would in my view result in substantial failure of justice. In that view of the matter, it must be held that the present petition is maintainable both under the provisions of Art. 226 (1) (b) and also Art. 226 (1) (c) of the Constitution of India.

10. The last objection of Mr. Chakraborty was based on the provisions of Art. 226 (3) of the Constitution of India. That provision which I have quoted above prescribes that if the petitioner has any other remedy for the redress of his grievance then no petition shall be entertained under Art. 226 of the Consti-

tution of India. It was not seriously disputed by Mr. Chakraborty that against the impugned notices there is no right of appeal under the relevant statute. He however submitted that the petitioner had a legal right to show cause against the impugned notices and get redress by showing that she had not committed any offence as alleged in the notices. This opportunity to show cause according to Mr. Chakraborty was "any other remedy" for redress as contemplated by Art. 226 (3) of the Constitution of India.

11. I am entirely unable to accept the contentions of Mr. Chakraborty. The provisions of Art. 226 (3) of the Constitution of India seem to prescribe that no petition for redress of any injury should be entertained in a case where the petitioner has what has been known as "alternative remedy" for the redress of his grievance. The alternative remedy as the expression itself suggests must be some other remedy other than that of contesting the proceeding itself. Such other remedy as is well-known is usually in the form of rights of appeal or revision as provided for in various Statutes. Such remedy in appropriate cases may also be the right of filing a suit but the expression "any other remedy" in my opinion cannot possibly mean the right of the petitioner to show cause against the impugned notices. This contention of Mr. Chakraborty therefore fails.

12. This disposes of all the contentions raised by Mr. Chakraborty with regard to the maintainability of the present application.

13. In the result, it must be held that in view of my judgment in the case of Saroj Kumar Bhotika v. The Director, Enforcement Directorate (Matter No. 486 of 1975) (Cal) wherein the judgment was delivered on the 18th January, 1977, this Rule must be made absolute. There will be a Writ in the nature of Mandamus directing the respondents to forthwith recall, cancel and withdraw the impugned notices dated 13th February, 1975 and the 4th August, 1976 and to forbear from giving effect thereto in any manner whatsoever.

14. There will be no order as to costs.
Rule made absolute.

**AIR 1977 CALCUTTA 386
FULL BENCH**

**SANKAR PRASAD MITRA, C. J.,
SABYASACHI MUKHARJI AND
SALIL KUMAR DATTA, JJ.**

Union of India and others, Appellants
v. Bholanath Karmakar, Respondent.

A. F. O. O. No. 252 of 1977, D/- 7-6-1977.*

Constitution of India, Art. 226 — Alternative remedy not availed of — Effect.

In cases where alternative remedies have been provided for, in the absence of sufficient grounds to show why those remedies should not or could not be availed of, a petition under Art. 226 ought not to be encouraged. 1974 Tax LR 2380 (Cal), Foll. (Effect or validity of S. 58 r/w S. 38 of Constitution Forty-second Amendment Act, 1976, not decided).

(Para 4)

Cases Referred: Chronological Paras
1974 Tax LR 2380 (Cal) 4

Noni Coomar Chakraborty and Surathi Mohan Sanyal, for Appellants; Nalin Chandra Banerjee and Binode Behari Giri, for Respondent.

SANKAR PRASAD MITRA C. J.:— This matter has been referred to the Special Division Bench under R. 1 (ii) of Chapter II of the Appellate Side Rules of this Court by Sabyasachi Mukharji and M. M. Dutt, JJ. The principal contention before the Division Bench centred round the applicability of S. 58 read with S. 38 of the Constitution 42nd Amendment Act, 1976 to pending appeals. The Act received the assent of the President on December 18, 1976.

2. By reason of the provisions of Section 1 (2) of the Act, Ss. 38 and 58 came into force on February 1, 1977. Section 58 contains special provisions as to pending petitions under Art. 226 of the Constitution. It provides as follows:

"58 (i) Notwithstanding anything contained in the Constitution, every petition under Art. 226 of the Constitution before the appointed day and pending before any High Court immediately before that day (such petition being referred to in this section as a pending petition) and any interim order (whether by way of any injunction or stay or any other manner) made on, or in any proceedings re-

lating to, such petition before that day shall be dealt with in accordance with the provisions of Art. 226 of the Constitution as substituted by S. 38.

Sub-section (2): In particular, and without prejudice to the generality of the provisions of sub-s. (1), every pending petition before a High Court which would not have been admitted by the High Court under the provisions of Article 226 as substituted by S. 38, if such petition had been made after the appointed day, shall abate and any interim order (whether by way of injunction or stay or in any other manner) made on, or in any proceedings relating to such petition shall stand vacated....."

2-A. The dispute before the Division Bench was whether the above provisions applied to appeals pending in this Court on the appointed day in respect of Article 226 of the Constitution.

3. Mr. Noni Coomar Chakraborty, learned Advocate appearing on behalf of the Union of India states that his instructions are to submit to this Court that S. 58 has no application to appeals pending in the Court on the appointed day. We need not therefore decide the dispute that arose before the Division Bench. And we proceed on the basis of the above concession that appeals pending in this Court under Art. 226 of the Constitution are not affected by the provisions of Section 58 read with S. 38 of the Constitution 42nd Amendment Act, 1976.

4. As the entire appeal has been referred to us we have to express our opinion on other issues in this appeal. The Union of India is entitled to succeed in view of the judgment of this Court in Collector of Central Excise and Customs, West Bengal v. Sumanlal Parekh, reported in 1974 Tax LR 2380 (Cal). This was also a case under the Gold Control Act, 1968. This Court has held that in cases where alternative remedies have been provided for, in the absence of sufficient grounds to show why those remedies should not or could not be availed of, a petition under Art. 226 of the Constitution ought not to be encouraged.

5. In the instant case there are admittedly alternative remedies. There is no indication in the petition under Article 226 as to why those alternative remedies could not be pursued to seek appropriate reliefs. In the circumstances, the application under Art. 226 of the Constitution was not maintainable and should have been dismissed.

* (Against judgment of Amiya Kumar Mookerji, J. reported in 1977 Cri LJ (NOC) 149 (Cal).)

6. In the result, the appeal is allowed. The cross-objection is dismissed. The Rule granted under Art. 226 of the Constitution is discharged. The interim orders, if any, are vacated.

7. There will be no order as to costs.

8. We make it clear that we express no opinion on the merits of the case of the petitioner under Art. 226 which the petitioner would be entitled to urge, if so advised, before the appropriate authorities. We also express no opinion on the scope, effect or validity of S. 58 read with S. 38 of the Constitution 42nd Amendment Act, 1976.

SABYASACHI MUKHARJI J.:— I agree.

S. K. DATTA, J.:— I agree.

Appeal allowed;
Cross-objections dismissed.

AIR 1977 CALCUTTA 387

A. N. SEN AND BIMAL CHANDRA BASAK, JJ.

Dwarka Prosad Bajaj, Petitioner v. Bisheswar Dayal Santi Swarup and others, Opposite Party.

Appeal No. Nil of 1977; Insolvency Case No. 1 of 1970, D/- 7-6-1977.

Constitution of India, Art. 133 (1)
— Proper grounds for issuing certificate
— By consent of parties order of change of receiver passed in insolvency proceeding — Order not appealed against — No proper grounds made out to set aside order — Certificate refused, as matter did not involve any substantial question of law of general importance. (Para 4)

Cases Referred: Chronological Paras
AIR 1976 SC 1111: (1976) 3 SCR 160: 3
1976 Lab IC 769 3
AIR 1976 SC 1163: (1976) 3 SCR 763: 3
1976 Lab IC 773 3

A. N. SEN, J.:— This is an application for the grant of a certificate under Article 133 (1) of the Constitution of India for preferring an appeal to the Supreme Court against the judgment delivered by this Court on the 5th May, 1977.

2. An application was filed on the 30th January, 1970 for adjudication of the appellant as an insolvent. After the said application had been filed, an application was made in the said proceeding for certain interim orders. On the said application on the 30th April, 1970 an

order was passed by consent of the parties and by the said consent order two receivers were appointed for the purpose of selling some of the properties of the appellant mentioned in the said order. By consent of the parties another order was passed on the 26th Aug., 1970 and by the consent order of 26th Aug., 1970 there was a change in the personnel of the receivers. It however appears that the receivers were not in a position to sell the said properties in terms of the orders passed. The said application for adjudication remained pending and the said application came up for hearing on the 22nd Dec., 1970 and on that day an order was made directing the said application for adjudication to be tried on evidence. On the 6th April, 1971 the said application came up for hearing and on that day by consent of the parties another order was passed on the said application. By this consent order there was a change in the personnel of the receivers and Shri Ajit Kumar Roy Mukherjee was appointed a special officer for the purpose of effecting the sale of the properties in terms of the earlier orders passed on the terms and conditions mentioned in this order which was passed by consent. An application was subsequently made for setting aside the order passed by consent of the parties on the 6th April, 1971. The said application for setting aside the consent order was heard and was dismissed by an order passed on the 6th Sept., 1971. Against the said order dated 6th Sept., 1971 dismissing the application of the appellant for setting aside the consent order passed on the 6th April, 1971 the appellant preferred this appeal. The appeal came up for hearing before this Bench. This Bench for reasons recorded in the judgment dismissed the said appeal. Against the said judgment of this Bench dismissing the said appeal, the appellant intends to prefer an appeal to the Supreme Court and the appellant has made this application for the grant of the necessary certificate. The facts of this case and the contentions which were raised by the appellant have been fully set out in the judgment of this Bench. Various contentions had been raised in the said appeal. Certain grounds were sought to be urged which were also not taken in the grounds of appeal. An application had also been made for allowing the appellant to urge further grounds and also for bringing the attention of the Court to various subsequent events. For

reasons stated in the judgment the said appeal was dismissed and the said application was also not entertained. The grounds which the appellant urged before this Court have been summarised in paragraph 16 of the present petition. The grounds which the appellant wants to urge before the Supreme Court have been set out in paragraph 19 of the petition.

3. Mr. Dutta appearing in support of this application has contended that the grounds which the appellant wants to urge before the Supreme Court raise substantial questions of law of general importance and they are required to be decided by the Supreme Court. It is the contention of Mr. Dutta that the present case meets the requirements of Art. 133 of the Constitution. Mr. Dutta has referred to the decision of the Supreme Court in the case of *Union of India v. Jyoti Chit Fund and Finance* reported in (1976) 3 SCR 763: (AIR 1976 SC 1163) and also to the decision in the case of *State Bank of India v. N. Sundara Money* reported in 1976 (3) SCR 160: (AIR 1976 SC 1111).

4. In the facts and circumstances of this case we cannot persuade ourselves to hold that this case raises any substantial questions of law of general importance which needs to be determined by the Supreme Court. The main question involved in the present proceeding was whether proper grounds had been made out for the setting aside of the consent order. The principles under which a consent order can be set aside are well established. It is no doubt true that various other contentions were raised and the said contentions have also been dealt with. One of such contentions raised was that this Court had no jurisdiction to pass the said order even by consent of the parties. It may however be noted, as has been pointed out in the judgment, that no appeal has been preferred against the consent order which was passed on the 30th April, 1970 directing sale of the properties by the receivers. No appeal was also preferred against the subsequent order bringing about a change in the personnel of the receivers for giving effect to the order of sale of the properties in terms of the earlier order. As we have noted in the judgment the argument was that these orders had merged in the order which was made directing that the application for adjudication should be tried on evidence. As

we have noted the main question with which this Court was concerned in this appeal was whether proper grounds had been made out for the setting aside of the consent order. We are unable to certify that this is a question which involves a substantial question of law of general importance and this needs to be determined by the Supreme Court.

5. This application is, therefore, dismissed. There will be no order as to costs.
BIMAL CHANDRA BASAK, J.:— I agree.

Application dismissed.

AIR 1977 CALCUTTA 388

N. C. MUKHERJI AND B. C. RAY, JJ.

J. K. Seth, Appellant v. Narendra Nath Banerjee. Respondent.

S. M. A. No. 50 of 1975, D/- 31-5-1977.

Civil P. C. (1908), S. 47 and O. 23, R. 3
— Ejectment suit — Compromise decree — Construction — Plaintiff under compromise decree entitled to get decree for possession and realise arrears of rent by execution proceedings — Violation of compromise decree — Execution — Plaintiff held entitled to recover possession by execution proceedings — Separate suit not required.

A clause in a compromise decree, passed in an ejectment suit on the ground of default, provided that in default of payment as provided in the petition the plaintiff would be entitled to get a decree for khas possession on eviction and realise the balance of arrears of rents and mesne profits by execution proceedings. On violation of the terms of the compromise decree, the plaintiff decree-holder sought to recover in execution possession and arrears of rents and mesne profits. It was contended by the defendant that, with regard to the arrears of rents and mesne profits, those could be realised by execution proceedings. But nothing had been provided in the clause which entitled the plaintiff to execute the decree for khas possession. The clause simply declared that in case of default the plaintiff was entitled to get a decree and for that the plaintiff would have to file a suit and get a decree and that decree could be executed.

Held, (i) negating the contention, that it had been clearly provided that in case of non-compliance with terms of the

compromise, the plaintiff would be entitled to get recovery of possession and realise the balance of arrears of rents and mesne profits by execution proceedings. It was not a case of a simple declaration. AIR 1958 Pat 546 and AIR 1923 Cal 252, Disting. (Para 3)

(ii) The principle that if two interpretations are possible in respect of a compromise decree that interpretation which is favourable to the judgment-debtor should be accepted, did not apply to the facts of the case, as the terms of the clause were clear and unambiguous and as such there was no scope for alternative interpretations. (Para 4)

Cases Referred: Chronological Paras

AIR 1972 Punj 144	4
ILR (1968) 1 Cal 47	4
AIR 1958 Pat 546	3
AIR 1923 Cal 252	3

S. K. Lahiri and Nani Chatterjee, for Appellant; Mano Mohan Mukherji and Amar Roy Chowdhury, for Respondent.

N. C. MUKHERJI J.— This is an appeal against the order passed on May 23, 1974 by Sri S. N. Ghosh. Additional District Judge, 9th Court at Alipore in Miscellaneous Appeal No. 79 of 1974 affirming an order passed by Sri S. P. Sen Gupta, Subordinate Judge, 2nd Court at Alipore in Miscellaneous Case No. 21 of 1972 rejecting an application under S. 47 of the Civil P. C. in connection with Title Execution Case No. 1 of 1971.

2. The facts of the case may briefly be stated as follows:—

The respondent brought a suit being Title Suit No. 69 of 1969 against the appellant for ejectment on the ground of default. The said suit was decreed on compromise in terms of joint petition of compromise on April 24, 1970. As the appellant violated the terms of the compromise decree an execution case was started being Title Execution Case No. 1 of 1971. An objection was filed under S. 47 of the Code which was allowed in part but objection of the judgment-debtor regarding delivery of possession was rejected. An appeal was filed before the learned District Judge. The appeal was also dismissed and hence the second appeal. This appeal was again dismissed for default on 28th April 1976. After that the appellant filed Title Suit No. 318 of 1976 on 25th of June 1976 claiming that the decree passed in Title Suit No. 69 of 1969 was not executable and also prayed for ad interim injunction. Prayer for ad interim injunction was refused. An ap-

peal was filed. The appeal was dismissed. The appellant came up to this Court but Second Miscellaneous Appeal was dismissed under O. 41, R. 11 by us as the same was not maintainable. Then a civil Rule was issued on an application under S. 115 of the Code. Ad interim injunction was prayed for but the same was refused. Again the appellant filed an application under S. 47 read with O. 21, R. 2, in Title Execution Case No. 1 of 1971. On 9-3-77 the learned Subordinate Judge has passed an order staying Title Execution Case No. 1 of 1971.

3. Mr. Siti Kantha Lahiri, learned Advocate appearing on behalf of the appellant contends that the compromise decree passed on 24th April 1970 is not executable so far as the recovery of possession is concerned inasmuch as Cl. 7 of the petition of compromise provides:

"That if the defendant fails to pay any three monthly instalments as provided in Cl. 4 or any of the current amounts as provided in Cl. 5, the plaintiff shall be entitled to get a decree for khas possession on eviction of the defendant from the suit premises and realise the balance of arrears, rents and mesne profits as claimed by execution proceedings and the defendant will not be entitled to resist the same."

Mr. Lahiri submits that with regard to the arrears rents and mesne profits those can be realised by execution proceedings, but with regard to the khas possession in case of non-compliance of the terms of Cl. 4 and/or 5 the plaintiffs shall be entitled to get a decree for khas possession. Nothing has been provided in Cl. 7 according to Mr. Lahiri, which entitles the plaintiff to execute the decree for khas possession. This clause simply declares that in case of default the plaintiff is entitled to get a decree and for that the plaintiff will have to file a suit and get a decree and that decree can be executed. Both the courts below have negated the contention raised by Mr. Lahiri. In support of his contention Mr. Lahiri refers to a decision reported in AIR 1923 Cal 252 (Syama Charan v. Satya Prasad). In this case it has been laid that

"A decree which merely declares the rights of parties and does not direct any act to be done, is incapable to execution. In such an event a separate suit will lie to enforce the rights declared by the decree."

The facts of the case are completely different. In this case the compromise settl-

ed the extent of the right of each of the rival claimants, which was by no means identical in respect of the different properties; but there was no provision that the rights so fixed were to be enforced by execution of the decree. In such circumstances it was held that "The decree was in essence declaratory in character, and the plaintiff could not have recovered possession in execution thereof". In the present case in Cl. 7 as has already been stated it has been provided that in default of payment as provided in Cl. 4 or 5 the plaintiff shall be entitled to get decree for khas possession on eviction and realise the balance of arrears rents and mesne profits by execution proceedings and the defendant will not be entitled to resist the same. Mr. Lahiri wants to submit that execution proceedings relate only with regard to the realisation of the balance of arrears rents and mesne profits. It has not been contemplated in para. 7 of the compromise petition that the plaintiff can execute the decree for khas possession. We are unable to accept the contention raised by Mr. Lahiri and on reading the terms of para. 7 of the compromise petition carefully we are of the opinion that it has been clearly provided that in case of non-compliance of terms of Cls. 4 and/or 5 of the petition, the plaintiff would be entitled to get recovery of possession and realise the balance of arrears rents and mesne profits by execution proceedings. Mr. Lahiri also relies on a decision reported in AIR 1958 Pat 546 (Meghraj Sah v. Rajbansi Lal). In this case one of the terms of the compromise decree ran that "this defendants neither have nor shall have any connection or concern with 4 1/2 cottahs of the disputed land... ..". It was held that "the parties merely agreed to a declaration of the plaintiff's right, title and interest in the disputed land. They did not say that the defendants would deliver possession of the land to the plaintiff, nor did they say that failing delivery of possession by the defendants out of court, the plaintiff would be entitled to take delivery of possession through Court. That being so the compromise decree was not executable at all". But in the present case it was not a simple declaration but the plaintiff got a right for recovery of possession by execution in case the defendant does not comply with the terms of Cls. 4 and 5.

4. Mr. Lahiri next submits that if two interpretations are possible in respect of a compromise decree that interpretation

which is favourable to the judgment-debtor should be accepted. In support of his contention he refers to a decision reported in AIR 1972 Punj 144 (Punjab and Sindh Bank Ltd. v. Jagdish Lal). The principle laid down in this case does not apply to the facts of the present case as the terms of the Cl. 7 are clear and unambiguous and as such there is no scope for alternative interpretations. Mr. Lahiri very much relies on a Bench decision of our Court reported in ILR (1968) 1 Cal 47 (Commrs. for the Port of Calcutta v. Basumati Bagh). In support of his contention that the time is not an essence of the contract and even assuming that there has been some default in making payment there can be relief against forfeiture. In this case there was provision of payment by two equal instalments. There was a short payment of Rs. 38 in making the first instalment, but that amount was paid with the second instalment. In such circumstances it was held that the short payment of Rs. 38 in the first instalment cannot be taken as a default because the provision of payment by two equal instalments was principally made for the benefit of the defendant. Again the first payment within the period of three months was only a mode of payment. All the arrears, however, were paid within the period of six months. In this case it was held that wasilat in respect of a particular month may have been deposited after the 7th of the next succeeding month. But there was nothing on record to show that how many months there was such delay and what was the extent of delay. Considering the facts of the case their Lordships found that the parties did not intend to make time of the essence of the contract and as such the judgment-debtor could ask for specific performance notwithstanding her failure to pay the arrears and wasilat within the dates fixed by Cl. 4 of the petition of compromise. As the facts of this case are different from the facts of the present case the principle enunciated does not apply here. Mr. Lahiri submits that even if a decree is passed on compromise in terms of the petition of compromise the court is required to see that there was existence of grounds for which a decree could be passed. In the present case we find that in para. 1 of the petition of compromise it is stated that the defendant admits that he is in arrears of rent for the suit premises since Sept. 1968 at Rs. 325 till April 1969, and the claim in the suit. In

para. 2 of the petition of compromise it has been stated that the defendant has also not paid or deposited to the court any amount at the rate of rent since May 1969. In such circumstances it must be said that the grounds for eviction existed very much and the court after being satisfied about such existence recorded the compromise. All the contentions raised by Mr. Lahiri fail.

5. In the result, the appeal is dismissed on contest. The orders passed by the courts below are upheld. Title Execution Case No. 1 of 1971 pending in the Court of the 2nd Subordinate Judge, Alipore, do proceed. There will be no order as to costs in this appeal.

6. The amounts deposited by the appellant in the court below will be permitted to be withdrawn by the respondents without furnishing security.

7. The prayer for stay of operation of the order is refused.

B. C. RAY, J.:— I agree.

Appeal dismissed.

AIR 1977 CALCUTTA 391

A. N. SEN AND BIMAL CHANDRA BASAK, JJ.

Soorajmull Nagarmull, Appellant v. The Bank of Tokyo Ltd. and others, Respondents.

Appeal No. 229 of 1971 (Suit No. 108 of 1971), D/- 18-5-1977.*

Transfer of Property Act (1882), S. 68 (2) — Stay of suit — Discretion — Interference by appeal court.

The appeal court will not interfere with the exercise of discretion by the trial Judge unless it is shown that in exercising its discretion the trial Judge has acted unreasonably or capriciously or has ignored relevant facts and has adopted an unjudicial approach. Held, on facts, that the trial Judge had correctly exercised his discretion in refusing to stay the suit. Order of Ghose, J., D/- 26-7-1971, Affirmed. (Para 7)

Cases Referred: Chronological Paras
AIR 1953 Cal 208 3, 4
AIR 1934 Cal 73 3

Deb, for Appellant; T. K. Bose (for the Bank of Tokyo); P. K. Das (for No. 3) and Mazumdar (for No. 4), for Respondents.

BIMAL CHANDRA BASAK, J.:— This appeal is directed against a judgment

*(Against judgment of Ghosh J., D/- 26-7-1971.)

and order of Ghose, J. passed on the 26th July, 1971 in respect of a suit instituted by the respondent No. 1 herein the Bank of Tokyo Ltd. (hereinafter referred to as the Bank). On or about 13th March, 1971 the Bank filed this suit for leave under Cl. 12 of the Letters Patent; Leave under O. 2, R. 2 of the Code of Civil Procedure, 1908; Decree for Rs. 38,78,552.58 P.; Declaration that the stocks and shares mentioned in Annexure 'D' to the plaint stand charged and pledged for repayment of the sum of Rs. 38,78,552.58 P.; with costs and interest; Decree in a form similar to Form 5 or 5A of Appendix D to the Code of Civil Procedure 1908 in respect of the stocks, shares mentioned in Annexure 'D' with modifications. Sale of the stocks and shares mentioned in Annexure 'D' and payment of the sale proceeds thereof to the plaintiff with liberty to appropriate the same in pro tanto satisfaction of its dues; Decree for enforcement of the aforesaid Charge or pledge and realisation of the dues of the plaintiff in such form as this Hon'ble Court thinks fit and proper; Interest; Costs; Receivers; Injunction; further and other reliefs.

2. The claim of the Bank arises out of transactions on an overdraft account opened in the Bank in the name of the defendant No. 1, a partnership concern. In this suit an application was made under S. 68 (2) of the Transfer of Property Act (hereinafter referred to as the said Act) by the appellant herein, who was the defendant No. 1 in the suit, praying for an order that the suit and all proceedings therein be stayed until the plaintiff has exhausted all its available remedies against the mortgaged property or what remains of it and alternatively for a direction to the plaintiff to surrender and/or release and/or abandon its security and, if necessary, to retransfer the mortgaged property. This application was heard by Ghose, J. and by his judgment and order his Lordship dismissed the application. This appeal has been preferred against the same.

3. Mr. Deb, learned counsel appearing for the appellant, has raised two points. Firstly, he has submitted that this is a suit for mortgage money within the meaning of S. 68 (1) (a) of the said Act and that the finding of the learned Judge to the contrary was erroneous. With regard to the decision in the case of Nityananda Ghosh v. Rajpur Chhaya Bani Cinema Ltd. reported in AIR 1953 Cal 208 relied upon by the learned trial Judge,

Mr. Deb relied on a decision of the Division Bench of this Court in the case of Sukhada Kanta v. Joginee Kanta reported in AIR 1934 Cal 73. He has further submitted that in the case of Nityananda Ghosh v. Rajpur Chhaya Bani Cinema Ltd. (supra) it was a suit on the promissory note which, according to him is not the same in the present case. He has further submitted that S. 68 (1) (a) of the Act does not refer to cause of action. He has submitted that in the case of a suit for mortgage money there is no question of any other independent cause of action because all these so-called causes of action merge in the mortgage. It was also contended by him that in any event the lower security merges in the higher security viz., the mortgage of immovable property in this case.

4. The second submission of Mr. Deb is that having regard to the fact that this is a suit for mortgage money within the meaning of S. 68 (1) (a) of the said Act, this is an appropriate case where the learned Judge should have exercised his discretion under sub-s. (2) of S. 63 of the said Act in favour of his client and should have stayed the suit and all proceedings therein. He has submitted that the reliance placed by the learned Judge on the case of Nityananda Ghosh v. Rajpur Chhaya Bani Cinema Ltd. (AIR 1953 Cal 208) (supra) in this context was not appropriate because that case proceeded on the basis that it was not a suit for mortgage money within the meaning of S. 68 (1) (a) of the Act and accordingly, the discretion of the learned Judge was exercised on that basis. He has further submitted that the learned trial Judge in this case went wrong in observing that Nityananda Ghosh's case applies on all fours to the facts and circumstances of the instant case. It was contended by Mr. Deb that Nityananda Ghosh's case proceeded on the basis that a party cannot blow hot and cold at the same time. In that case the defendant who had made the application under S. 68 (2) had himself raised the question of validity of the mortgage. Mr. Deb contended that the appellant-petitioner Soorajmull Nagarmull had never raised the question of the validity of such mortgage.

5. On behalf of the Bank of Tokyo, Mr. T. K. Basu has supported the findings of the learned trial Judge. He has submitted that this suit was not a suit for mortgage money within the meaning of S. 68 (1) (a) of the Act and for this pur-

pose he has placed before us the plaint in the suit, particularly paragraphs 32 and 33 thereof, wherein the plaintiff has referred to the security furnished by way of deposit of title deeds and whereby the plaintiff has reserved its rights to pursue its remedy in respect of such security in some other action. He has also drawn our attention to the prayer regarding O. 2, R. 2 of the Code of Civil Procedure. In respect of the exercise of the discretion by the learned trial Judge, it was submitted that the discretion was properly exercised.

6. On behalf of respondent No. 3 Mr. P. K. Das appeared but he did not make any submission. He, however, made it clear that he was not supporting this appeal and his client was denying and disputing the validity of the mortgage. It may be pointed out that the respondent No. 3 is Mohanlal Jalan who was admittedly one of the partners of Soorajmull Nagarmull. Mr. Majumdar, appearing for the respondent No. 4, pointed out that there was a suit for dissolution of the appellant firm.

7. In view of our findings in respect of second contention of Mr. Deb, we do not think it necessary to go into the merits of the first submission of Mr. Deb. Proceeding on the basis that this is a suit for mortgage money within the meaning of S. 68 (1) (a) of the said Act, the question is whether we should interfere with the exercise of discretion by the learned trial Judge. It is well settled that the Court of Appeal should not ordinarily interfere with the discretion exercised by the learned trial Judge and substitute its own exercise of discretion. Had the matter been before the Appeal Court at the first instance, it might or might not have held the same view or might or might not have exercised its discretion in the same manner as the learned trial Judge had done; but that by itself is not sufficient to enable the Appeal Court to interfere with the exercise of discretion by the learned trial Judge. It must be shown that in exercising its discretion the trial Judge has acted unreasonably or capriciously or has ignored relevant facts and has adopted an unjudicial approach. In this particular case we are not satisfied that any case has been made out to compel us to interfere with the discretion exercised by the learned trial Judge. The learned trial Judge has referred to the fact that one of the partners, Mohanlal Jalan, has in his affidavit deni-

ed the factum as well as the validity of the said mortgage stated to have been created by the deposit of title deeds as referred to in the plaint. The learned Judge has also pointed out that Deokinandan Jalan, another partner, has also in his affidavit denied the factum as well as the validity not only of the mortgage but also of the validity of the loans so far as the firm is concerned. The power and authority of Kishorilal Jalan to file or maintain the instant application on behalf of the defendant No. 1, Soorajmull Nagarmull, which was a partnership concern has also been challenged. In these circumstances we are of the opinion that it cannot be said that the exercise of discretion by the learned trial Judge was improper. On the other hand, we are of the opinion that the learned trial Judge correctly exercised his discretion in refusing to stay the suit in terms of sub-s. (2) of S. 68 of the said Act. The fact remains that Soorajmull Nagarmull is a partnership firm. Two of its partners have raised the question of validity of this mortgage. It has also to be pointed out that there are certain suits instituted in this Court for dissolution of this firm which, inter alia, include suit for declaration that the said firm stood dissolved on and from a particular date. According to Deokinandan the appellant firm stands dissolved. The admitted position further is that meanwhile the hearing of this suit has started and one of the witnesses had been examined de-benue-esse. The authority of any person to make any application on behalf of Soorajmull Nagarmull at the relevant time is also disputed. In that view of the matter, we are of the opinion that no case has been made out to enable us to interfere with the exercise of discretion by the learned trial Judge.

8. Accordingly, we dismiss this appeal with costs.

A. N. SEN, J.:— I agree.

Appeal dismissed.

AIR 1977 CALCUTTA 393

**SALIL KUMAR DATTA AND
GANENDRA NARAYAN RAY, JJ.**

Union of India, Petitioner v. Ad-hoc Claims Commissioner and others, Opposite Parties.

Civil Rule Nos. 1305-9, 693-694, 1363-64, 1053-56, 1059-60 and 421 of 1976, D/-25-2-1977.

DU/DU/B174/77/VSS

(A) Railway Accidents (Compensation) Rules (1950), R. 6 (2) (as substituted by Amendment Rules, 1974) — Applicability — Not applicable in case of permanent partial disablement caused by injury.

Rule 6 (2) applies when the amount of injury is not specified in part II of the Schedule but at the same time deprives a person of all capacity to do any vocational or occupational work. This sub-rule has no application where there is permanent partial disablement caused by the injury of the accident, as such injury does not deprive a person of all capacity to do any work. (Para 10)

(B) Railway Accidents (Compensation) Rules (1950), R. 6 (as substituted by Amendment Rules, 1974) — Scope and effect of amendment.

What the amended rules have introduced is a scale of compensation for the loss of a limb or member, assuming the total deprivation of all capacity for work at Rs. 50,000 for a victim instead of linking it with the income which the victim might be earning at the material time. The scale again provided for fixed amount for loss of limb, member or organ according to the importance of such limb, member or organ with reference to human activity in connection with man's vocational work. There is really no departure from the basis of calculation as in the Workmen's Compensation Act except that instead of the total permanent disability being linked with the victim's income, it is now assumed at Rs. 50,000 and specified amounts have been prescribed, calculated on the same percentage though in greater details in respect of the loss of such limb or member. (Para 13)

The discretion under R. 6 (3) undoubtedly will be judicial one but has to be exercised with reference to all circumstances including temporary or permanent disability with reference to the vocational work of the victim resulting in loss of income or earning capacity either temporarily or permanently as also the pain and suffering thereby caused to such victim. It cannot therefore be said that the principles of payment as provided in the Workmen's Compensation Act have been given up, as otherwise, there will be no guideline for determining reasonable compensation for injury not included in the Schedule which results in pain and suffering. In the original schedule, the complete and permanent loss of use of a limb or member was equat-

ed with the loss of that limb or member, as in the Workmen's Compensation Act in force which is omitted in the amended rules (by omission of R. 2 (e) of the original Rules). This is an unfortunate omission which undoubtedly will cause serious hardship in many cases. This inequitable omission should be remedied and loss of a limb or member should be equated to loss of use of that limb or member. (Para 14)

(C) Railway Accidents (Compensation) Rules (1950), R. 6 (3) (as substituted by Amendment Rules, 1974) — Interpretation — Non-schedule injury which results in pain and suffering — Compensation — Determination — Word 'any' does not mean 'all'. (i) Railways Act (1890), S. 82-A — (ii) Interpretation of Statutes — Language plain and unambiguous).

Compensation is not payable for merely for pain or suffering but for personal injury only which results in pain and suffering. It may be that in determining compensation, the Claims Commissioner will have to take into consideration all circumstances including pain and suffering from respective injury, but unless there is a personal injury no compensation is payable under S. 82-A of the Railways Act and the Railway Accidents (Compensation) Rules, 1950 as amended. Further, different injuries may cause different type of pain and suffering and such pain and suffering may be separately and individually felt and suffered even apart from the cumulative effect of pain and suffering from all injuries together. (Para 15)

In appropriate cases, the Courts have interpreted the word 'any' as 'all' but where the provisions are clear and free from ambiguity it is not permissible to read in statute what is not there. In this Cl. (3) 'any injury' is being referred in the same clause as "other than an injury specified in the schedule or referred to in sub-r. (2)". This clear provision militates against the contention that 'any' should be read as 'all'. Further if there is a loss of use of limb or member or more by the injuries of the accident, an interpretation of maximum compensation of Rs. 10,000 will lead to further inequity and hardship. (Para 16)

The contention that all sub-rules of R. 6 are independent and sub-r. (4) has no application to sub-r. (3) cannot be accepted. This sub-r. (4) is placed immediately after sub-r. (3) and there is no prohibition providing for its non-application

to sub-r. (3) nor does the working of the sub-rule indicate its non-application to sub-r. (3). It also cannot be urged that in sub-r. (4) the injuries therein mentioned are confined to schedule injuries in absence of any such provision.

(Para 16)

On an interpretation of the compensation rules it is clear that the compensation not exceeding Rs. 10,000 under sub-rule (3) of R. 6 relates to each injury resulting in pain and suffering which a victim of the accident sustains on account thereof, subject to the maximum overall statutory limit of Rs. 50,000 for all injuries so suffered. Further, in determining the compensation, the Claims Commissioner will have to take into account all circumstances including the loss of income or earning capacity of the victim as also the pain and suffering endured by him on account thereof as may be deemed reasonable. (Para 17)

(D) Railways Act (1890), S. 86— Merely directory — Examination of victim of accident by qualified medical practitioner not essential condition for determining compensation — Non-examination will not render decision nugatory. (Para 18)

(E) Constitution of India, Art. 227 — Railways Act (1890), S. 82-F (2) — Alternate remedy — Appeal under S. 82-F (2) not availed of — Order of Claims Commissioner impugned under Art. 227 on ground that compensation was determined in manner not warranted by law and accordingly such determination was without jurisdiction — Application under Art. 227 maintainable. (Para 19)

Cases Referred: Chronological Paras
AIR 1977 Cal 158 19

Noni Coomar Chakraborti, R. N. Das and P. K. Ghosh, for Petitioners in all Rules; Bikash Chandra Sen and B. Dutta (in C. R. No. 1305-6 of 1976); Mrs. Jyotirmoyee Nag (in C. R. Nos. 1307 and 693 of 1976), Paresh Nath Bhattacharya (in C. R. No. 1308 of 1976), Amal Chandra Roy and Dipankar Das Gupta (in C. R. No. 694 of 1976), S. P. Sahay (in C. R. Nos. 1363-64 of 1976), H. D. Ghosh (in C. R. No. 1053 of 1976), Mrs. Jyotirmoyee Nag and Mrs. Juthika Bose (in C. R. Nos. 1054-56 of 1976), Miss Nandita Ghose and Dibakar Dutta Sharma (for No. 3) in C. R. No. 1059 of 1976 and R. P. Bagchi, S. S. Roy and Miss Nandita Ghose (for No. 3) in C. R. No. 421 of 1976, for Opposite Parties.

SALIL KUMAR DATTA, J.:— A major train accident occurred on January 29,

1975 at Ultadanga Road Station by collision between two passenger trains. The accident was attended with loss of human life and grievous injury to passengers as also loss of property. The Railway Administration appointed an Ad-hoc Claims Commissioner (hereinafter referred as Claims Commissioner) for determination of claims for compensation made by the passengers for personal injury as also for loss of property on account of the accident. The Claims Commissioner held sittings when evidence was adduced by the victims in support of their respective cases in respect of the compensation payable by the Railway for injury to person and loss of property caused by the accident. The Claims Commissioner determined the compensation payable by the Railway Administration to the passengers before him on account of personal injury suffered by them as also for loss of goods. The Railway Administration was dissatisfied with the determination of such compensation which according to the Railway was not authorised by the provisions of the Indian Railways Act, 1890 and the Rules made thereunder. Accordingly the Union of India moved this Court by applications under Art. 227 of the Constitution against the several orders for compensation and the Rules before us were issued on those applications for appropriate orders and directions. The Rules involving common questions of law and similar questions of facts have been heard before us together and will be governed by this judgment.

2. The liability of railway administration in respect of accidents to trains carrying passengers is provided in Ss. 82A to 82J of the Indian Railways Act, 1890. Section 82-A provides in sub-s. (1) that the Railway Administration shall be liable to pay compensation for death and for personal injury and loss of accompanying goods owned by the passenger sustained as a result of such accident. Sub-s. (2) provides that the liability of the Railway administration shall in no case exceed rupees fifty thousand in respect of any one person. Section 82-B provides for appointment of a Claims Commissioner for local area. The applications for compensation have been provided in S. 82-C including claims for interim relief. Section 82-D provided for procedure and powers of the Claims Commissioner who shall have the powers of the Civil Court for enforcing attendance of witnesses and production of documents and material objects and also power to ap-

point persons possessing special knowledge to assist him in holding the inquiry. Section 82-E provides for interim compensation as may be deemed reasonable by the Claims Commissioner. The Claims Commissioner under sub-s. (1) to S. 82-F is to determine the liability of the railways to pay compensation under S. 82-A and the amount and person to whom such compensation would be payable. Sub-section (2) provides for appeal to the High Court by the persons aggrieved against the decision of the Claims Commissioner but High Court shall not be authorised to grant compensation in excess of limit specified in S. 82-A.

3. Section 82-G lays down the procedure for recovering and payment of compensation. Section 82-H provides that the right of any person to claim compensation under S. 82-A shall not affect his right to compensation under any other law for the time being in force but no person shall be entitled to claim compensation more than once in respect of the same accident. Section 82-H provides for interim relief by railway administration while S. 82-I is a bar to legal proceedings against any person for anything done in good faith under the foregoing sections. Section 82-J provides for power to make rules by the Central Government to carry out the objects of Ss. 82-A to 82-H inclusive.

4. The Central Government in pursuance thereof framed Rules called Railway Accidents (Compensation) Rules, 1950. We are concerned in these causes with Part III thereof which provides for rates for compensation in Rules 6 and 7 and the Schedule thereof. The said Rules prior to subsequent amendment mentioned hereinafter were as follows:—

"Rule 6. (1) The amount of compensation payable in respect of death or for injuries causing partial disablement or total disablement shall be at the rates set out in the schedule:

Provided that where more than one injury is caused by the same accident compensation shall be payable in respect of each injury but so that the aggregate amount of compensation does not exceed the amount which would have been payable if a total disablement had resulted from such injuries:

Provided further that where compensation has been paid for any injury which is less than the amount which would have been payable as compensation if the injured person had died and that

person subsequently dies as a result of injury, a further compensation equal to the difference between the amount payable and that already paid shall become payable.

(2) In case of partial disablement arising out of an injury not specified in Part II of the Schedule such percentage of compensation payable in the case of a total disablement as is proportionate to the loss of earning capacity permanently caused by the injury shall be payable.

(3) The amount of compensation payable in respect of injuries causing temporary disablement total or partial or of injuries resulting in pain and suffering without causing any disablement, shall be such as the Claims Commissioner may, in all the circumstances of the case, determine to be reasonable:

Provided that such compensation shall in no case exceed 3/5 of the amount prescribed for total disablement in Part I of the Schedule.

Rule 7. Compensation for loss of goods and animals: Compensation for loss, destruction or deterioration of goods or animals shall be paid to such extent as the Commissioner in the circumstances deems reasonable, provided that such compensation together with any compensation payable for personal injury shall not, in respect of any one person, exceed the limit specified in sub-s. (2) of Section 82-A."

5. In the schedule there are two parts. Part I provided for compensation for death or total disablement and such compensation was linked with monthly income of the injured person. Part II provided for partial disablement and loss of limb or member or complete loss of use thereof at specified percentage of the amount of compensation payable for total disablement ranging from 70% for loss of right arm above at the elbow to 5% for loss of a finger other than index finger.

6. By the Railway Accidents (Compensation) Amendment Rules, 1974 which is to be deemed to have come into force on the 14th day of December, 1973, amongst others old Rules 6 and 7 and the Schedule thereunder were substituted by new Rules 6 and 7 and new Schedule. They are:—

"6. Amount of compensation:— (1) The amount of compensation payable in respect of death or injuries shall be as specified in the Schedule.

(2) The amount of compensation payable for an injury not specified in Part II

of the Schedule but which in the opinion of the Claims Commissioner, is such as to deprive a person of all capacity to do any work, shall be rupees fifty thousand.

(3) The amount of compensation payable in respect of any injury other than an injury specified in the schedule or referred to in sub-r. (2) resulting in pain and suffering shall be such as the Claims Commissioner may, in all the circumstances of the case, determine to be reasonable. Provided that such compensation shall in no case exceed rupees ten thousand.

(4) Where more than one injury is caused by the same accident, compensation shall be payable in respect of each injury;

Provided that where compensation has been paid for injury which is less than the amount which would have been payable as compensation if the injured person had died and the person subsequently dies as a result of the injury, a further compensation equal to the difference between the amount payable for death and that already paid shall become payable.

(5) Compensation for loss, destruction or deterioration of goods or animals shall be paid to such extent as the Commissioner may, in all the circumstances of the case, determine to be reasonable." The new Schedule consists of three parts. Part I is for death, the amount of compensation being Rs. 50,000. Part II is practically for loss of vital limbs, members or organ or severe facial disfigurement the amount of compensation being Rs. 50,000. Part III is for loss of limbs or members, or organs as specified in seriatim thereof with compensation for specific amount against loss of such limb or member, instead of a specific percentage of the amount of compensation payable for total disablement as in the schedule of the previous rules.

7. It may further be mentioned that sub-cl. (e) of Cl. (2) was omitted under the new rules. The sub-cl. (e) was as follows:—

"2.....(e) 'Partial disablement' and 'total disablement' have the meaning respectively assigned to them in the Workmen's Compensation Act, 1923 (VII of 1923)."

8. The explanatory memorandum to the Amendment Rules, 1974 states that the amendments are intended to bring the original Rules in line with the provisions of new S. 82-A of the principal Act. This new section increases the liability

of the railway administration in respect of accidents to trains carrying passengers for the benefit of victims.

9. The Claims Commissioner in determining the compensation in the cases before us has proceeded on his finding that the claimants were bona fide passengers in one of the passenger trains involved in the accident. In considering the cases of the victims the Claims Commissioner found in individual cases that permanent partial disability in respect of the injuries sustained by the victim was a percentage of his capacity to do his work which is interpreted vocational or occupational work. Accordingly under R. 6 (2) such percentage of Rs. 50,000 is the amount which is the compensation thus determined the said opposite party is entitled to get from the Railways.

10. We may at once say that the learned Claims Commissioner was entirely wrong in determining compensation as being payable under and on basis of R. 6 (2) in case other than death and complete incapacity to do any work. This sub-rule applies when the amount of injury is not specified in Part II of the Schedule but at the same time deprives a person of all capacity to do any work and 'work' obviously means vocational or occupational work. This sub-clause applies when the injury is not specified in Part II of the Schedule but at the same time the injury deprives a person of all capacity to do any work. This sub-rule has in our opinion, no application where there is permanent partial disablement caused by the injury of the accident, as such injury does not deprive a person of all capacity to do any work.

11. The Claims Commissioner however has determined the compensation on an alternative basis under sub-rr. (3) and (4) of R. 6. The contention of the Railways that Rs. 10,000 is payable for the sum total of the pain and suffering of all injuries under that sub-rule was not accepted by the Claims Commissioner. He referred to sub-r. (4), which according to him would be not there nor necessary if the sum total of injuries was to be Rs. 10,000 and there was no reason to confine the said sub-cl. (4) to injuries mentioned in the schedule. The Claims Commissioner accordingly determined the compensation taking into consideration the pain and suffering caused by each injury ensuring at the same time that compensation of each injury does not exceed Rs. 10,000 as provided in R. 6 (3) subject to the maximum of Rs. 50,000.

12. The conclusion on the interpretation of sub-r. (3) of R. 6 has been really the only substantial challenge before us. It has been contended by Mr. Das appearing for the Union of India that sub-rule (3) contemplates pain and suffering for all injuries together not mentioned in Part III of the schedule the maximum compensation being Rs. 10,000 as provided therein. The basis of calculation of compensation on basis of partial or total disablement as contained in Part II of the original schedule had been removed from the schedule of the amended rules and the words are no longer there by omission of original sub-rule (e) of R. 2 of the original Rules. Instead by the amendment rules in Part III of the schedule specific amount of compensation has been provided for loss of a limb or member. When injury does not relate to loss of limb or member as mentioned in the schedule, the only basis of calculation is in sub-rule (3) of R. 6. This rule states, it is submitted that for the pain and suffering resulting from all injuries of the accident the compensation is Rs. 10,000. This compensation is for the sum total for the pain and suffering and the cumulative effect thereof undergone by the victim for all injuries to which he may be subject on account of the accident, and it is not possible to divide or demarcate the pain and suffering for separate injuries so sustained as pain and suffering is one integrated feeling. Further the sub-rule expressly mentions that compensation shall be such as the Claims Commissioner may, in all circumstances of the case, determine to be reasonable provided that such compensation shall never exceed Rs. 10,000. These provisions, it is further submitted, clearly indicate that the compensation will never be in excess of Rs. 10,000 in respect of the pain and suffering from all injuries not included in Parts II and III of the schedule. It was further submitted that sub-r. (4) has no application to injuries under sub-rule (3) and in fact all the sub-rules of R. 6 are independent. The words 'any injury' in sub-rule (3) should be construed to mean all injuries not included in the schedule suffered by the victim for which a total sum of Rs. 10,000 will be available for compensation. Accordingly Mr. Das submitted that the determination of compensation separately for each non-schedule injury as also the pain and suffering therefrom is an erroneous decision not warranted by law and as such beyond the jurisdiction of the Claims

Commissioner to order. Accordingly such orders should be set aside.

13. The contention that the deletion of the basis of determination of compensation in lines similar to that of the Workmen's Compensation Act as in the original rules does not stand scrutiny. What the amended rules have introduced is a scale of compensation for the loss of a limb or member, assuming the total deprivation of all capacity for work at Rs. 50,000 for a victim instead of linking it with the income which the victim might be earning at the material time. The scale again provides for fixed amount for loss of limb, member or organ according to the importance of such limb, member or organ with reference to human activity in connection with man's vocational work. There is really no departure from the basis of calculation as in the Workmen's Compensation Act except that instead of the total permanent disability being linked with the victim's income, it is now assumed at Rs. 50,000 and specified amounts have been prescribed practically calculated on the same percentage basis though in greater details in respect of the loss of such limb or member.

14. For a non-schedule injury, which results in pain and suffering, under the said sub-rule (3) of R. 6 the compensation will be such as the Claims Commissioner may, in all circumstances of the case determine reasonable subject to the condition that such compensation in no case shall exceed Rs. 10,000. The discretion undoubtedly will be judicial one but has to be exercised with reference to all circumstances including temporary or permanent disability with reference to the vocational work of the victim resulting in loss of income or earning capacity either temporarily or permanently as also the pain and suffering thereby caused to such victim. While the temporary disablement caused by an injury may have reference to loss of actual income, the permanent disablement of any limb or member or loss of its use from injury will be the percentage of loss of earning capacity calculated on the basis of Rupees 50,000 being the amount of loss for 100% disability. It cannot therefore be said that the principles of payment as provided in the Workmen's Compensation Act have been given up, as otherwise, there will be no guideline for determining reasonable compensation for injury not included in the schedule which results in pain and suffering. We may at this stage

point out a lacuna in the amendment rules. In the original schedule, the complete and permanent loss of use of a limb or member was equated with the loss of that limb or member, as in the Workmen's Compensation Act in force which is omitted in the amended rules. This is an unfortunate omission which undoubtedly will cause serious hardship in many cases. For instance the compensation provided say for complete and permanent use of by both hands according to sub-rule (3) of R. 6 will be a maximum of Rs. 10,000 for each hand in all Rs. 20,000 assuming till now that in the said sub-clause the maximum provided is Rupees 10,000 for each injury, while according to Part III of the schedule of the original rules it would be Rs. 30,000 for loss of each hand subject however to the maximum of Rs. 50,000. This inequitable omission should be remedied and loss of a limb or member should be equated to loss of use of that limb or member.

15. According to Mr. Das the maximum compensation of Rs. 10,000 for pain and suffering resulting from all non-schedule injuries is based on sound reason as the pain and suffering for each injury are not divisible and must obviously be one integrated whole, whether the injuries are more than one or not as their cumulative effect. This contention overlooks that the compensation is not payable for merely for pain or suffering but for personal injury only which results in pain and suffering. It may be that in determining compensation, the Claims Commissioner will have to take into consideration all circumstances including pain and suffering from respective injury, but unless there is a personal injury no compensation is payable under S. 32-A of the Railways Act and the Railway Accidents (Compensation) Rules, 1950 as amended. We are not concerned for mere pain and suffering undergone by the victim on account of the accident without any personal injury though such compensation for such pain and suffering may be available under the general law. Further, different injuries may cause different type of pain and suffering and such pain and suffering may separately and individually be felt and suffered even apart from the cumulative effect of pain and suffering from all injuries together. We are accordingly unable to accept the contention so strongly urged by Mr. Das as practically the foundation of his contention.

16. Mr. Das's next contention is that the word 'any' before injury in sub-rule (3) of R. 6 should be read as 'all' so that for all injuries suffered by the victim the compensation will be as may be determined by the Claims Commissioner as reasonable not exceeding Rs. 10,000. This contention is supported according to him, by the further provision that the Commissioner may determine the amount of compensation in all the circumstances of the case as reasonable. There is no dispute that in appropriate case, the courts have interpreted the word 'any' as 'all' but where the provisions are clear and free from ambiguity it is not permissible to read in statute what is not there. In this clause 'any injury' is being referred in the same clause as "other than an injury specified in the schedule or referred to in sub-rule (2)". This clear provision militates against the contention that 'any' should be read as 'all'. Further, the condition is that in determining the reasonable compensation the Claims Commissioner is to have regard to all circumstances of the case. This means that all circumstances in respect of each injury are to be taken into account and not that all circumstances on all injuries together are to be taken into account. Such interpretation as suggested will be in violation of the plain reading of the section. Further if there is a loss of use of a limb or member or more by the injuries of the accident, this interpretation of maximum compensation of Rs. 10,000 will lead to further inequity and hardship. That the interpretation suggested by Mr. Das is also not borne out by sub-rule (4) which provides that compensation shall be payable for each injury. Mr. Das's contention that all sub-rules are independent and this sub-rule has no application to sub-rule (3) is not acceptable. This sub-rule (4) is placed immediately after sub-rule (3) and there is no prohibition providing for its non-application to sub-rule (3) nor does the working of the sub-rule indicate its non-application to sub-rule (3). It also cannot be urged that in sub-rule (4) the injuries therein mentioned are confined to schedule injuries in absence of any such provision.

17. For all these reasons we are unable to accept the contentions made on behalf of the Union of India limiting compensation under sub-rule (3) of R. 6 to all injuries together as may be suffered by the victims of the accident. We hold on an interpretation of the compen-

sation rules that the compensation not exceeding Rs. 10,000 under sub-rule (3) of R. 6 relates to each injury resulting in pain and suffering which a victim of the accident sustains on account thereof, subject to the maximum overall statutory limit of Rs. 50,000 for all injuries so suffered. Further in determining the compensation, the Claims Commissioner will take into account all circumstances including the loss of income or earning capacity of the victim as also the pain and suffering endured by him on account thereof as may be deemed reasonable.

18. Mr. Das has also contended that in all cases there was no direction by the Claims Commissioner for compulsory medical examination of the persons injured by an accident as provided in Section 86. Thereby the several determinations of compensation which were based only on medical reports were contrary to law. On a perusal of S. 86 it appears to us that the Section is not mandatory and is merely directory. The provision that the authority may order that a victim may be examined by qualified medical practitioner is not essential condition for determining compensation and absence of such examination will not render the decision nugatory. We also do not find from the records of the cases that any application was made for any appointment in due time and at least no such appointment was prayed for till after the trial commenced. The prayer for such appointment was accordingly rightly rejected.

19. A preliminary objection has also to be considered. It is said that an appeal has been provided against the determination of the Claims Commissioner under S. 82-F (2) of the Act and accordingly the application under S. 227 is not maintainable. Without entering into the controversy that the right of appeal conferred on a 'person' is available to the Union of India, the orders of the Claims Commissioner were impugned on the ground that the compensation was determined in manner not authorised or warranted by the relevant law and accordingly such determination was without jurisdiction. In view of the challenge to determination of compensation as being without jurisdiction we think that the applications under Art. 227 are maintainable in law. We have further held in C. R. No. 954 of 1972, *State of West Bengal v. Jyotsna Bhowmik* dated February 8, 1977: (reported in AIR 1977 Cal 158) that the am-

endment made by the Constitution (42nd Amendment) Act, 1976 to Art. 227 does not affect pending proceedings.

20. On the basis of the conclusion we have arrived at in regard to the interpretation of the relevant sections and the rules, we shall consider the individual cases.

21. In Civil Revision No. 1305 of 1976 the Claims Commissioner has determined Rs. 10,000 each for the pain and suffering caused by two major injuries — fracture in right wrist and injury on the left knee joint under sub-rules (3) and (4) of R. 6 and Rs. 200 for loss of goods in all Rs. 20,200. The Claims Commissioner found the said compensation reasonable and acting under Art. 227 we do not find any scope or reason for interference as the decision suffers from no legal infirmity in exercise of jurisdiction. The Rule is accordingly discharged. There will be no order as to costs. We however set aside the compensation determined under R. 6 (2) as the said sub-rule is not applicable to the case.

22. In Civil Revision No. 1306 of 1976, the Claims Commissioner has determined for pain and suffering for each injury suffered for the total sum of Rs. 20,000, Rs. 8,000 on account of two fractures of the bridge of the nose and left ankle and Rs. 4,000 in respect of multiple injuries on the face and Rs. 200 was awarded for loss of goods in all Rs. 20,200. For the reasons already indicated we decline to interfere with the impugned order. The Rule is accordingly discharged. There will be no order as to costs. We however set aside the determination made by the Claims Commissioner under R. 6 (2) as the said Rule is not applicable.

23. In Civil Revision No. 1307 of 1976 the Claims Commissioner has found that the petitioner has been deprived of all capacity for work (word 'work' being rightly interpreted as occupational work) and the compensation was determined as Rs. 50,000 under R. 6 (2). In view of the above finding we decline to interfere with the above impugned order. The Rule is accordingly discharged. There will be no order for costs. We may add here that the determination of the compensation was also made on the alternative basis under sub-rules (3) and (4) and we also do not feel necessary to interfere with such determination as well.

24. In C. R. 1308 of 1976 the Claims Commissioner has determined compensation for pain and suffering caused by the

fractures of six ribs and the rate of Rs. 4,166 for each fracture, in all for Rupees 25,000 under sub-rules (3) and (4) of R. 6 and Rs. 200 for goods lost. For the reasons stated earlier we decline to interfere with the determination of the Claims Commissioner and the Rule is discharged. There will be no order as to costs. We however set aside the determination made by the Commissioner under R. 6 (2) on the alternative basis which we have already indicated has no application.

25. In C. R. 1309 of 1976 the Claims Commissioner has determined as reasonable compensation for the pain and suffering endured by the petitioner on account of three major injuries at the rate of Rs. 10,000 for each injury. Two major injuries are one fracture of right forearm and another of both bones of the left leg and also severe injury on chest causing severe pain which was continuing even on the date of trial. For reasons already indicated, we decline to interfere with the order and discharge the Rule. There will be no order as to costs. We however set aside determination made by the Commissioner on the alternative basis under R. 6 (2) which has no application.

26. In C. R. 693 of 1976 the Claims Commissioner found that the petitioner was incapable to do any work by reason of the compound fracture of the left leg on the knee joint and also ankle and the union has resulted in a mal-union with consequent loss of normal capacity to stand up or walk whereby the petitioner has become completely crippled. It was further found that due to his physical and mental condition the petitioner was incapable to do any work and accordingly compensation was determined at Rs. 50,000. We find no jurisdictional error or infirmity in the decision in determining the compensation under R. 6 (2) of the Rules. The Rule is accordingly discharged. We also sustained the determination made on the alternative basis under R. 6 (3) and (4) in respect of several injuries as indicated therein in the circumstances of the case. There will be no order as to costs.

27. In C. R. 694 of 1976 there was amputation of the left leg below knee with stump exceeding $3\frac{1}{2}$ " but below 5" and by reason of the internal injury of spine, chest and right leg as also the leg injury, the petitioner, according to the Commissioner has been deprived of all her capacity to do any work. The com-

compensation was accordingly determined at Rs. 50,000 under R. 6 (2). We do not find any jurisdictional error or infirmity in the aforesaid order. The Rule is accordingly discharged. There will be no order as to costs.

28. In C. R. 1363 of 1976 the Commissioner found that under Rule 6 (2), the petitioner was entitled to 40% of his earning capacity on Rs. 50,000 and on that basis he has awarded Rs. 20,000. We do not find that this Rule is applicable and we do not sustain the compensation founded on the above Rule. The Commissioner however has found alternatively that the petitioner is entitled to compensation under R. 6 (3) and (4) for three major injuries, viz., (1) fracture of right pelvis, (2) Osteo arthritis of the lumbar spine and (3) Osteo arthritis of left knee with pain and suffering caused on account of the above injuries. The Commissioner has awarded Rs. 10,000 for injury No. 1 and Rs. 5,000 each for injuries Nos. 2 and 3; in all Rs. 20,000. Further, a sum of Rs. 31 has been awarded for loss of articles. We do not find any jurisdictional infirmity in the above order of determination under R. 6 (3) and (4). The Rule is accordingly discharged. There will be no order as to costs.

29. In C. R. 1364 of 1976 the Commissioner has determined compensation under R. 6 (2) which we have already indicated has no application. The Commissioner has determined compensation on the alternative basis under R. 6 (3) and (4) for fracture of (1) right clavicle and (2) of right ankle besides hurt and multiple injuries. He has awarded Rs. 10,000 each for the pain and suffering caused thereby. We do not find any jurisdictional infirmity in respect of the said determination. The Rule is accordingly discharged. There will be no order as to costs.

30. In respect of C. R. 1053 of 1976 the Commissioner has awarded Rs. 25,000 less paid Rs. 1000 under S. 82-HH. The Commissioner found that there were two double fractures in the left leg for which he awarded Rs. 10,000 each and for the lumbo-sacral spinal injury he awarded Rs. 5,000, in all taking into account Rupees 1,000 paid already Rs. 24,000. We do not find any jurisdictional infirmity in respect of this determination made under R. 6 (3) and (4). We however set aside the determination made under R. 6 (2) as the said Rule has no application. The Rule is discharged. There will be no order as to costs.

31. In C. R. 1054 of 1976 the Commissioner has awarded Rs. 10,000 for the pain and sufferings caused by the major injuries for (1) contusion of lower 1/3rd of right thigh and knee joint he has determined compensation at Rs. 10,000 and together for (2) abrasion over right elbow and (3) tenderness of left upper part of tibia with abrasion he has awarded Rs. 10,000. We do not find any jurisdictional infirmity in the determination made under R. 6 (3) and (4). We however set aside the determination made under R. 6 (2) in the alternative which has no application. The Rule is discharged. There will be no order as to costs.

32. In C. R. 1055 of 1976 the Commissioner has found that the petitioner on account of injuries has been completely disabled from doing any work and he has awarded Rs. 50,000 under R. 6 (2). He has also awarded on the alternative basis under R. 6 (3) and (4) in all a sum of Rs. 50,000 for each of several injuries. The petitioner was paid Rs. 1000. Accordingly the amount payable has been determined at Rs. 49,000. We find no jurisdictional infirmity in the order and accordingly discharge the Rule. There will be no order as to costs.

33. In C. R. 1056 of 1976 the Commissioner has found six injuries which are fracture of six ribs and he has determined the compensation for the injuries at the rate of Rs. 2,850 and the pain and suffering therefrom also Rs. 2,850 in all Rs. 20,000 under R. 6 (3) and (4). We do not find any jurisdictional infirmity in such determination. The Rule is accordingly discharged. There will be no order as to costs. We however set aside the determination made under R. 6 (2) which according to us has no application.

34. In C. R. 1059 of 1976 there were fracture of cervical 4th vertebra in respect of which under R. 6 (3) compensation of Rs. 10,000 was determined. There are other multiple injuries, abrasion on upper surface of right foot, tenderness of both sides of neck and contusion of neck, multiple pain and suffering and for all these multiple injuries and the pain and suffering therefrom the Commissioner has awarded Rs. 10,000. A sum of Rupees 20,000 has been determined in respect thereof with Rs. 200 for loss of goods, in all Rs. 20,200. We do not find any jurisdictional infirmity in the above determination. The Rule is accordingly discharged. There will be no order as to costs.

35. In C. R. 1060 of 1976 the Commissioner has determined the pain and suffering caused by the injury on right finger (which has been deformed) at Rupees 10,000 and he has also determined the compensation for the injury to chest and ribs at Rs. 8,000 in all Rs. 18,000 under R. 6 (3) and (4). We do not find any jurisdictional infirmity in the above order and accordingly discharge the Rule. There will be no order as to costs.

36. In C. R. 421 of 1976 the Commissioner has determined the compensation at the rate of Rs. 10,000 each for (1) multiple abrasions over the left thigh, (2) abrasions on the shinbone and (3) for abrasion on the forehead and eyebrow leading to deterioration of eye sight, in all Rs. 30,000 together with Rs. 100 for loss of goods. The compensation in respect of injuries has been determined under Rule 6 (3) and (4). We do not find any jurisdictional infirmity in respect of the said order. The Rule is accordingly discharged. There will be no order as to costs.

37. Mr. Das has prayed for stay of operation of the order. We are not inclined to grant any stay in respect of persons involving total disablement. There will be no stay in respect of the Civil Rules Nos. 1307 of 1976, 693 of 1976, 694 of 1976, 1055 of 1976. We however grant stay of operation of the order in respect of the other cases for a period of four weeks.

G. N. RAY, J.:— I agree.
Ordered accordingly.

AIR 1977 CALCUTTA 402

MRS. MONJULA BOSE, J.

The Indian Cable Co. Ltd., Plaintiff v. Lodna Colliery Co. (1920) Ltd., Defendant.

Suit No. 583 of 1973, D/- 25-7-1977.

Coal Mines (Nationalisation) Act (1973), S. 20 — Interpretation — Suit against ex-owner of Nationalised Colliery in respect of claim arising before appointed day — Suit, if maintainable in Civil Court.

In certain cases a negative implication can be drawn from a positive enactment. But to oust the jurisdiction of a civil court, mere negative implication is not enough. The implication must be necessary and inevitable. The Act does not positively or by necessary implication take

away the jurisdiction of Civil Courts. On the contrary it appears that so far as claims against owners of coal mines are concerned, the jurisdiction of the courts is by necessary implication retained (vide S. 7).

The Act neither directly nor by implication takes away the jurisdiction of the Civil Courts to entertain suits against the ex-owners of the collieries nationalized, and particularly so in respect of claims arising before the appointed day, i.e. May 1, 1973. The said Act does not prescribe any forum against the ex-owners of the colliery for such claims and only lays down a procedure for having certain claims admitted and adjudicated upon by the Commissioner at the instance of creditors, to be realised out of compensation monies in the hands of the Government payable to such owners. AIR 1977 NOC 198 (Cal), Followed.

(Para 26)

Cases Referred: Chronological Paras
AIR 1977 NOC 198 (Cal): 81 Cal WN 380

	19
(1975) 45 Com Cas 574 (Bom)	9
AIR 1970 SC 833	13
AIR 1965 SC 1942	20
AIR 1964 SC 322	20
AIR 1919 All 275	15
AIR 1918 All 346	15
(1876) 4 Ch D 33: 46 LJ Ch 57	12

Jayanta Mitra, for Plaintiff; Hirak Mitra, for Defendant.

ORDER:— This suit has been filed by the plaintiff, inter alia, for a decree for Rs. 1,93,274.10 p. for price of goods sold and delivered to the defendant.

2. The plaintiff's case, in short, is that on October 3, 1972 it had sold and delivered to the defendant various electrical goods of the total value of Rupees 1,83,082.50 p. On October 9, 1972, the plaintiff to secure payment of its dues drew a Hundi and/or sola of exchange upon the defendant directing the latter to pay within 45 days from date the said sum to the plaintiff's bankers and the defendant duly accepted the same. On due date, the instrument was dishonoured by non-payment and in spite of demands the defendant has failed and neglected to pay the plaintiff's dues.

3. The defendant has filed its written statement denying the allegations in the plaint. It is contended further that the suit is not maintainable by virtue of the provisions of the Coal Mines (Nationalisation) Act, 1973 (hereinafter referred to as the said Act).

4. The only issue raised and settled at the trial was — Is the suit maintainable by reason of the provisions of the Coal Mines (Nationalisation) Act, 1973?

5. No witness was called to depose at the trial. The parties by consent tendered the Hundi and/or sola of exchange dated October 9, 1972 and two invoices both dated October 5, 1972 collectively marked Exhibit 'A' and an order dated January 13, 1977 of the Assistant Commissioner of Payments under the said Act (hereinafter referred to as the Commissioner) in Claim Case No. 325 of 1975, marked Exhibit 'B'.

6. Mr. Jayanta Mitra, learned counsel appearing for the plaintiff and Mr. Hirak Mitra appearing for the defendant have both contended that this Court was competent to consider subsequent events and made submissions keeping in view the said order.

7. It transpires that subsequent to the filing of this suit, in or about 1975, a claim for Rs. 1,93,274.10 p. was preferred by the plaintiff before the Commissioner for the price of the said goods, and also for Rs. 12,442.50 p. on account of sales tax thereof. This claim was adjudicated upon, and by the said order dated January 13, 1977 the Commissioner admitted the plaintiff's entire claim of Rupees 2,05,716.50 p. Under the said Act, the sum has now become payable by way of compensation out of funds in the hands of the Commissioner.

8. The defendant's main contention in this suit has been that in view of the provisions of the said Act, a Code in itself, all claims against the colliery owners could be made only before the Commissioner and this Court was not competent and had no jurisdiction to try and determine this suit.

9. Mr. H. Mitra, learned counsel for the defendant, relied on Ss. 20, 23 and 24 of the said Act which may be noted as hereunder. Section 20 of the said Act inter alia provides that:—

"Every person having a claim against the owner of a Coal Mine shall prefer such claim before the Commissioner within thirty days from the specified date."

Section 23 of the said Act reads inter alia:—

1.
2.

3. Every claimant who fails to file the proof of his claim within the time specified by the Commissioner shall be excluded

from the disbursements made by the Commissioner.

4. The Commissioner shall after such investigation as may, in his opinion, be necessary and after giving the owner of the coal mine an opportunity of refuting the claim and after giving claimant a reasonable opportunity of being heard, in writing, admit or reject the claim in whole or in part.

5. The Commissioner shall have the power to regulate his procedure in all matters arising out of the discharge of his functions including the place or places at which he will hold his sittings and shall, for the purpose of making any investigation under this Act, have the same powers as are vested in a Civil Court under the Code of Civil Procedure, 1908, while trying a suit, in respect of the following matters, namely:—

(a) the summoning and enforcing the attendance of any witness and examining him on oath;

(b) the discovery and production of any document or other material object producible as evidence;

(c) the reception of evidence on affidavits;

(d) the issuing of any commission for the examination of witness.

6.

7. A claimant who is dissatisfied with the decision of the Commissioner may prefer an appeal against the decision to the principal civil court of original jurisdiction within the local limits of whose jurisdiction the coal mine is situated. Mr. H. Mitra cited the case of Cricket Club of India Ltd. v. Madhav L. Apte, reported in (1975) 45 Com Cas 574 (Bom) for the following observations:—

"Statutory enactments, although expressed in affirmative language, are sometimes treated as having a negative implied and their provisions, though affirmative in words are not necessarily so, if they are absolute, explicit and peremptory. Every statute limiting anything to be in one form, although it bespoken in the affirmative, yet includes in itself a negative. When there is a special affirmative power given which would not be required because there is a general power, it is always read to import the negative. Necessary implication means, not natural necessity, but so strong a probability of intention that an intention to the contrary to that which is imputed to the legislature cannot be supposed."

Mr. H. Mitra also relied on a passage from Craies on Statute Law 5th Edition at page 244 which reads as follows:—

"Statutory enactments, although expressed in affirmative language, are sometimes treated as having a negative implied" ... In Viner's Abr. (i) the following rule is laid down: "Every statute limiting anything to be in one form, although it bespoke in the affirmative, yet includes in itself a negative" and in Bacon's Abr. (k) the rule given is, that "if an affirmative statute which is introductive of a new law direct a thing to be done in a certain way, that thing shall not, even if there be no negative words, be done in any other way."

10. On the strength of the above authorities Mr. H. Mitra submitted that in the instant case reading the statute in question, by necessary negative implication the jurisdiction of the Court has been taken away.

11. Mr. H. Mitra next argued that by reason of a prior adjudication by a competent authority the plaintiff's original claim had merged in the said order and the plaintiff did not have a cause of action in this suit.

12. In support of this contention Mr. H. Mitra cited the decision In re: European Central Rly. Co. Ex parte Oriental Financial Corporation reported in (1876) 4 Ch D 33. In that case a debenture holder brought an action against the company and recovered judgment for the principal debt with interest at 4% and costs. The company was ordered to be wound up and the debenture holder was admitted to prove for the judgment debt and interest at 4%. The debenture holder subsequently sought to prove an additional 2% on the original amount of the debenture. The Court held that the original debt having merged in the judgment, the claimant was only entitled to interest at 4%.

13. Mr. H. Mitra also relied upon Satish Kumar v. Surinder Kumar reported in AIR 1970 SC 833 for the proposition that "it is well settled that as a general rule all claims which are the subject-matter of a reference to arbitration merge in the award..... and after an award is pronounced no action can be started on the original claim which has been the subject-matter of the reference."

14. Mr. H. Mitra next contended that S. 11 of the amended Civil Procedure Code was an embargo to the plaintiffs

proceeding with this suit as the matter in issue having been finally decided by a competent court, although of limited jurisdiction has become *res judicata*.

15. Mr. H. Mitra finally argued that having elected to pursue its claim before the Commissioner the plaintiff could not again proceed with the same claim before this Court. He cited the case of Pitaram v. Jujhar Singh reported in AIR 1918 All 346 and Jauhari Singh v. Ganga Sahai reported in AIR 1919 All 275. In those two cases the litigant chose to avail himself of the remedy provided by S. 22 of the Provincial Insolvency Act, and his application was dismissed on merits. It was held that he cannot agitate the same issue thereafter in a Civil suit as the decision upon the merits had become final. It was contended that in the instant case, the claim of the plaintiff after adjudication by the Commissioner cannot be pursued once again.

16. Mr. J. Mitra, learned counsel for the plaintiff submitted on the other hand that, only two questions arose for determination in this case. Firstly, whether after the promulgation of the Coal Mines (Nationalisation) Act, 1973, a suit would lie in a Civil Court for a claim which could be realised under the Act, and secondly, if a claim had once been proceeded with before the Commissioner whether the same could be again agitated before a Civil Court, assuming it had jurisdiction.

17. Mr. J. Mitra did not dispute that the principles of *res judicata* or principles analogous thereto would apply in the instant case.

18. He conceded that if payments were received pursuant to any adjudication of the Commissioner, the same amount could not be again realisable under a decree of the Civil Court.

19. Mr. J. Mitra cited a decision of this Court in Barakar Coal Co. Ltd. v. N. C. Mehta reported in (1977) 81 Cal WN 380: (AIR 1977 NOC 198) (Cal). Here, a Division Bench held that the Coking Coal Mines (Nationalisation) Act, 1972 which was in *pari materia* with the statute in the instant case, did not take away the jurisdiction of the Civil Courts. The said Act, merely laid down the procedure for realisation of claims out of the compensation payable by the Government to the erstwhile owners. If a creditor chose not to avail of the procedure laid down in the Act, he merely ran the risk of not being entitled to enforce his claim against money in the hands of the

Commissioner. There was nothing to prevent execution of a decree against other assets if any, of the erstwhile owners.

20. Mr. J. Mitra contended next, that the exclusion of the jurisdiction of Civil Courts will not be assumed unless the relevant statute expressly provided for the same or that it was a necessary or inevitable implication of the statute that such jurisdiction would be excluded. The provision of a certain remedy by a particular statute may not by itself necessarily exclude the jurisdiction of the Civil Courts. He cited a decision of the Supreme Court in *Firm Illuri Subbayya & Sons v. State of Andhra Pradesh* reported in AIR 1964 SC 322 in support of his contention. He also cited the decision in the case *Kamala Mills Ltd. v. State of Bombay* reported in AIR 1965 SC 1942 and contended that where a statute created a special right or a liability and provided for a determination of the same by a Tribunal specially constituted in that behalf with exclusive jurisdiction, the question of ouster of the jurisdiction of Civil Courts could arise by necessary implication. In the instant case, however, the statute in question did not create any special right or a liability. All that it provided was a method of realisation of existing claims. There could not be any exclusion of jurisdiction of Civil Courts by necessary implication.

21. Mr. J. Mitra drew the attention of the Court to Ss. 7 (1) and 7 (2) (b) of the said Act, which read as follows:—

"7 (1) Every liability of the owner, agent, manager or managing contractor of a coal mine, in respect of any period prior to the appointed day shall be the liability of such owner, agent, manager or managing contractor, as the case may be, and shall be enforceable against him and not against the Central Government or the Government company."

"7 (2) (b) No award, decree or order of any Court, Tribunal or other authority in relation to any coal mine passed after the appointed day, but in relation to any matter, claim or dispute which arose before that day, shall be enforceable against the Central Government or the Government company."

22. He submitted that the liability of the owner before May 1, 1973 was expressly left enforceable against the owner and such liabilities were not meant to be agitated before the Commissioner and these sections by implication left the jurisdiction of Civil Court unaffected.

23. The case of the Cricket Club of India (supra) and the passage at p. 244 in *Craies Statute Law* (supra) lay down the general proposition that in certain cases a negative implication can be drawn from a positive enactment. But to oust the jurisdiction of a Civil Court, mere negative implication is not enough. The implication must be necessary and inevitable. The Statute in the instant case does not positively or by necessary implication take away the jurisdiction of Civil Courts. On the contrary reading the entire scheme it appears that so far as claims against owners are concerned the jurisdiction of the Courts is by necessary implication retained (vide S. 7).

24. The two Allahabad decisions cited have no application in the facts of this case. There, a Civil Court had come to a decision in one jurisdiction i.e. insolvency, thereafter the same court could not be called upon to adjudicate the same matter in another jurisdiction i.e. a Civil suit.

25. It is also necessary to consider the common contention that the decision of the Commissioner has become final and attracts the principles of *res judicata* and/or principles analogous thereto. It is to be noted that there is neither any pleading of *res judicata* nor any issue has been raised thereon. This however makes little difference to this case. If the finding of the Commissioner is *res judicata* then the matter is not to be agitated any further and a decree will follow. It is not the contention that the entire suit has become *res judicata*. If the matter is not *res judicata* even then, the same result follows as the defendant has not joined issue with the plaintiff as to the latter's claim. A decree can be passed on the basis of the decision of the Commissioner and/or on admitted facts, no issues having been raised on the merits of the case.

26. For the reasons above and following the principles laid down in the decision in *Barakar Coal Company's case* (supra) I hold that this Act, viz., Coal Mines (Nationalisation) Act, 1973 neither directly nor by implication takes away the jurisdiction of the Civil Courts to entertain suits against the ex-owners of the collieries nationalised, and particularly so in respect of claims arising before the appointed day, i.e. May 1, 1973. The said Act does not prescribe any forum against the ex-owners of the colliery for such claims and only lays down

a procedure for having certain claims admitted and adjudicated upon by the Commissioner at the instance of creditors, to be realised out of compensation monies in the hands of the Government payable to such owners.

27. In view of the above I answer the only issue raised in the affirmative and in favour of the plaintiff. There will be a decree for Rs. 1,33,082.52 p. against the defendant, interim interest at the rate of 6% per annum, interest on judgment at the rate of 6% and costs. In case any amount has been realised by the plaintiff from the Commissioner, the defendant will be entitled to pro tanto adjustment in the decree.

Suit decreed.

AIR 1977 CALCUTTA 406

MRS. MONJULA BOSE, J.

Ghulam Mohiuddin and others, Petitioners v. The Official Assignee, Calcutta and others, Respondents.

Suit No. 247 of 1971, D/- 18-7-1977.

Civil P. C. (1908), O. 6, R. 17 — Amendment of plaint — Suit for declaration — Amendment sought by deleting certain paragraphs and also alternative relief and incorporation of certain facts — Deletion and incorporation sought not altering character or changing the foundation in original pleadings and the same continuing to be a suit by owners for a declaration that deeds executed or tenancies created by defendant are null and void and not binding — Defendants can be compensated by costs and will not suffer any injury — Amendments allowed. (Case law discussed.) (Para 10)

Cases Referred: Chronological Paras

AIR 1972 SC 2091	8
AIR 1969 SC 1267	5
AIR 1967 SC 96	8
(1964) 68 Cal WN 965	9
AIR 1957 SC 357	6
AIR 1951 SC 177	7
AIR 1921 PC 50: 47 Ind App 255	6
(1887) 19 QBD 394	8

T. P. Das and B. K. Chatterjee, for Petitioners; Jayanta Mitra and S. Sinha (for No. 4) and Mrs. Pushpa Chowcharia (for No. 3), for Respondents.

ORDER:— This is an application for amendment of the plaint which has been instituted on May 28, 1971 inter alia for a declaration that the purported lease

dated June 23, 1964 referred to in paragraph 20 (a) of the plaint, the purported agreement of tenancy dated May 1, 1964, referred to in paragraph 20 (b) of the plaint, and the purported tenancy referred to in paragraph 20 (c) of the plaint are null and void, inoperative and not binding on the plaintiffs. Alternatively, a declaration that the sale of the premises No. 2, Chingrihatta Lane, Calcutta by the defendant 1 to the plaintiffs Nos. 1 and 2 and one Golam Rasul since deceased is null and void and for other reliefs. The petitioner's case in the plaint in short is that they are absolute owners of premises No. 2, Chingrihatta Lane, Calcutta, which premises was the subject-matter of various proceedings and purchased by the plaintiffs Nos. 1 and 2 and one Golam Rasul (since deceased) in execution proceedings at an auction sale held by the defendant No. 1.

2. The petitioners' further case is that after purchase of the said property the plaintiffs Nos. 1 and 2 and the said Golam Rasul came to know of certain proceedings filed by the defendant No. 2 Jamela Begum, against her husband Shamsuddin the previous owner of the said premises claiming Rs. 50,000 as dower, and that Shamsuddin had allowed an ex parte decree to be suffered against him. It is alleged that in execution of the decree passed in that suit No. 1172 of 1958, premises No. 2, Chingrihatta Lane, Calcutta was attached and sold in execution proceedings and purchased by the decree-holder wife. On 10th May, 1963, the plaintiffs Nos. 1 & 2 and the said Golam Rasul (since deceased) filed a suit being Suit No. 833 of 1963 in this Court against the defendants Nos. 1 and 2 inter alia for a declaration that the decree passed in the said suit No. 1172 of 1958 was null and void and for a declaration that the sale of the said premises in purported execution of the decree was also null and void, and for other reliefs. On September 1, 1967 the defendant No. 2 consented to a decree being passed setting aside the sale in her favour. Subsequently, the plaintiffs came to know that although the defendant No. 2 had no right, title and interest in the said premises, she had purported to create a lease in favour of the defendant No. 3 J. B. Norton & Sons Ltd., a purported tenancy in favour of the defendant No. 4 A. K. Products, and had also a purported tenancy in favour of the defendant No. 5 Bengal Rubber Manufacturing Co. and it is these agreements and/or leases executed by the de-

defendant No. 2 which are sought to be challenged in this suit. The defendants Nos. 3 and 4 have alone entered appearance and filed their written statements in this suit and the defendants Nos. 1, 2 and 5 have not entered appearance nor filed any written statement herein. The matter came up for hearing before me on June 24, 1977 and was part heard. On June 27, 1977 the next date of hearing the plaintiff's counsel prayed for an adjournment of the suit, and he submitted that it was necessary to amend the plaint for the purpose of determining the real controversy between the parties. Thereafter, this application for amendment was moved and Mr. T. P. Das, appearing with Mr. B. K. Chatterjee counsel for the petitioners conceded fairly and squarely that there had been blundering mistakes in the plaint which had to be deleted and also certain facts were necessary to be incorporated. In para 10 of the petition it was stated that the said amendments by deleting certain paragraphs and also the alternative relief prayed for, and the incorporation of certain facts were necessary for the ends of justice and for proper determination of the issues between the parties, and that no injustice will be caused thereby.

3. Counsel appearing on behalf of petitioners contended that the alternative relief for declaration that the sale of the said premises to the plaintiffs and the said Golam Rasul be declared null and void was an obvious mistake, as the plaintiffs had instituted this suit as owners of the said premises and there could be no question of challenging their own title. Counsel for the petitioners on the same grounds submitted that paragraphs 25 and 26 of the plaint wherein it is inter alia stated that the defendant Official Assignee should have known about the serious defects of title to the said property and that the Indenture of Conveyance dated March 29, 1963 executed by the Official Assignee in their favour was a sale of a mere right to litigate should be deleted from the plaint as the same had been stated by negligence and/or inadvertence and/or mistake on the part of the learned draftsman.

4. Counsel for the petitioners further contended that for determination of the real issues in the suit it is necessary to plead that the claim of the defendants 3, 4 and 5 as tenants under the defendant No. 2 amounts to an infringement of the plaintiff's rights and the same is a conti-

nuous cause of action arising from day-to-day and inasmuch as the last of such attacks was in January 1971, no part of the plaintiff's claim is barred by limitation.

5. Counsel for the petitioners submitted that the deletion and incorporation sought were curable by amendments and relied upon the decision in *Jai Jai Ram Monohar Lal v. National Building Material Supply, Gurgaon*, reported in AIR 1969 SC 1267, in support of the proposition that a party cannot be refused just relief merely because of some mistake, negligence, inadvertence, or even infraction of the rules of procedure. In that case the plaintiff who was the Manager of a joint family and was carrying on business under a business name, brought a suit in that business name and when objection was taken by the defendant that the firm being an unregistered firm was incompetent to sue, applied for an amendment stating that he himself had intended to file and had in fact filed the action on behalf of the family in the business name.

6. Counsel for the petitioners contended that however defective the pleadings, the object of the plaintiffs in filing this suit was to assert their title as owners of the premises 2 Chingrihatta Lane, Calcutta and a perusal of the plaint would make it quite clear that the plaintiffs had alleged that the defendant No. 2 had no right, title and interest in the property, and they challenged the deeds executed by the defendant No. 2 in favour of the defendants Nos. 3, 4 and 5 on the ground that the said deeds were null and void and not binding on the plaintiffs. The amendments sought therefore did not change the cause of action and in fact no legal right had accrued to the defendants which would entitle them to resist the amendments. Counsel for the petitioners relied upon the Privy Council decision in *Charan Das v. Amir Khan*, reported in 47 Ind App 255: (AIR 1921 PC 50) in support of the authority that although the power of the Court should not as a rule be exercised to take away a legal right which had accrued to the defendant by lapse of time, yet there are cases in which that consideration is overweighed by special circumstances. In that case the respondents sued for a declaration of their right of pre-emption over certain land, a form of suit which would not lie having regard to the proviso to S. 42 of the Specific Relief Act (1 of 1877). The trial Judge and the first

appellate Court refused to allow the plaintiff to be amended by claiming possession on pre-emption, since the time had expired for bringing a suit to enforce the right. Upon a second appeal the Court allowed the amendment to be made, there being no ground for suspecting that the plaintiffs had not acted in good faith, and the proposed amendment not altering the nature of the reliefs sought. Counsel for the petitioners also relied upon the decision in *L. J. Leach and Co. Ltd. v. M/s. Jardine Skinner & Co.* reported in AIR 1957 SC 357 and submitted that the power of the court to order amendment if required in the interest of justice is not affected even if the claim is time barred on the date of the application for amendment.

7. Mr. Jayanta Mitra appearing with Mr. S. Sinha counsel for the defendant No. 4 and Mrs. Pushpa Chowcharia, Advocate for the defendant No. 3 opposed the application mainly on the grounds that the proposed amendments would have the effect of converting the suit into an entirely different suit which had no foundation in the pleadings. They further contended that by reason of the averments challenging their own title, the plaintiffs had non-suited themselves. In support of their contentions, the respondents relied on the decision in *Firm Srinivas Ram Kumar v. Mahabir Prasad* reported in AIR 1951 SC 177 and submitted that the Court cannot grant relief to the plaintiffs on a case for which there was no foundation in the pleadings. This case is not of much help to the respondents as the petitioners herein had pleaded in the original plaint that they are the absolute owners of the property having purchased the same at a Court sale and they had further alleged that the defendant No. 2 had no authority to execute leases and/or to enter into tenancy agreements with the defendants Nos. 3, 4 and 5, and the said tenancies and/or leases were challenged as being null and void and not binding on the plaintiffs.

8. The respondents secondly contended that the amendments should not be allowed at this late stage of the proceedings and relied upon the decision in *Gauri Shankar v. M/s. Hindusthan Trust Pvt. Ltd.* reported in AIR 1972 SC 2091 where the plea of absence of a valid notice terminating the contractual tenancy was not taken in the original written statement and an amendment to include a new plea after 8 years was not allowed

on account of gross delay and laches. The Court in that case considered that the technical plea of the nature sought to be raised had it been raised at an earlier stage, the petition for eviction could have been withdrawn with liberty to file another petition after serving the requisite notice and in that view of the matter, the amendment was disallowed. The respondents also relied upon the decision in *A. K. Gupta & Sons Ltd. v. Damodar Valley Corporation* reported in AIR 1967 SC 96 in support of the proposition that amendment of pleadings, introducing a new case cannot be allowed if a suit on such a case is barred. In that case the Court following the Privy Council and the Supreme Court decisions cited by the petitioners held that "the general rule, no doubt is that a party is not allowed by amendment to set up a new case or a new cause of action particularly when a suit on new case or cause of action is barred: *Weldon v. Neale*, (1887) 19 QBD 394. But it is also well recognised that where the amendment does not constitute the addition of a new cause of action or raise a different case, but amounts to no more than a different or additional approach to the same facts, the amendment will be allowed even after the expiry of the statutory period of limitation". The three cases cited in my opinion are of no assistance to the respondents inasmuch as no new case or cause of action is being introduced by the proposed amendment and the incorporations sought amount merely to an additional approach to the same facts and no prejudice and/or injury will be caused to the respondents, if allowed.

9. The respondents in support of their contentions that the plaintiffs have non-suited themselves by challenging their own title and in any event are bound by the admissions in the plaint rely upon the decision in *Karanpura Development Co. Ltd. v. The State of Behar* reported in (1964) 68 Cal WN 965. In that case, the Court whilst considering whether the allegation in the written statement verified as submissions amounts to an admission, held that the pleadings regulate the cause and conduct of a suit and any attempt to rob the pleadings of this effect and character of admission at the stage of argument by suggesting the introduction of a new case would amount to placing the additional written statement on an entirely different footing. The question which arose for consideration in that suit was whether touzi No. 28

vested in the State of Bihar, and if so, on what date, and in view of the admission made by the contesting defendants in their additional written statements that the said touzi No. 28 vested in the State of Bihar by notifications dated 7th June, 1952 and September 11, 1952 the Court held the defendants could not retract therefrom. In that case, counsel for the defendants had contended that their written statements containing the said paragraphs were verified as submission and did not amount to admission and what the defendants meant was "purported" notification and the written statement should accordingly be amended by introducing the word "purported" before the word notification. I do not think that the ruling cited supports the proposition in the broad form as contended by the respondents. In that case, the cause of action pleaded in the plaint was examined and dealt with in the written statement and certain admissions were made regarding material facts constituting the cause of action namely that Touzi 28, had vested in the State of Bihar by several notifications. The Court held that the defendant having admitted the said facts should not be allowed by amendment to repudiate those admissions in relation to a material fact, which constitute the cause of action. The decision in my view cannot be held to apply to a case of a mistake and/or negligence where plaintiffs have filed a suit on the basis of their own title and have throughout challenged the authority of the defendant No. 2 to deal with the said property and are not seeking to introduce any new case by way of amendment. In my view the entire plaint has to be looked into to ascertain the cause of action in the suit and admissions have to be taken as a whole. In my opinion before the right of a party can be considered to have been defeated on the basis of an alleged admission by him, the implication of the statement made by him must be clear and conclusive. A perusal of the entire plaint would disclose that the plaintiffs throughout assert their rights as owner and seek reliefs on the basis of that right. Moreover, the pleadings sought to be deleted in paragraphs 25 and 26 of the original plaint herein, on a plain reading thereof cannot be said to be statements of fact but are submissions. There is nothing in law to prevent the plaintiff from withdrawing and/or deleting the same and/or giving up an alternative relief, which was not intended to be claimed. More-

over whether the plaintiffs purchased a mere right to litigate or not is to be determined by construing the deed of conveyance and there can be no admissions with regard thereto.

10. In my view the ultimate test is, can the amendment be allowed without injustice and whether the delay and/or negligence evidenced in this case is not sufficient to justify refusal in so far as it may be compensated in costs? To my mind the deletions and incorporations sought, will not in any manner alter the character and/or change the foundation in the original pleadings and the same continues to be a suit by the owners for a declaration that deeds executed or tenancies created by the defendant No. 2 are null and void and not binding upon them and the defendants can be compensated by costs and will not suffer any injury if amendment is allowed. In this view of the matter, I accept the submission and contentions of the petitioners and I allow the amendments as prayed for. The said amendments are to be effected within 7 days on a signed copy of the minutes. Additional written statement if any, to be filed within a week thereafter. Cross order for discovery within 3 days thereafter, inspection forthwith, and the suit to appear in the peremptory list 3 weeks hence. Petitioners to pay the costs of this application assessed at 40 G. Ms. for each of the other appearing parties including the costs of the filing of additional written statement if any. The said costs to be paid as a condition precedent within 5 days. In default, this application shall stand dismissed with costs.

Order accordingly.

APR 1977 CALCUTTA 409

N. C. MUKHERJI, J.

Pronati Mitra, Appellant v. Sachindra Nath Chatterjee, Opposite Party.

Second Appeal No. 1954 of 1968, D/-7-9-1977.

Civil P. C. (1908), O. 6, R. 17 and S. 100 — Amendment necessitated by subsequent events — Suit for eviction — Application for amendment of plaint seeking to add a ground of sub-letting — If can be allowed in second appeal.

A tenancy is determined by serving a notice under S. 13 (6), W. B. Premises

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Tenancy Act read with S. 106 of the Transfer of Property Act and as soon as a tenancy is determined, the cause of action for the suit arises. It is not necessary to state the grounds of ejectment in the notice. In such circumstances, if any ground is added subsequently that cannot change the cause of action or the nature of the suit. The suit remains one for eviction as it was at the date of commencement of the suit. The Court thus is not prevented even in a second appeal to take into consideration the subsequent events of sub-letting which according to the plaintiff, has taken place during the pendency of the appeal. Case law Rel. on. (Para 12)

Cases Referred: Chronological Paras
AIR 1977 Cal 108 : (1976) 3 Cal HC (N)

674	7
(1977) 4 Cal HC (N) 394	7
AIR 1975 SC 1146	4
AIR 1975 SC 1409	9
AIR 1974 SC 1178	8
AIR 1973 Cal 448	5
AIR 1969 SC 101	11
ILR (1969) 1 Cal 582	12
AIR 1964 Cal 1 (SB)	12
AIR 1931 Cal 45 : 34 Cal WN 634	11
AIR 1917 Cal 716 : 20 Cal WN 1099	10
AIR 1915 Cal 103 : 20 Cal LJ 107	10
(1907) 6 Cal LJ 74	10

Promotha Nath Mitter, for Appellant;
Ranajit Kumar Banerjee, for Opposite Party.

JUDGMENT:— This appeal is directed against the judgment and decree dated 30th January 1968 passed by Sri P. K. Banerjee, Additional District Judge, 7th Court at Alipore in Title Appeal No. 1000 of 1967 affirming those dated 4th May, 1967 passed by Sri R. K. Ghatak, Munsif, 2nd Court at Sealdah in Title Suit No. 483 of 1963.

2. The plaintiff filed the suit on the ground that she requires the suit premises for her own personal use and occupation. The defendant contested the suit.

3. The learned Munsif found that the plaintiff failed to prove that she requires the said premises for her own use and occupation. In that view of his finding the suit was dismissed. The plaintiff preferred an appeal before the learned Additional District Judge and the learned Additional District Judge dismissed the appeal. Being aggrieved, the present appeal has been filed.

4. During the pendency of this appeal on September 20, 1976 an application was filed for amendment of the

plaint which became necessary in view of the decision of B. Banerjee v. Anita Pan, reported in AIR 1975 SC 1146. The application was allowed and paragraph 6-A was incorporated in the plaint. Additional issues were also framed. Another application was filed on 9th of August 1977 for further amendment of the plaint for the purpose of taking into consideration some subsequent events which happened during the pendency of the second appeal. This application is very much opposed by the respondent. In this application it is stated that in the month of June 1976 the petitioner has come to know that in the year 1974 during the pendency of the second appeal the opposite party has sublet a portion of the suit premises to one Satyendra Kumar Roy, who is running a business there named and styled as "M/s. Innervias View X-Ray & Electro Therapy" and has taken out a trade licence from the Calcutta Corporation for running the said business in the suit premises. The petitioner states that the said subletting was done without the knowledge and prior consent of the petitioner and as such the opposite party has disentitled himself to the protection of the West Bengal Premises Tenancy Act and rendered himself liable to ejectment. It has further been stated that in the interest of justice and in order to shorten the litigation and avoid multiplicity of proceedings it is necessary for the petitioner that the plaint should be amended by inserting two new paragraphs therein after paragraph No. 6-A. Those new paragraphs have been numbered as 7-A and 7-B in the petition. Previously a similar application was filed and while disposing of the application on July 7, 1977 it was stated that the other application will be considered at the time of hearing of the appeal. The said application was opposed by the respondent and an affidavit of the respondent dated 2nd February 1977 and an affidavit of S. K. Roy dated 1st of March 1977 were filed: In those affidavits the story of subletting has been completely denied. It is not now necessary for me to decide whether in fact the respondent sublet the premises as alleged by the appellant. I am only required to consider whether such an application for taking into consideration the subsequent events of subletting can be allowed at this stage.

5. Mr. Promotha Nath Mitter, learned Advocate appearing on behalf of the appellant, in support of his contention

first refers to a decision reported in AIR 1973 Cal 448 (*Tinkari Das v. Jamuna Bala Dasi*). In this case it was a suit for recovery of possession of leased property on eviction of tenant on the ground of forfeiture of property. It was held that the Court could allow the amendment to add the additional ground of determination of lease by efflux of time. It was further held that for shortening the litigation and for ends of justice the Court is entitled to take into consideration the subsequent events even if there was a change in the ground of eviction where the nature and character of suit, which was for recovery of possession of the suit property on eviction of the defendant was not in any way affected.

6. Mr. Ranjit Kumar Banerjee, learned Advocate appearing on behalf of the respondent, submits that the facts of this case are completely different. Here forfeiture of property by efflux of time could not be disputed by the defendant and as such the Court could take notice of such an event. But the case will be different where the alleged subsequent event is very much challenged by the other side.

7. The next case relied on by Mr. Mitter has been reported in (1976) 3 Cal HC (N) 674: (AIR 1977 Cal 108) (*Ayesha Khatoon v. Durga Sahaya*). It is a Bench decision and their Lordships laid down the same principle as in the case referred to above. Mr. Mitter very much relies on a decision reported in (1977) 4 Cal HC (N) 394 (Dr. R. D. Anklesaria v. Mrs. Kamala Roy). This was a suit for ejectment under West Bengal Premises Tenancy Act on the ground of building and rebuilding. During the pendency of the suit the plaintiff made an application for amendment of the plaint by inserting other grounds, e.g. sub-letting, using the premises for a purpose other than residential for which it was let out. The application for amendment was allowed. The defendant came up to this Court challenging the order on the ground that the proposed amendments would change the cause of action and nature of the suit and the subsequent events could not be permitted to be introduced, if such introduction results in changing the nature and character of the suit or the cause of action on which the suit is based. Their Lordships after considering several decisions held that "under the West Bengal Premises Tenancy Act a tenant whose contractual tenancy had been determined by a valid notice to quit but against

whom no decree for eviction has been passed remains a tenant under the Premises Tenancy Act. Consequently a statutory tenant who continues to be the tenant under the Premises Tenancy Act because of special definition of the tenant is liable to be evicted under the said Act if he commits any illegal act of sub-letting and/or wrongful user of the suit premises within the meaning of S. 13 of the Premises Tenancy Act. In this context, a tenant governed by the Transfer of Property Act simpliciter and a tenant governed by the West Bengal Premises Tenancy Act stand on altogether different footing. In the former case, after the determination of the contractual tenancy the tenant ceases to be a tenant any further; as such raising of unauthorised structure by such person cannot attract the provisions of S. 108 of the Transfer of Property Act and no suit for eviction of a tenant for such wrongful act can be filed. But in the case of a statutory tenant under the West Bengal Premises Act, an act of sub-letting attracts the provisions of S. 13 of the Premises Tenancy Act and such tenant is liable to be evicted on the ground of sub-letting even if such sub-letting is made after the determination of contractual tenancy. Accordingly, the nature and character of the suit namely the suit for eviction of a tenant is not changed in the case of a tenant governed by the Premises Tenancy Act". It was further held that "In the circumstances of the case, the Court cannot ignore the subsequent events on the statutory principle of avoiding multiplicity of legal proceedings, shortening the course of litigation and achieving the ends of justice."

8. Mr. Mitter next refers to a decision reported in AIR 1974 SC 1178 (*Sikharchand Jain v. Digamber Jain Praband Karini Sabha*). It was held that "Ordinarily, a suit is tried in all its stages on the cause of action as it existed on the date of its institution. But it is open to a Court (including a court of appeal) to take notice of events which have happened after the institution of the suit and afford relief to the parties in the changed circumstances to do complete justice between the parties and to shorten litigation."

9. Mr. Mitter also refers to a decision reported in AIR 1975 SC 1409 (*Pasupuleti Venkateswarlu v. The Motor & General Traders*). It was held that "Where during the pendency of a proceeding

under Rent Control Legislation by the landlord for permission to evict the tenants, a subsequent event in the facts of the case takes place which has a material bearing on the landlord's right to evict, the approach of the High Court in revision, in taking cognizance of the new development cannot be said to be wrong or illegal". Mr. Mitter submits that if this amendment be allowed then it will not in any way change the cause of action. The suit was brought for eviction by determining the tenancy after serving notice according to law. It was not necessary for the landlord to state the grounds of eviction in the notice for ejectment. The cause of action for the suit will remain unchanged and that being so, in order to shorten litigation and for doing justice the amendment must be allowed.

10. Mr. Banerjee contends that a subsequent event which is admitted can be taken into consideration by the court, but a fact which is very much challenged should not be allowed to be added by the plaintiff. The proposed amendment will change the nature of the suit completely. The suit is one for reasonable requirement, that having failed the plaintiff now cannot add a ground in the plaint which is said to have taken long after the institution of the suit and long after the decrees of the courts below were passed. Mr. Banerjee in support of his contention refers to several decisions. He first cites to a decision reported in 20 Cal WN 1099: (AIR 1917 Cal 716) (Nuri Mian v. Ambica Singh). It was held: "The decree in a suit should ordinarily conform to the rights of the parties as they stood at the date of its institution. But there are cases when it is incumbent upon a Court of Justice to take notice of events which have happened since the institution of the suit and to mould its decree according to the circumstances as they stand at the time the decree is made. This principle will be applied where it is shown that the original relief claimed has, by reason of subsequent change of circumstances, become inappropriate or that it is necessary to base the decision of the Court on the altered circumstances in order to shorten litigation or to do complete justice between the parties". The same principle has been laid down in (1907) 6 Cal LJ 74 (Ram Ratan Sahu v. Mohant Sahu), 29 Cal LJ 107: (AIR 1915 Cal 103) (Rai Charan Mandal v. Biswa Nath Mandal) and 34 Cal WN 634: (AIR 1931 Cal 45)

(Sm. Balak Bala Dassi v. Jadu Nath Das) cited by Mr. Banerjee. I do not see how the principles of law enunciated in the above cases support Mr. Banerjee's contention.

11. Mr. Banerjee next relies on a decision reported in AIR 1969 SC 101 (S. Rajagopal v. C. M. Armugam). In this case before the Supreme Court request was put forward during the hearing of the appeal to direct the production of a baptismal register. Their Lordships were of opinion that there was no justification under O. 41, R. 27 of the Code for summoning it at this stage, particularly because even if that register is brought, a lot of oral evidence would have to be recorded in order to have the register properly proved and to give an opportunity to the party, against whom inferences follow from it, to meet those inferences. In the circumstances, the prayer was refused. Mr. Banerjee submits that in this case also if the amendment be allowed then the case will have to be heard afresh and new evidence will have to be adduced. If the plaintiff's allegation is correct that the defendant has sublet without the consent of the plaintiff then the plaintiff can very well bring a fresh suit for ejectment. Mr. Mitter joins issue and contends that there is absolutely no reason why the plaintiff will be compelled to bring another suit if the matter can be decided in this suit and that would avoid multiplicity of proceedings, shorten litigation and would meet ends of justice.

12. Mr. Banerjee next relies on a decision reported in ILR (1969) 1 Cal 582 (S. B. Sen v. Tejendra Chandra Bhowmik). In this case it was held: "Sub-letting need not subsist till the date of institution of the suit, it is sufficient if the fact of sub-letting without the written consent of the landlord is proved". It was further held: "Sub-letting was found concurrently by the Courts below which cannot be interfered with in a second appeal". Mr. Banerjee submits that the question whether the plaintiff reasonably requires the premises or not has been concurrently found by the courts below against the plaintiff and that being so, that question cannot be made in this appeal. As has already been stated at the present moment I am not hearing the appeal on merits. I am now dealing with the application filed by the plaintiff for further amendment of the plaint seeking to add a ground of subletting.

Mr. Banerjee also relies on a Special Bench decision reported in AIR 1964 Cal 1 (Surya Properties Private Ltd. v. Bimalendu Nath Sarkar). It has been held in this case that "It is not necessary to mention in a notice under S. 13 (6) the ground or grounds of ejectment for which a suit is to be instituted for recovery of possession. There is, however, nothing to prevent the landlord from setting out such grounds in the notice. The notice, however, will not be a notice of such grounds". This case without helping Mr. Banerjee rather helps Mr. Mitter. A tenancy is determined by serving a notice under S. 13 (6) read with S. 106 of the Transfer of Property Act and as soon as a tenancy is determined, the cause of action for the suit arises. It has been clearly laid down that it is not necessary to state the grounds of ejectment in the notice. In such circumstances, if any ground is added subsequently that cannot change the cause of action or the nature of the suit. The suit remains one for eviction as it was at the date of commencement of the suit. Taking into consideration the principles of law enunciated in the decisions referred to above I am of opinion that in the facts and circumstances of the present case the Court is not prevented even in a second appeal to take into consideration the fact of sub-letting which, according to the plaintiff, has taken place during the pendency of the appeal. I, therefore, allow the application filed by the appellant on 9-8-77.

13. The paragraphs marked as 7-A and 7-B in paragraph 7 of the petition be added in the plaint as paragraphs 6-B and 6-C. The plaintiff will have to prove the fact of sub-letting by adducing evidence. The defendant may also adduce evidence to disprove the fact. The plaintiff is also required to adduce evidence for the amendment which has already been allowed on her application dated 20th September 1976. For the purpose of adducing fresh evidence I think that the case should be sent back to the learned Munsif. The appeal is kept pending. Let the records go down to the learned Munsif who will give the plaintiff an opportunity to adduce fresh evidence on the question whether the plaintiff has any other reasonably suitable accommodation in Calcutta besides the suit premises and whether the defendant in 1974 has sub-let a portion of the suit premises to one Satyendra Kumar Roy. The defendant will also be permitted to challenge these

facts by adducing evidence. After recording such evidence as may be adduced by the parties the learned Munsif will send the same to this Court. As the matter is pending for a long time, the learned Munsif is requested to send the report as early as possible.

Application allowed.

AIR 1977 CALCUTTA 413

SANKAR PRASAD MITRA, C. J. AND
SALIL KUMAR DATTA, J.

The Imperial Tobacco Co. of India Ltd., Appellant v. The Registrar of Trade Marks and another, Respondents.

A. F. O. O. No. 190 of 1969, D/- 14-6-1977.*

(A) Trade and Merchandise Marks Act (1958), S. 9 (4) and (5) — Registration in Part B of the Register — Requirements for — Geographical name as trade mark.

In regard to registration in Part B of the register, provisions have been made in sub-s. (4) of S. 9. The essential conditions are that the mark in relation to goods proposed to be registered is (1) distinctive or (2) if not distinctive, capable of distinguishing the goods of the applicant from those of others. To be distinctive (which means adapted to distinguish) or capable of distinguishing the goods as aforesaid, there may be some inherent qualities or distinguishing characteristics in the mark itself which may make it so distinctive or capable of such distinguishing the goods of the applicant from others. The degree or extent of such inherent quality that may satisfy the requisite qualification for registration is left to the discretion of the Tribunal to determine, with his expert knowledge as the extent of quality is always variable from mark to mark. (Para 22)

If however the mark has no inherent distinguishing qualities or features, the distinctiveness may be acquired by appropriate user or other circumstances thereby overcoming the negative quality in the mark. Here again the Tribunal has been given the discretion to register a mark in the B part of the register taking into account the extent of the distinctiveness or capability of distinguishing the applicant's goods from others in fact acquired by reason of the use of the trade mark or other circumstances. There is thus actually no question of exclusion

*(Against judgment of P. B. Mukharji, J. reported in AIR 1968 Cal 582.)

of one clause by another in sub-s. (5) of S. 9 but all relevant factors are to be taken into consideration by the Tribunal who as an expert will exercise his discretion in the light of the provisions of law and judicial interpretation thereof. A decision upon registrability involves balancing an inherent tendency to unregistrability on the one hand against evidence showing distinctiveness in fact on the other. (Para 23)

All these are subject to the condition that where inherent unsuitability is so strong no degree of distinctiveness in fact can counterbalance it, so that some marks are totally unregistrable. This is for the reason that if any mark for example violates the requirements of the sub-cl. (d) of sub-s. (1) of S. 9 such mark because of inherent infirmity can never be distinctive or capable of distinguishing the goods of the applicants sought to be registered from others' goods either inherently or by reason of user of the mark or other circumstances. (Para 24)

A geographical name according to its ordinary signification is such mark inherently or otherwise incapable of registration subject to minor exceptions. A geographical name not used in geographical sense to denote place of origin, but used in an arbitrary or fanciful way to indicate origin or ownership regardless of location, may be sustained as a valid trade mark. (Para 25)

The test of cl. (b) of S. 9 (5) is if by reason of use the mark in fact has become distinctive as adapted to distinguish or is in fact capable of distinguishing the goods of the appellant from others. Case law ref. (Para 26)

(B) Trade and Merchandise Marks Act (1958), S. 9 (5), Cl. (b) — Acquisition of distinctiveness — Evidence of subsequent events not admissible.

The acquisition of distinctiveness should be on the date when the application is filed for registration, and the law does not require or provide for acceptance of evidence of subsequent events. (Para 26)

(C) Trade and Merchandise Marks Act (1958), S. 9 — Right to withdraw application for registration and file fresh one — Failure to withdraw earlier application till filing of second one — Effect. AIR 1968 Cal 582, Dissented from.

An applicant is entitled to withdraw an application and to make a second application so as to obtain the advantage of

a longer period of use. Held that it was open to the applicant not to withdraw its earlier application till the date of filing its second application; the earlier application was obviously kept pending to meet a possible challenge in the meantime. AIR 1968 Cal 582, Dissented from.

(Para 27)

(D) Trade and Merchandise Marks Act (1958), S. 9 — Distinctiveness — Evidence — Application for registration of mark on cigarettes — Affidavits of dealers, employees and smokers stating position in the market in respect of the goods — Acceptable. AIR 1968 Cal 582, Dissented from. (Para 28)

(E) Trade and Merchandise Marks Act (1958), S. 9 — Distinctiveness on the date of application — Evidence — No time limit fixed — Distinctiveness — Meaning.

There can be little dispute that the acquisition of distinctiveness of a trade mark is a long, laborious and time consuming process. Even so, no time limit is fixed by statute. There may be a case where for sundry reasons, a trade mark may attain the requisite distinctiveness within a "magically short period" and it is not possible to predicate or lay down any hard and fast rule about the period of time on the expiry whereof only a trade mark by user can attain distinctiveness required under the statute. Every case will depend on the attending circumstances and evidence adduced in support of the acquisition of distinctiveness. (Para 29)

Distinctiveness has been understood to mean "some quality in the trade mark which earmarks the goods so marked as distinct from those of other producers of such goods." (Para 30)

(F) Trade and Merchandise Marks Act (1958), S. 9 (5), Cl. (b) — Requirements — Registration of geographical name 'Simla' on wrapper of cigarettes — Held could not be registered in Part B of the Register.

Where the trade mark for registration was a label, used as wrapper of packets of cigarettes bearing the device of snow clad hills in outline with the word "Simla" written prominently in various panels of the label with small inscription that the content was a "a product" of the applicant company.

Held that though mark is composite in character, including word "Simla" in bold character with snow clad hills in outline and an inscription that the product is of the appellant in ordinary

character or manner, the word "Simla" is the prominent feature of the mark and distinctiveness is claimed in respect of the word "Simla". Even so the trade mark is not confined to the word 'Simla'. The 'Simla' label bears the inscription in ordinary character of being the product of the appellant whose products are of good and standard tobacco. It is accordingly not possible to say that the word 'Simla' by itself has acquired a secondary meaning to its customers, so as to conjure in their mind the cigarettes belonging to the appellant only and to none else even if the mark did not contain the inscription that it was a product of the appellant. A trade mark like 'Simla' on goods to distinguish them from other's goods as claimed must be the trade mark on its own without any assistance from indications like such goods being a product of the appellant. That is not the case possible here, as the mark 'Simla' does not stand on its own, so that it is not possible to say that by reason of the use, 'Simla' is adapted to distinguish or capable of distinguishing as the goods of appellants to the exclusion of goods of others.

(Para 31)

"Simla" is not an invented word; and though it has no reference to the character or a place of origin of the goods sought to be registered it is not inherently distinctive or adapted to distinguish as there is no sufficient distinguishing characteristic in the mark itself so that distinctiveness might be expected to result whatever the type and scale of user and thus secure an estimation of the positive quality in the mark. This infirmity brings the trade mark out of the operation of Cl. (a) of S. 9 (5). There is no other circumstance pleaded and the user of the trade mark 'Simla' by itself on the evidence adduced cannot be said in fact as distinctive or capable of distinguishing the goods of the appellants from others by use in consequence whereof Cl. (b) of S. 9 (5) has also no operation.

(Para 32)

Even assuming that the trade mark 'Simla' has become capable of distinguishing by use thus fulfilling the condition of Cl. (b) of S. 9 (5) entitling registration in Part B of the register, the mark 'Simla' is a geographical name and the snow-clad hills in outline in the mark indicate its use in ordinary or geographical signification, so that the mark is neither a fancy nor invented word nor one with a secondary meaning.

(Paras 33, 34)

Though Cl. (d) of S. 9 (1) which refers to geographical name in the ordinary signification relates to registration in Part A of the register, the distinctiveness of the trade mark which makes it capable of distinguishing the applicant's goods, as required in Cl. (b) of S. 9 (5) in respect of registration in Part B of the register, is a vital essential element for the purpose. Such distinctiveness is not possible for any geographical name in its ordinary or geographical signification.

(Para 34)

A trade mark in Part B of the Register will be registered if the mark is distinctive or capable of distinguishing the applicant's goods from others. In determining whether the mark is distinctive or capable of distinguishing, the Tribunal shall have regard if the mark is inherently distinctive or is inherently capable of distinguishing as aforesaid. If, not, the Tribunal will further examine if by reason of use or other circumstances, the trade mark has in fact become distinctive (as adapted to distinguish) or capable of distinguishing as aforesaid. All the same the Tribunal will refuse registration in respect of either part of the register if the trade mark is inherently incapable of being distinctive or inherently incapable of distinguishing the goods of the applicants from others. Such reasons obviously are the disabilities violating the provision of Cls. (c), (d) and (e) of sub-s. (1) of S. 9 of the Act which again may not be exhaustive. The courts of law have further imposed the condition that no trade mark should be allowed to be registered which may hamper or embarrass the traders or trade now or in future in respect of the place or country which is proposed to be registered.

(Para 37)

In view of the imprint of snow clad hills in outline in the trade mark 'Simla' the ordinary or geographical signification is obvious and patent even though it has no reference to the quality or place of origin of the goods. Further, registration of such trade mark may hamper or embarrass the trade or traders in or around the locality in future. Also 'Simla' is too prominent a city, the capital of Himachal Pradesh, well known in the country and abroad and in its ordinary or geographical signification it is inherently neither distinctive nor adapted to distinguish also nor capable of distinguishing the goods of the appellant as a particular trader from those of others, and is also

hit by the provisions of S. 9 (1) (d). Case law discussed; AIR 1968 Cal 582, Affirmed. (Para 39)

Cases Referred: Chronological Paras

1973 RPC 453: 1973 FSR 235	30, 38
1966 RPC 220: 1966 FSR 65	21
1965 RPC 590	20
(1954) 71 RPC 150	30, 36
(1938) 55 RPC 253: (1938) 2 All ER 377	30, 35
(1929) 46 RPC 99	30, 34

Noni Coomar Chakravarti, Rathindra Nath Das and B. C. Bachawat, for Appellant; B. Das, N. C. Roy Chowdhury and Dipak Shome, for Respondents.

SALIL KUMAR DATTA, J.:— This is an appeal from the judgment and order of P. B. Mukharji, J. (as his Lordship then was) dated May 24, 27 and 28, 1968* in an appeal under S. 109 of the Trade and Merchandise Marks Act 1958 (hereinafter referred to as the said Act). By that judgment the order of the Registrar of Trade Marks dated March 26, 1968 rejecting the application for registration of a trade mark filed by the Imperial Tobacco Company of India Ltd. in Part A of the Register or alternatively in Part B of the Register, was affirmed. The trade mark for registration is a label, used as wrapper of packets of cigarettes bearing the device of snow clad hills in outline with the word 'Simla' written prominently in various panels of the label with small inscription that the content is 'a product' of the applicant company. The application had been made for registration of the trade mark in class 34 in respect of manufactured tobacco. In course of hearing of this appeal, an application has been filed stating that the name of the appellant has since been changed to I. T. C. Ltd. under the provisions of the Companies Act, 1956 and accordingly name of the applicant has been amended to read as "I. T. C. Ltd." by order of this court and the cause title has been directed to be amended in consequence.

2. The appellant filed an application on April 20, 1960 for registration of the said trade mark in Part A of the register stating that the said trade mark was 'proposed to be used' in respect of manufactured tobacco in class 34. The Registrar of Trade Marks sent a reply on December 9, 1960 to the following effect:

"..... Word 'Simla' which forms the essential and distinguishing feature of the mark is a famous geographical name and is not registrable except on very

strong evidence of distinctiveness. No such evidence is possible as the mark is proposed to be used. You should therefore show cause why the application should not be refused....."

3. By its letter dated July 17, 1963 the appellant withdrew the application and on the same date filed a fresh application for registration of the same trade mark in class 34 in respect of manufactured tobacco. It was stated therein that during the period from April 1960 to June 30, 1963, about 42 crores of such cigarettes under the said trade mark had been sold throughout India while Rupees 15.50 lakhs had been spent as advertisement costs, the value of cigarettes sold being Rs. 1.14 crores. In support of the application the appellant also filed 22 affidavits from consumers, dealers and shopkeepers throughout the country to establish that the trade mark had in the meantime acquired distinctiveness and further, it appears the cigarettes have been in continuous use since then.

4. Thereafter there was a hearing of the application before the Deputy Registrar of Trade Marks, Calcutta and by letter dated December 29, 1965 issued by the Asstt. Examiner of Trade Marks the appellant was informed that the materials on record and arguments advanced on its behalf were duly considered by the Deputy Registrar and the said application for registration of the trade mark either in Part A or Part B of the Register had been refused by him.

5. The Deputy Registrar forwarded grounds of his decision under S. 18 (6) of the Act dated March 28, 1966 to the appellant on its requisition. Against this decision, the appellant preferred an appeal to this Court under S. 109 (2) of the Act which was heard by P. B. Mukharji J. and was dismissed as already stated. Thereafter the appellant preferred a further appeal to the Bench of this Court under S. 109 (5) which has been heard by us.

6. The Deputy Registrar who heard and considered the application held that though the trade mark is composite in character, its essential feature was 'Simla'. 'Simla' in its only and obvious signification is a well known geographical name and the chief town of a State and further the word 'Simla' was inherently not adapted to distinguish the goods of any particular trader. In regard to the contention that the mark had become distinctive on the material date by

*Reported in AIR 1968 Cal 582.

reason of extensive sales and advertisement, it was held that it would be unwise to accept the trade evidence as conclusive on question of acquired distinctiveness. The Deputy Registrar was unable to hold that the mark had become distinctive even on the material date while a word purely geographical in its signification, it was held, should not be registered whatever be the evidence as to its distinctiveness. As to deceptiveness of mark as to the place of origin of the goods, though no tobacco had been grown in or around Simla and there was no market as such for tobacco, an ordinary smoker without having any special knowledge, might associate the origin of cigarettes with Simla. The Deputy Registrar was also of opinion that it could not be predicated that the name would not be required, then or later, by other traders for bona fide use in respect of similar goods and thus it would be wrong, in exercise of his discretion, to accord registration of the name to the appellant.

7. As to registration in Part B of the register, the Deputy Registrar observed as follows:—

"..... I would refuse registration of the mark even in Part B of the Register because of its inherent incapacity to distinguish the goods of a particular trader and in the exercise of my discretion. Registration in any form, whether in Part A or Part B will confer a kind of monopoly right on the registrants and will naturally interfere with the bona fide rights of such traders in the locality, dealing with the same goods. Such monopoly rights must not be granted, otherwise wealthy applicants will divide amongst themselves all the names of important cities and towns of India to the embarrassment and prejudice of small traders....."

The application for registration, as already stated, was accordingly refused.

8. The learned Judge was also of opinion that 'Simla' was neither an invented word nor a word having a dictionary meaning. Its geographical signification was thus plain and unequivocal and the snow-clad hills in outline in the label made the geographical significance inescapable. Even so, it was held, a geographical word is not an absolute disqualification for the purpose of registration in Part A of the Register, as S. 9 (2) of the Act provides that a geographical name "shall not be registrable in Part A of the register except upon evidence of

its distinctiveness". A geographical name in its ordinary signification can thus be registered upon evidence of distinctiveness and such evidence will establish if the mark has acquired distinctiveness. This is the position in law in England and is also the statutory position in law under the Trade and Merchandise Marks Act of 1958. The affidavit evidence by dealers adduced by the appellant in support of the proof of acquisition of distinctiveness was considered insufficient to establish distinctiveness in "a magically short time of barely three years", as "distinctiveness of goods in a trade by association with a particular name requires normally a hard laborious time consuming process in business". The court agreed with the finding of the Registrar that the appellant's mark had not become distinctive and evidence is not such as to prove such distinctiveness.

9. As to registration in B Part of the Register, the Court referred to the guidelines laid down in sub-s. (5) of S. 9 which were considered to be illustrative and not exhaustive. The first consideration in Cl. (a) is that the mark must be inherently distinctive or is inherently capable of distinguishing. The second feature in Cl. (b) is where by reason of the use of trade mark or any other circumstances the trade mark is in fact so adapted to distinguish or is in fact capable of distinguishing. The Court was of opinion that even applying either of the tests, 'Simla' trade mark is neither inherently distinctive nor is inherently capable of distinguishing the appellant's goods. The court further found that the use of the trade mark 'Simla' or any other circumstances in fact does not make the appellant's trade mark adapted to distinguish or capable of distinguishing the appellant's goods. The court felt that the term 'capable of distinguishing' connotes both present capability with reference to goods, market, geography, consumer as also future potentiality, while adapted to distinguish implies the nature of adaptation in the mark and also what is in the mark which is adapted to distinguish. The court agreed with the discretion of the Registrar in refusing registration of the trade mark either in Part A or Part B of the Register and the appeal was accordingly dismissed. This judgment is reported in AIR 1968 Cal 582.

10. Mr. Noni Coomar Chakrabarti learned counsel for the appellant has challenged the judgment of Mukharji, J. as unsustainable in law on various points.

On the finding that a geographical word is not an absolute disqualification for registration, it was contended, the learned Judge should have accepted, upon the affidavit evidence, that the trade mark had acquired distinctiveness during the period of three years it had been offered to public who had spent over Rs. 1.14 crores for 'Simla' cigarettes, there being no rule of law laying down the minimal period for acquisition of distinctiveness by use. Though contending that upon the evidence adduced and unchallenged, the appellant is entitled to have its trade mark registered in Part A of the register, Mr. Chakravarti submitted that the appellant will be content, for the time being, if its trade mark is registered in Part B of the Register. Accordingly without giving up his objections in regard to the refusal of registration in Part 'A' of the Register, he concentrated his attack against the refusal of registration of the trade mark in Part B of the Register.

11. The relevant provisions of the Trade and Merchandise Marks Act, 1958 (Act 43 of 1958) are as follows:—

6. The Register of Trade Marks.— (1) For the purposes of this Act, a record called the Register of Trade Marks shall be kept at the Head Office of the Trade Marks Registry, wherein shall be entered all registered trade marks with the names, addresses and descriptions of the proprietors, notifications of assignments and transmissions, the names, addresses and descriptions of registered users, disclaimers, conditions, limitations and such other matters relating to registered trade marks as may be prescribed * * *

7. Part A and Part B of the register.— (1) The register referred to in S. 6 shall be divided into two parts called respectively Part A and Part B.

(2) The Register of Trade Marks existing at the commencement of this Act shall be incorporated with and form part of Part A of the register, and this part shall comprise all trade marks entered in the Register of Trade Marks existing at the commencement of this Act and all trade marks which after such commencement may be entered in Part A of the register.

(3) Part B of the register shall comprise all trade marks which after the commencement of this Act may be entered in Part B of the register * * *

9. Requisites for registration in Parts A and B of the register.— (1) A trade mark

shall not be registered in Part A of the register unless it contains or consists of at least one of the following essential particulars, namely:—

(a) the name of a company, individual or firm represented in a special or particular manner;

(b) the signature of the applicant for registration or some predecessor in his business;

(c) one or more invented words;

(d) one or more words having no direct reference to the character or quality of the goods and not being according to its ordinary signification, a geographical name or a surname or a personal name or any common abbreviation thereof or the name of a sect, caste or tribe in India;

(e) any other distinctive mark.

(2) A name, signature or word, other than such as fall within the descriptions in Cls. (a), (b), (c) and (d) of sub-s. (1) shall not be registrable in Part A of the register except upon evidence of its distinctiveness.

(3) For the purposes of this Act, the expression 'distinctive' in relation to the goods in respect of which a trade mark is proposed to be registered, means adapted to distinguish goods with which the proprietor of the trade mark is or may be connected in the course of trade from goods in the case of which no such connection subsists either generally or, where the trade mark is proposed to be registered subject to limitations in relation to use within the extent of the registration.

(4) A trade mark shall not be registered in Part B of the register unless the trade mark in relation to the goods in respect of which it is proposed to be registered is distinctive or is not distinctive but is capable of distinguishing goods with which the proprietor of a trade mark is or may be connected in the course of trade from goods in the case of which no such connection subsists, either generally or, where the trade mark is proposed to be registered subject to limitations in relation to use within the extent of the registration.

(5) In determining whether a trade mark is distinctive or is capable of distinguishing as aforesaid the Tribunal may have regard to the extent to which—

(a) a trade mark is inherently distinctive or is inherently capable of distinguishing as aforesaid; and

(b) by reason of the use of the trade mark or of any other circumstances, the

trade mark is in fact so adapted to distinguish or is in fact capable of distinguishing as aforesaid.

(6) Subject to the other provisions of this section, a trade mark in respect of any goods—

(a) registered in Part A of the register may be registered in Part B of the register; and

(b) registered in Part B of the register may be registered in Part A of the register; in the name of the same proprietor of the same trade mark or any part or parts thereof.

x x x x x

28. Rights conferred by registration.—

(1) subject to the other provisions of this Act, the registration of a trade mark in Part A or Part B of the register shall, if valid, give to the registered proprietor of the trade mark the exclusive right to the use of the trade mark in relation to the goods in respect of which the trade mark is registered and to obtain relief in respect of infringement of the trade mark in the manner provided by this Act.

(2) The exclusive right to the use of a trade mark given under sub-s. (1) shall be subject to any conditions and limitations to which the registration is subject.....

29. Infringement of trade mark.— (1) A registered trade mark is infringed by a person who, not being the registered proprietor of the trade mark or a registered user thereof using by way of permitted use, uses in the course of trade a mark which is identical with, or deceptively similar to, the trade mark, in relation to any goods in respect of which the trade mark is registered and in such manner as to render the use of the mark likely to be taken as being used as a trade mark.

(2) In an action for infringement of a trade mark registered in Part B of the register an injunction or other relief shall not be granted to the plaintiff if the defendant establishes to the satisfaction of the court that the use of the mark of which the plaintiff complains is not likely to deceive or cause confusion or to be taken as indicating a connection in the course of trade between the goods in respect of which the trade mark is registered and some person having the right, either as registered proprietor or as registered user, to use the trade mark.

12. As is well known, the laws relating to trade marks are based on and

similar to those in United Kingdom. The latest Act in that country is the Trade Marks Act 1938 consolidating as its preamble indicates, the Trade Marks Act, 1905, the Trade Marks Act, 1919 and the Trade Marks (Amendment) Act, 1937. The 1905 Act contemplated only one Register of Trade Marks and Parts A and B in the register were introduced for the first time by the Act of 1919, provisions whereof had been since also incorporated in 1938 Act. Section 2 of 1919 Act provided that where any mark has for not less than two years been in bona fide use in the United Kingdom upon or in connection with goods for sale in United Kingdom or exportation abroad, as indicating the goods of the proprietor, he may apply for registration in Part B of the Register and the Registrar may refuse registration if it is not inconsistent with the provisions of S. 11 (deception) or S. 19 (identical mark) or if he is not satisfied that mark has been so used as aforesaid or that it is capable of distinguishing the goods of the applicant. It may be noted that the conditions for registration in Part B Register according to the above section appears to be disjunctive, the intervening preposition being 'or'.

13. 'The Indian Act of 1958 repealed the earlier Trade Marks Act, 1940 and this earlier Act had no Part A or B in Register of Trade Marks maintained for the purpose. Part B of the Register was introduced for the first time in our 1958 Act and the Objects and Reasons for such introduction have been set out in respect of S. 9 (5) as follows:—

"The requisites for registration in Parts A and B of the register are laid down in this clause. A mark which is distinctive (a term the definition of which occurs in sub-s. (3), is to be understood to apply wherever it occurs in the Act—J.C.R.) that is to say, adapted to distinguish, is registrable in Part A of the register. A less stringent test is proposed for registration in Part B register. A trade mark which is not distinctive but which is capable of distinguishing may be registered in Part B of the register. The establishment of the Part B register will bring on the register many valuable trade marks which are in use but not registrable and facilitate the registration of these Indian owned marks in foreign countries where a certificate of home registration is a condition precedent to registration. Such a provision

is essential in view of the expanding export trade of this country....." S.O.R."

14. Sub-section (1) of S. 9 of the British Act of 1938 lays down the essential particulars for registration in Part A of the register and Cls. (a), (b), (c), (d) and (e) are similar to provisions of S. 9, sub-sec. (1), Cls. (a), (b), (c), (d) and (e) of our Act. Sub-sections (2) and (3) of S. 9 of our Act is similar to Cl. (e) of sub-sec. (1) and sub-s. (2) of S. 9 of the British Act and they are in similar terms. Sub-section (3) of S. 9 of the British Act provides the guidelines for determining whether a trade mark is adapted to distinguish in regard to registration in Part A which is as follows:—

"Sec. 9. (3) In determining whether a trade mark is adapted to distinguish as aforesaid, the tribunal may have regard to the extent to which—

(a) the trade mark is inherently adapted to distinguish as aforesaid; and

(b) by reason of the use of the trade mark or any other circumstances, the trade mark is in fact adapted to distinguish as aforesaid."

15. Sub-section (1) of S. 10 of the British Act of 1938 provides that a trade mark will be registrable in Part B of the register, if it shall be capable of distinguishing goods with which the proprietor is connected in course of trade from goods in case of which no such connection exists. Sub-section (2) of this Act of 1938 is as follows:—

"(2) In determining whether a trade mark is capable of distinguishing as aforesaid the tribunal may have regard to the extent to which—

(a) the trade mark is inherently capable of distinguishing as aforesaid and

(b) by reason of the use of the trade mark or of any other circumstances, the trade mark is in fact capable of distinguishing as aforesaid."

The guidelines for registration in Part A of the register as provided in S. 9 (3) of the British Act and those for registration in Part B of the register as provided in S. 10 (2) of the British Act have been combined in sub-ss. (4) and (5) of S. 9 of our Act of 1958 which we have quoted above. We have referred to the provisions of the British Act in some detail, as the decisions cited are under the said Act and naturally have reference to its provisions.

16. Mr. Chakravarti has referred to the above provisions and submitted that

the conditions for registration in Part B of the register have been fulfilled by the trade mark sought to be registered. He submitted that the trade mark is inherently distinctive or is inherently capable of distinguishing the appellant's goods from others or in the alternative, the trade mark by reason of its use has become adapted to distinguish or is capable of distinguishing as aforesaid, as required in Cls. (a) or (b) of sub-s. (5) of S. 9 of our Act. He submitted that these clauses are disjunctive and if any of the tests are satisfied, the appellant is entitled to registration at least in Part B register. These contentions have been strongly disputed by Mr. Roy Choudhury learned counsel for the respondents, who has referred to the conjunctive pronoun 'and' used in connecting Cls. (a) and (b) of S. 9 (5). The tests required for registration in Part B of the register are both as provided in Cls. (a) and (b), so that, it is submitted, even, if it can be said that the trade mark is capable of distinguishing by use it is neither inherently distinctive or inherently capable of distinguishing the appellant's goods to the extent necessary.

17. In Halsbury's Laws of England Third Edition, Volume 38, Art. 880 it is laid down as follows:—

"880. Requirements for registration in Part B.— To be registrable in Part B of the register, a mark must be capable of distinguishing goods for which it is registered and in judging of such capacity the tribunal may take into account both the inherent qualities of the mark and the extent to which user or other circumstance has rendered it so capable."

18. In Kerly's Law of Trade Mark and Trade Names (10th Edition) it has been observed:—

"3.72...It will be apparent on comparing S. 10 with S. 9 that so far as registrability is concerned, the differences between Part A and Part B are (1) that in the former the mark must be "adapted to distinguish" and in the latter "capable of distinguishing" (the context being virtually identical); and (2) that in the case of names, signatures or words which do not fall within paragraphs (a) to (d) of S. 9 (1), so that registration in Part A can only be granted upon evidence of distinctiveness such evidence is not required for Part B if it is possible without evidence to satisfy the tribunal that the mark is capable of distinguishing the goods."

19. Even so, the provisions both of Ss. 9 (2) (b) & 10 (2) (b) of the British Act and our S. 9 (5), Cl. (b) also require evidence of use to establish that the trade mark is in fact adapted to distinguish or capable of distinguishing the goods in respect whereof registration is sought for.

20. In considering the implication of the words "adapted to distinguish" for registration in Part A of the register, and words "capable of distinguishing" for registration in Part B of the register, in the case of 'Weldmesh' trade mark reported in 1965 RPC 590 (595), Lloyd-Jacob J. observed as follows:—

"..... Section 9 and Part A of the register are concerned with the registration of marks the primary significance of which is that they are adapted to distinguish the goods of the proprietor and the qualification for registration is the possession of such significance and this may be immediately evident or require use or special circumstances to demonstrate it.

Section 10 and Part B of the register are concerned with an alternative method of registration for marks which can be shown to be capable of distinguishing goods of the proprietor and this is secured by proof of the development of a secondary meaning which outweighs the apparently non-distinctive character of the mark when viewed in isolation. It is, therefore, not unreasonable to regard the two expressions 'adapted to distinguish' and 'capable of distinguishing' as being deliberately chosen so as to direct the particular enquiry aright, the former emphasising that it is because of the presence of a sufficient distinguishing characteristic in the mark itself that distinctiveness is to be expected to result whatever the type and scale of the user and thus secure an estimation of a positive quality in the mark; and the second that, in spite of the absence of a sufficient distinguishing characteristic in the mark itself, distinctiveness can be acquired by appropriate user, thereby overcoming a negative quality in the mark."

21. This interpretation was approved by Willmer L. J. in Court of appeal where the 'Weldmesh' case 1965 RPC 590 went up in appeal and the other lawlords did not expressly or by implication disapprove the proposition (vide 1966 RPC 220), as also noted in the judgment under appeal before us.

22. In regard to registration in Part B of the register, provisions have been

made in sub-s. (4) of S. 9. The essential conditions are that the mark in relation to goods proposed to be registered is (1) distinctive or (2) if not distinctive, capable of distinguishing the goods of the applicant from those of others. To be distinctive (which means adapted to distinguish) or capable of distinguishing the goods as aforesaid, there may be some inherent qualities or distinguishing characteristics in the mark itself which may make it so distinctive or capable of such distinguishing the goods of the applicant from others. The degree or extent of such inherent quality that may satisfy the requisite qualification for registration is left to the discretion of the Tribunal to determine, with his expert knowledge as the extent of quality is always variable from mark to mark.

23. If however the mark has no inherent distinguishing qualities or features, the distinctiveness may be acquired by appropriate user or other circumstances thereby overcoming the negative quality in the mark. Here again the Tribunal has been given the discretion to register a mark in the B part of the register taking into account the extent of the distinctiveness or capability of distinguishing the applicant's goods from others in fact acquired by reason of the use of the trade marks or other circumstances. There is thus actually no question of exclusion of one clause by another in sub-s. (5) of S. 9 but all relevant factors are to be taken into consideration by the Tribunal who as an expert will exercise his discretion in the light of the provisions of law and judicial interpretation thereof. As has been pointed out by Kerly, a decision upon registrability involves balancing an inherent tendency to unregistrability on the one hand against evidence showing distinctiveness in fact on the other.

24. All these are subject to the condition that where inherent unsuitability is so strong no degree of distinctiveness in fact can counter-balance it, so that some marks are totally unregistrable. This is for the reason that if any mark for example violates the requirements of sub-clause (d) of sub-s. (1) of S. 9 such mark because of inherent infirmity can never be distinctive or capable of distinguishing the goods of the applicants sought to be registered from others goods either inherently or by reason of user of the mark or other circumstances.

25. A geographical name according to its ordinary signification is such mark inherently or otherwise incapable of registration subject to such minor exceptions in regard to other aspects as noticed in judicial decisions referred hereinafter. In *Corpus Juris* Vol. 63 (1933 Edn.), in Chapter of Trade Marks etc. Art. 53 (pp. 356-7) it is stated:

"Geographical terms and words in common use to designate a locality, a country, or a section of country cannot be monopolised as trade marks; but a geographical name not used in geographical sense to denote place of origin, but used in an arbitrary or fanciful way to indicate origin or ownership regardless of location, may be sustained as a valid trade mark."

According to S. 9, sub-s. (1), Cl. (d) of our Act, a trade mark for registration in 'A' part of the Register must contain one or more words having no direct reference to the character or quality of the goods and not being according to its ordinary signification, a geographical name.

26. The first point for consideration is whether the test of Cl. (b) of S. 9 (5) has been satisfied in this case, that is, if by reason of use the mark in fact has become distinctive as adapted to distinguish or is in fact capable of distinguishing the goods of the appellant from others. The appellant has submitted affidavit evidence to prove that on the date of application on July 20, 1963 the goods (cigarettes) introduced in 1960, have in course of three years user reached fantastic figure of sale at over Rs. 1.14 crores with advertisement costs of over Rs. 15.50 lakhs. Mr. Chakraborty also filed an application before us in support of his case that the sale figure has been constantly increasing since along with costs of advertisement. We have however thought it fit to confine ourselves to facts as existing on the date of application which is the usual practice followed in such cases. Though evidence as to subsequent events may be admissible as throwing light on the question, we shall proceed on the basis that the 'Simla' cigarettes have not been withdrawn from the market and the sale of 'Simla' cigarettes has been continuing. Even so, the acquisition of distinctiveness should be on the date when the application is filed for registration, and the law does not require or provide for acceptance of evidence of subsequent events.

27. Before we proceed further, we shall consider two aspects of the contro-

versy in respect whereof grievance has been made before us. The learned Judge did not approve of the conduct of the appellant in not withdrawing its earlier application of April 20, 1960 till the date of filing the present application on July 20, 1963 while in the meantime the appellant went on building its trade. As laid down in Kerly's book referred to above, "an applicant is entitled to withdraw an application and to make a second application so as to obtain the advantage of a longer period of use and earlier application was obviously kept pending to meet a possible challenge in the meantime. That context, we say with respect, has no bearing on the merits of the application."

28. As to evidence also, the learned Judge found affidavits of dealers and employees unacceptable as they were not disinterested witnesses while the affidavits of smokers were held not dependable. We are unable to subscribe to this view, as who else other than dealers and their employees would be the fit persons to state of the position in the market, the consumers' demand and of the sale figures in respect of the goods. There is also no reason to disbelieve the smokers in the context of the huge sale figures even on the date of the application.

29. Let us now examine if the trade mark could have attained the distinctiveness on the date of application. There can be little dispute that the acquisition of distinctiveness of a trade mark is a long laborious and time consuming process. Even so, no time limit is fixed by statute and in the British Act of 1919 two years bona fide user was considered sufficient. There may be a case where for sundry reasons, a trade mark may attain the requisite distinctiveness within a "magically short period and it is not possible to predicate or lay down any hard and fast rule about the period of time on the expiry whereof only a trade mark by user can attain distinctiveness required under the statute. Every case will depend on the attending circumstances and evidence adduced in support of the acquisition of distinctiveness.

30. We shall now consider if the trade mark has attained 'distinctiveness' on the date of the application. 'Distinctiveness' has been understood to mean 'some quality in the trade mark which earmarks the goods so marked as distinct from those of other producers of such goods'. In *Liverpool Cables Case* ((1929)

46 RPC 99) the trade mark applied for registration was 'Liverpool Cables' in respect of electric cables. In *Glastonburys* case ((1938) 55 RPC 253), the trade mark was 'Glastonburys' in respect of slippers etc. In *Yorkshire* case ((1954) 71 RPC 150) the trade mark sought to be registered was 'Yorkshire' for solid-drawn tubes and capillary fittings of copper or copper-alloys. In *Tijuana Smalls* case 1973 RPC 453 the trade mark under consideration was 'Tijuana Smalls' the first word in block capitals. In all these cases the trade mark was a word or combination of words and it was claimed that by reason of user, the trade mark has acquired a secondary meaning distinguishing goods under the mark sought to be registered as of the applicants from similar goods of others.

31. In the trade mark we are concerned with there is no dispute that though the mark is composite in character, including word 'Simla' in bold character with snow clad hills in outline and an inscription that the product is of the appellant in ordinary character or manner, the word 'Simla' is the prominent feature of the mark and distinctiveness is claimed in respect of the word 'Simla'. Even so the trade mark is not confined to the word 'Simla' and in the affidavits filed by the smokers on behalf of the appellant, the deponents say that the 'Simla' label bears the inscription in ordinary character of being the product of the appellant whose products are of good and standard tobacco. It is accordingly not possible to say that the word 'Simla' by itself has acquired a secondary meaning to its customers, so as to conjure in their mind the cigarettes belonging to the appellant only and to none else even if the mark did not contain the inscription that it was a product of the appellant. A trade mark like 'Simla' on goods to distinguish them from others goods as claimed must be the trade mark on its own without any assistance from indications like such goods being a product of the appellant. That is not the case possible here, as the mark 'Simla' does not stand on its own, so that it is not possible to say that by reason of the use 'Simla' is adapted to distinguish or capable of distinguishing as the goods of appellants to the exclusion of goods of others.

32. As we have seen 'Simla' is not an invented word; and though it has no reference to the character or a place of origin of the goods sought to be register-

ed it is not inherently distinctive or adapted to distinguish "as there is no sufficient distinguishing characteristic in the mark itself so that distinctiveness might be expected to result whatever the type and scale of user and thus secure an estimation of the positive quality in the mark." This infirmity brings the trade mark out of the operation of cl. (a) of S. 9 (5). There is no other circumstances pleaded and the user of the trade mark 'Simla' by itself as we have seen, on the evidence adduced cannot be said in fact as distinctive or capable of distinguishing the goods of the appellants from others by use in consequence whereof Cl. (b) of S. 9 (5) has also no operation. In arriving at this conclusion, we are not influenced by the finding that three years' time is too short for acquisition of distinctiveness, as there may be cases where a product may attain such distinctiveness within a short spell of time for its inherent qualities of the product.

33. Even assuming that the trade mark 'Simla' has become capable of distinguishing by use thus fulfilling the condition of Cl. (b) of S. 9 (5) entitling registration in Part B of the register, there are other formidable hurdles in the way for registration as already noted.

34. As we have seen, the mark 'Simla' is a geographical name and the snow-clad hills in outline in the mark indicates its use in ordinary or geographical signification, so that the mark is neither a fancy or invented word nor one with a secondary meaning. As has been observed in *Karly's Treatise* (10th Edition).

"8.51. A word is not debarred from registration under S. 9 (1) (e) as a distinctive word merely because it is geographical and so cannot be registered under S. 9 (1) (d). Some geographical names can be inherently adapted to distinguish the goods of particular traders, but only if it can be predicated that they are such names as it would never occur to any other trader in such goods to use. At the other extreme, the name of a major industrial area or city will be totally unregistrable in respect of almost any goods. In between come the marks calling for more or less evidence that they are distinctive in fact..... It may tip the balance that the applicant can show that he has a natural or legal monopoly of the production of goods concerned in the place concerned; but that alone will not make a geographical name registrable without substantial evidence of distinctiveness."

Though Cl. (d) of S. 9 (1) which refers to geographical name in ordinary signification relates to registration in Part A of the register, the distinctiveness of the trade mark which makes it capable of distinguishing the applicant's goods, as required in Cl. (b) of S. 9 (5) in respect of registration in Part B of the register, it is a vital and essential element for the purpose. Such distinctiveness is not possible for any geographical name in its ordinary or geographical signification. Though the rule has been relaxed in respect of small and insignificant place or where there is no geographical significance of the mark, if the geographical name propounded for registration is the name of an important country or a large district, county or city of commercial importance or has a geographical signification, the mark will be refused registration notwithstanding evidence of long and extensive use. In Liverpool Electric Cable Co. Ltd.'s case ((1929) 46 RPC 99) where registration was sought for trade mark 'Liverpool' in both Parts A and B of the register it was held that the name of an important commercial centre as Liverpool, even though it may in fact be distinctive of the goods in respect of which it is sought to register it is not registrable. In respect of Monte Rosa Cigarettes or Tenerife Boiler Plates it was noted that there was no geographical significance in the mark which were mere pet names. It was further held that Liverpool being a well known city is geographical and not capable of distinguishing the goods of any particular trader and such registration will tend to embarrass traders who are in the trade or who may hereafter so trade as they would have difficulty in describing their goods if prevented from using the word 'Liverpool' Cables.

35. In *A. Bailey & Ltd. v. Clark, Son & Morland Ltd.* (1938) 55 RPC 253 known as *Glastonburys*' case, the respondents obtained registration as a trade mark of the word 'Glastonburys' used in connection with goatskin slippers and the appellants brought an action to rectify the register by expunging trade mark 'Glastonburys'. The prayer was allowed on the ground that (in spite of 'S') Glastonbury was a geographical name *prima facie* unregistrable under S. 9 and evidence was unsuitable to prove the word to be generally distinctive of the respondents' goods and the word was not adapted to distinguish. The court of appeal held that 'Glastonburys' had become distinctive and had acquired as secondary

meaning indicating exclusively the goods of the respondents. The House of Lords on further appeal held that the mark was not adapted to distinguish the goods of the respondents from those of other persons and its presence in the register would hamper rights of other traders. It was held that the word 'Glastonburys' is obviously a geographical name indicating the town of Glastonbury which had a reputation of manufacturers of Sheepskin slippers and parties were such manufacturers. It was observed that the respondents and future manufacturers of slippers in Glastonbury or their retail customers should not be hampered or restricted by the presence of the mark on the register while evidence was also insufficient to prove distinctiveness or that the mark was a fancy name.

36. In respect of Yorkshire Copper Works Ltd.'s application for registration of the trade mark 'Yorkshire' ((1954) 71 RPC 150) on its goods of copper tubes and capillary fittings, the House of Lords proceeded on the basis that the trade mark had acquired 100 per cent distinctiveness. It was held that as the mark is beyond question a geographical name, even though it has no direct reference to the character or quality of goods, it cannot be registered if it is according to its ordinary signification a geographical name. Lord Simonds L. C. observed that the Registrar could not have come to any other conclusion than refusal of the application.

"Unless having found distinctiveness in fact, he (the tribunal) needed to pay no regard to the other factor of inherent adaptability, he was faced with by the fact that there could not well be a geographical name less inherently adapted than Yorkshire to distinguish the goods of the appellants (applicants)" For just as a manufacturer is not entitled to a monopoly of a laudatory or descriptive epithet, so he is not to claim for his own a territory whether country, county or town, which may be in the future if it is not now, the seat of manufacture of goods similar to his own."

37. The position emerging from the statutory provisions and the judicial interpretations thereon appears to be that a trade mark in Part B of the Register will be registered if the mark is distinctive or capable of distinguishing the applicant's goods from others. In determining whether the mark is distinctive or capable of distinguishing, the Tribunal

shall have regard if the mark is inherently distinctive or is inherently capable of distinguishing as aforesaid. If not, the Tribunal will further examine if by reason of use or other circumstances, the trade mark has in fact become distinctive (as adapted to distinguish) or capable of distinguishing as aforesaid. All the same the Tribunal will refuse registration in respect of either parts of the register if the trade mark is inherently incapable of being distinctive or inherently incapable of distinguishing the goods of the applicants from others. Such reasons obviously are the disabilities violating the provision of Cls. (c), (d) and (e) of sub-s. (1) of S. 9 of our Act which again may not be exhaustive. The courts of law have further imposed the condition that no trade mark should be allowed to be registered which may hamper or embarrass the traders or trade now or in future in respect of the place or country which is proposed to be registered.

38. Mr. Chakrabarty has referred us to the decision in Tijuana Smalls' case where registration in respect of cigars was allowed in Part B (1973 RPC 453). Tijuana is a town in Mexico with inhabitants over 2 lakhs. Graham J. in allowing registration in Part B held that the question whether a geographical word could be registered was one of degree. These words whose primary signification is geographical and where the geographical significance is so general and so likely to be adapted or desired for use by more than one trader, it would be wrong, however distinctive they might in fact have become ever to allow one trader by registration to seek to monopolise them (e.g. Yorkshire or Liverpool). There are other 'geographical' words (e.g. North Pole) where, for one reason or other, when considered as applied to the goods in respect of which it is sought to register them, it is clear that the use is in fact clearly not geographical but fanciful, and was therefore, at least, capable, particularly by use, of being distinctive in practice of one of manufacturers' goods. Registration could, therefore, in such cases be allowed without causing inconvenience to or encroaching upon the reasonable trading rights of other manufacturers. The learned Judge found that the conclusion that Tijuana, an arid area, could well become tobacco producing centre being so improbable should be rejected.

39. Strong reliance was placed on this decision by Mr. Chakravarti who contend-

ed that Simla was never a tobacco producing centre or likely to be so and there is no chance or occasion for any prejudice being caused to other traders or manufacturers. He also referred to the Trade Marks Journal published by the Government containing advertisements of various geographical names for acceptance: 'Sheemla' for agarbati, 'Gulmarg' for wire, 'Shalimar' for engineering goods 'Kalighat' for biddies were cited and referred. In all such cases it appears that the names prima facie are fanciful without geographical or ordinary signification and at this stage it will not be proper to depend on those marks without further material or evidence. The propositions of law in respect of geographical names have been referred to above and in view of the imprint of snow clad hills in outline in the trade mark 'Simla' the ordinary or geographical signification is obvious and patent even though it has no reference to the quality or place of origin of the goods as at present advised. Further, registration of such trade mark may hamper or embarrass the trade or traders in or around the locality in future as held by judicial authorities cited earlier in similar cases. Also 'Simla' is too prominent a city, the capital of Himachal Pradesh, well known in the country and abroad and in its ordinary or geographical significance it is inherently neither distinctive nor adapted to distinguish also nor capable of distinguishing the goods of the appellant as a particular trader from those of others, and is also hit by the provisions of S. 9. sub-s. (1), Cl. (d) of the Trade and Merchandise Marks Act, 1958. In view of the above position, the Deputy Registrar in rejecting the application for registration is Part A or Part B of the Register rightly exercised his discretion conferred on him by law.

40. For the aforesaid reasons the appeal fails and is dismissed without any order for costs in the circumstances.

SANKAR PRASAD MITRA, C. J.:—
I agree

Appeal dismissed.

AIR 1977 CALCUTTA 426**SABYASACHI MUKHARJI, J.**Bareilly Electricity Supply & Co. Ltd.,
Petitioner v. State of U. P., Respondent.

Award Case No. 125 of 1976, D/- 16-5-1977.

(A) Electricity (Supply) Act (1948), Sch. VI, Paragraph XVII (2) (b) (xi) — 'Loan' — Bank overdraft is a loan and hence interest on bank overdraft is not admissible item of expenditure. (Para 6)**(B) Arbitration Act (1940), S. 30 — Error of Law — Reference of question as to whether interest on overdraft can be treated as interest on loan — Question being one of law, decision on it even erroneous cannot be interfered with by Court. (Para 9)****Cases Referred: Chronological Paras**
AIR 1973 SC 683 7
AIR 1955 SC 468 7
1933 AC 592:102 LJ KB 648 8
(1909) 2 Ch 226:78 LJ Ch 529 6

ORDER:— The petitioner is a company registered under the Indian Companies Act, 1913. During the year 1968-69 ending on 31st March, 1969 the liability on account of interest on bank overdraft to the extent of Rs. 60,580.39 was deducted out of the income for that year on the ground that it was an item of expenditure under sub-paragraph (xi) of paragraph XVII (2) (b) of the Sixth Schedule to the Electricity (Supply) Act, 1948 and was deductible for working out the clear profit. Such deduction was disputed on behalf of the State of Uttar Pradesh. According to the State of Uttar Pradesh such amount was not deductible. The said dispute was referred to arbitration under the provisions of S. 76 of the Electricity (Supply) Act, 1948. One of the questions referred, inter alia, was as follows:

"Whether the amount of Rs. 60,580.39 being the interest on overdraft is admissible as an item of expenditure during 1968-69 under sub-paragraph XVII (2) (b) (xi) of the Sixth Schedule."

2. The arbitrators have made the award by holding, inter alia, as follows:

"The amount of Rs. 60,580.39 being the interest on overdraft for the year 1968-69 is not admissible as an item of expenditure under paragraph XVII (2) (b) (xi) of the Sixth Schedule to the Electricity (Supply) Act, 1948."

3. The said award has been challenged in this application under the Arbitra-

tion Act, 1940 on the ground that there is an error of law apparent on the face of the award. Paragraph XVII of the Sixth Schedule to the said Electricity (Supply) Act, 1948 provides for certain definitions. Under sub-clause (2) of paragraph XVII clear profit has been indicated to mean the difference between the amount of income and the sum of expenditure plus appropriations, made up in each case as indicated in the different sub-clauses. Several expenditures property incurred under different heads have been allowed to be deducted. But sub-clause (xi) provides as follows:

"(xi) other expenses (excluding interest on debentures and loans), admissible under the law for the time being in force in the assessment of Indian Income-tax and arising from and ancillary or incidental to the business of electricity supply."

Sub-clause (iv-a) provides as follows:

"(iv-a) interest on loans borrowed from organisations or institutions approved by the State Government."

4. It was, therefore, contended that inasmuch as the arbitrators had excluded Rs. 60,580.39 which was interest on overdraft, the arbitrators had committed an error of law because what was excluded was not interest on overdraft but interest on debentures and loans. It was submitted that overdraft was not loan and in proceeding on the said basis the arbitrators had committed an error of law apparent on the face of the award. In considering whether overdraft was loan it may be mentioned that in Halsbury's Laws of England 4th Edn., Vol. 3 at paragraph 155 it has been stated that a customer might borrow from a banker by way of loan or by way of overdraft. A loan was a matter of special agreement. In the absence of agreement, express or implied from a course of business, a banker was not bound to allow his customer to overdraw.

5. In Banking Law and Practice in India by M. L. Tannan, 14th Edn. at page 324, it has been stated that when a customer requires temporary accommodation, he may be allowed to overdraw his current account, usually against collateral securities. From the customer's point of view this arrangement like the cash credit is advantageous as he is required to pay interest on the amount actually used by him. But when a Banker makes an advance on lump sum the whole of which is withdrawn and is sup-

posed to be repaid generally, wholly and at one time is called a loan.

6. These propositions, in my opinion, do not establish that an overdraft is not a loan. On the other hand, an overdraft can also be treated as a loan. See the observations in the case of *Cuthbert v. Roberts, Lubbock & Co.*, (1909) 2 Ch 226. Therefore, I am unable to accept the position that there is any error of law apparent on the face of the award because the Arbitrators have held that an overdraft was a loan. From one point of view an overdraft can certainly be treated as a loan. There is no error in holding that an overdraft is a loan.

7. There is a second aspect of the matter. It was contended on behalf of the respondent and, in my opinion, rightly, that the specific question of law as such had been referred to the Arbitrators and, therefore, any error committed by the Arbitrators could not be interfered with by this Court. Reliance in this connection was placed on certain observations of the Supreme Court in the case of *Thawardas Pherumal v. Union of India* reported in AIR 1955 SC 468 at p. 472 and in the case of *U.G.V.E.S. & Co. Ltd. v. U. P. Electricity Board*, AIR 1973 SC 683.

8. On the other hand, on behalf of the petitioner it was contended that in the facts of this case no specific question of law as such had been referred to and reliance was placed on the observations of Lord Wright in the case of *F. R. Ab-salom Ltd. v. Great Western (London) Garden Village Society Ltd.*, 1933 AC 592 at p. 616 of the report. It was submitted in this case that there was no submission on any specific question of law as such.

9. In this case, it is indisputable that Rs. 60,580.39 was interest on overdraft and there was no dispute between the parties on this aspect. No question was referred on this point. The reference was on the question whether such interest on the overdraft is admissible as an item of expenditure in paragraph XVII (2) (b) (xi) of the Sixth Schedule. Therefore, the question whether the interest on overdraft can be said to be interest on loan had been referred to and referred to specifically and that is a question of law. Indeed, the decision on this aspect is being challenged by the petitioner as an error of law. Therefore, the question that the Arbitrators had to adjudicate was a question of law. The question is whether such a question of law had been specif-

cally referred to the Arbitrators. The question had been specifically referred to and if it is a question of law, then it need not be recited in the reference, that what has been referred to the Arbitrators is a specific question of law. On behalf of the petitioner it was urged that the question referred to was not whether an overdraft is a loan. Such a decision was only incidental to the reference that had been made. I am, however, unable to accept this contention. Whether overdraft is a loan, is only putting differently the same question. The question, essentially and only is whether interest on overdraft is the same thing, as interest on loan and as such inadmissible under the relevant paragraph referred to hereinafter. That, in my opinion, is a question which had been referred to. Right or wrong decision on this aspect of the question, in my opinion, is immune from attack in an application for setting aside the award.

10. On behalf of the petitioner it was further urged that in view of Cl. IV, sub-cl. (b) of Cl. 2 of paragraph XVII of the Sixth Schedule, the Arbitrators were in error in making the award in the manner they did. The question had not been referred to the Arbitrators. Therefore, the Arbitrators were not concerned with this aspect of the matter. The award does not in any way conclude this contention or this controversy on this aspect of the matter.

11. It was also submitted that in the certified copy of the award forwarded to the petitioner one of the Arbitrators had signed the award. It appears however from the original award which has been filed in this Court that both the Arbitrators have signed the award. In the certified copy supplied to the petitioner there must have been a mistake.

12. During the pendency of this application the petitioner's name was changed to Bareilly Holdings Ltd. I direct that the cause-title and the body of the petition be amended in terms of prayer (a) of the petition for amendment filed in this Court today. Let that amendment be effected within a fortnight on a signed copy of the minutes.

13. In the view, however, I have taken on the main point urged, this application fails and is dismissed. In the facts and circumstances of the case, there will be no order as to costs.

14. There will be a judgment in terms of the award and costs of obtain-

ing and filing the award. The judgment upon award is stayed for six weeks.

Application dismissed.

AIR 1977 CALCUTTA 428

RAMENDRA MOHAN DATTA AND
S. K. HAZRA, JJ.

Foundation Overseas Ltd., Appellant
v. Punjab National Bank Ltd. and another, Respondents.

A. F. O. O. No. 250 of 1976, (Suit No. 1733 of 1965), D/- 22-4-1977.

(A) Civil P. C. (1908), O. 9, R. 9 — Conditional order of restoration — Order to furnish security as condition precedent to restoration of suit — Not valid.

In order to construe the expression 'or otherwise' in O. 9, R. 9 for a limited purpose viz. whether an order for deposit of money is contemplated within the meaning of the said expression it would be necessary to construe and compare the said provision with that of O. 9, R. 13 where in using similar expression some significant difference has been maintained. (Para 18)

Order 9, R. 13 provides for the Court's power to set aside the decree as against the defendant. The Court has discretion in imposing the terms upon the defendant for setting aside the ex parte decree. Here, not only the terms as to costs are for the Court's consideration but the question of 'payment into Court' has also to be taken into consideration. The difference in the language, is quite significant in respect of the two Rules being R. 9 and R. 13. A different consideration would arise when the defendant is in default. (Para 18)

Even though the expression 'or otherwise' has also been used in R. 13 yet the legislature thought it necessary to expressly add the words 'payment into Court' along with the expression 'or otherwise' in order to signify that this is a special consideration which attaches in the case of R. 13 and, accordingly the expression 'or otherwise' in R. 9 cannot include any term as to 'payment into Court'. In view of the absence of the expression 'payment into Court' in R. 9, it would surely be legitimate to hold that the legislature intended that the use of such a term viz., 'payment into Court' is not called for in respect of the provision which empowers the plaintiff to apply for

restoration of the suit when it is dismissed for default of appearance. (Para 20)

Further, although O. 9, R. 9 gives discretion to the Court in imposing terms for setting aside the order of dismissal, such discretion is only as to costs in one way or the other. In view of this, the Court has no power to order the plaintiff to furnish security as a condition precedent to restoration of suit. (Para 51)

(B) Letters Patent (Calcutta), Cl. 15 — 'Judgment' — Conditional order of restoration — Order is judgment and hence appealable. AIR 1963 Cal 9 and AIR 1926 Cal 668, Rel. on. (Paras 24, 41)

Cases Referred: Chronological Paras
AIR 1972 Cal 449 (FB) 39
AIR 1969 SC 823 45
AIR 1968 All 288 23, 49
AIR 1967 SC 849 22, 48
AIR 1963 SC 1116: (1963) 2 Cri LJ 186

22, 48
AIR 1963 Cal 9 26, 41
AIR 1960 SC 1080 22, 48
AIR 1927 Bom 1 (FB) 39
1943 AC 166: (1942) 2 All ER 425 23, 49
AIR 1926 Cal 668: 30 Cal WN 298 25, 41
(1911) 2 KB 688: 80 LJ KB 913 22
(1876) 1 Ex D 188: 45 LJ MC 78 23, 49

Goutam Chakraborty, for Appellant;
R. L. Sinha, for Respondents.

RAMENDRA MOHAN DATTA, J.:—
This appeal is from an order dated 25th June, 1976 passed by the Court below recalling the order of dismissal of the suit upon condition that the plaintiff would deposit a sum of Rs. 7,50,000 in cash with the Registrar of this Court and in default thereof, directing the plaintiff's application for restoration of the suit to stand dismissed for non-prosecution with no order as to costs.

2. The operative part of the order reads as follows:—

"It is ordered that upon the plaintiff depositing on or before the second day of July next the sum of Rupees Seven Lacs and fifty thousand in cash only with the Registrar of this Court the order of dismissal of suit dated the Eighth day of June instant be recalled and that this suit shall appear in the list on the fifth day of July next. And it is further ordered that the interim order of the appeal court shall continue till one week from the date hereof and that the parties herein be at liberty to mention before this Court for having an early date fixed for hearing of this suit. And it is further ordered that in default of furnishing such security within the time as aforesaid

this application shall stand dismissed. And it is further ordered that in any event the plaintiff do pay to the parties appearing as aforesaid their respective costs of and incidental to this application to be taxed by the Taxing Officer of this Court. And it is further ordered that all parties concerned do act on a copy of the minutes of this order signed by an officer of this Court being served upon them."

3. The suit herein has been filed on 23rd Sept., 1965, inter alia, for a decree declaring the bond dated 31st October, 1963 and its purported extensions void and for an order directing the said bond to be delivered up and cancelled. There are also prayers for ancillary relief by way of perpetual injunction in respect of the said bond. Incidentally, it may be mentioned that the said bond was executed in terms of a clause in the global tender which required the execution of such a bond. Accordingly, the said bond was furnished in favour of the State of Uttar Pradesh through the Punjab National Bank for the sum of Rs. 27,60,000. Thereafter, disputes arose by and between the plaintiff and the State of Uttar Pradesh in which the plaintiff contended that the bond should be delivered up and cancelled but the said defendant contended that the same should be enforced. Ultimately, the plaintiff filed this suit and prayed for its cancellation. The State of Uttar Pradesh was thereafter added as a party to this suit.

4. The plaintiff is a foreign company incorporated in Canada having its registered office at No. 2200 Yonge Street, Toronto, Ontario in Canada.

5. The admitted position is that the suit, for the first time, appeared in the peremptory list on 6th Jan., 1976 and, thereafter, from day-to-day till 15th Jan., 1976 when by and with the consent of the parties the plaintiff got it adjourned till 22nd Jan., 1976. Thereafter the suit appeared in the list on the 21st Jan., 1976 but it did not appear in the list thereafter till 26th May, 1976. It was again adjourned till 7th June, 1976 but this time upon mentioning by and on behalf of the plaintiff without notice to the defendants. Thereupon, at the instance of the defendant No. 2 the suit was directed to appear on 1st June, 1976 in the list marked as 'to be mentioned'. On 1st June, 1976 all the parties appeared and in their presence it was directed that the suit was to appear on 7th June, 1976. On 7th

June, 1976 the suit was called on when prayer for adjournment was made on behalf of the plaintiff but the same was refused. Thereupon pleadings were placed but ultimately it was passed over for the day with direction that it was to appear in the list on the next day at the top of the list. On the next day i.e. on 8th June, 1976 the suit was called on and the counsel for the plaintiff again prayed for adjournment which was refused and, thereafter, at the prayer of the plaintiff's counsel for leave to retire such leave was granted and counsel retired. Thereafter, the suit was dismissed for non-prosecution with no order as to costs.

6. Immediately thereafter on the next day i.e. on 9th June, 1976 an application was made on behalf of the plaintiff for recalling and for setting aside the order of dismissal of the suit. An ad interim order for stay of the order dated 8th June, 1976 was prayed for but the same was refused. The notice of motion was made returnable on 14th June, 1976. On the returnable date, viz., on 14th June, 1976 on behalf of the plaintiff the prayer for injunction and for ad interim stay of the order was renewed but the same was again refused. Directions were given for filing of affidavits.

7. Thereafter, on 16th June, 1976 the plaintiff preferred an appeal against the order for dismissal dated 8th June, 1976. The appeal was admitted and on 18th June, 1976 an ad interim order staying the operation of the order dated 8th June, 1976 was granted by the appeal Court till the disposal of the application for restoration pending before the trial Court.

8. The plaintiff's case in the petition for restoration is that Messrs. Orr, Dignam & Co., the solicitors for the plaintiff wrote to the plaintiff at its address as given in the plaint at Toronto, in Canada but the said intimation did not reach the plaintiff and it came back unserved. The envelope containing the intimation was produced in Court which showed the postal registration date as on 4th February, 1976. It is contended that there was a change in the address of the plaintiff and as such the solicitors could not get in touch with the client in spite of efforts. Having failed to come in touch with the client on 5th June, 1976 the solicitors sent a cable to Mr. Silverston at London so that Mr. Silverston could contact the plaintiff in Canada and intimate them about the hearing of the suit. In the petition it is alleged that in

the forenoon of 8th June, 1976 Messrs. Orr, Dignam & Co. received a telex message from the plaintiff in reply to the request made to the plaintiff by Mr. Silverston from London. In the said telex message the plaintiff reiterated the stand taken by Mr. Silverston and requested Messrs. Orr, Dignam & Co. to obtain a short adjournment, if possible. The said telex message was handed over to Court and it was also intimated to Court that there was a telephonic conversation between Mr. Silverston and Mr. P.N. Basu of the solicitors' firm. In spite of the aforesaid the learned trial Judge refused the adjournment and dismissed the suit.

9. As stated above, when the application for restoration of the suit was moved the learned Judge made the aforesaid conditional order.

10. On behalf of the plaintiff it is contended that in an application under O. 9, R. 9 of the Civil P. C. there is no scope for putting the plaintiff on terms to the effect that the plaintiff would be directed to deposit any money in court or to furnish security to the satisfaction of the Registrar as a condition precedent to the restoration of the suit. It is contended that if the learned Judge should so think fit the learned Judge could have asked the plaintiff to deposit the amount by way of costs or in the nature of costs. That would have been in compliance with the provision of O. 9, R. 9 of the Code.

11. Order 9, R. 9 of the Civil P. C. provides as follows:—

"(1) Where a suit is wholly or partly dismissed under R. 8, the plaintiff shall be precluded from bringing a fresh suit in respect of the same cause of action. But he may apply for an order to set the dismissal aside, and if he satisfies the Court that there was sufficient cause for his non-appearance when the suit was called on for hearing, the Court shall make an order setting aside the dismissal upon such terms as to costs or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit.

(2) No order shall be made under this rule unless notice of the application has been served on the opposite party."

12. It would appear from the above that broadly speaking the provision of O. 9, R. 9 has two limbs; the first limb gives a right to the plaintiff, whose suit has been dismissed, to make the application for restoration of the suit. In doing so it is an obligation on his part to satisfy the court that there was suffi-

cient cause for his non-appearance in Court when the suit was called on for hearing. Once he can satisfy the Court, he is entitled to an order setting aside the dismissal but upon such terms as to costs or otherwise as the Court might think fit to impose upon him depending upon the facts and circumstances of each case. The second limb provides for the power given to Court to make the conditional order setting aside the dismissal when the Court is satisfied that sufficient cause has been made out for the non-appearance of the plaintiff. In making such an order the Court has been vested with the discretion to decide what costs, if any, which would be imposed as a term to set aside such dismissal. Only this part of the order is discretionary. Otherwise when the Court is satisfied about the sufficient cause being made out for his non-appearance the Court is bound to make the order for setting aside the dismissal.

13. Another question arises as to whether in making an order under O. 9, R. 9 of the Civil P. C. it is competent for the Court to make an order directing the plaintiff to deposit any amount as a condition precedent for setting aside the order of dismissal. The point is worth considering because when such an order for deposit of any amount would be made as a condition precedent to the setting aside of the dismissal of the suit then the question may yet arise as to for whose benefit such deposit would be made, or, in other words, on what principle such a deposit would be ordered. It is to be appreciated that if the plaintiff would so deposit the amount the same would remain in the custody of the Court to the credit of the plaintiff's account until the Court would direct the return thereof to the plaintiff. Nobody else can be interested in such an amount excepting the plaintiff. If the plaintiff would win in the suit then it goes to him. If the plaintiff would lose in the suit then also the same would have to be returned to the plaintiff.

14. It is contended that the plaintiff being a foreign company the said security money should be held as a security for costs. To that the answer is that for that purpose the provision of O. XXV of the Code would be attracted and an order would have to be made under the said provision after the requirements contained therein would be satisfied; and the Court in making such an order would also be required to record its reasons as

provided thereunder. In short there are formalities attached to the making of such an order for security for costs. Such formalities had neither been complied with nor any such requirements were present before this Court. Accordingly, such a consideration could not have arisen in making the order herein. Moreover, even though such a huge amount has been directed to be deposited in Court yet no judgment has been delivered to indicate for what purpose the said amount was so directed to be deposited. It has yet to be considered as to what would happen to the said amount when the same would be deposited? What purpose would be served by making such an order for security?

15. It is contended that the expression "upon such terms as to costs or otherwise as it thinks fit" as appearing under O. 9, R. 9 would contemplate that the Court's powers in making the order are not limited to costs only, in imposing the terms. The Court has power to order deposit of any amount if the Court so thinks fit by virtue of the expression 'or otherwise' appearing in the said rule.

16. In my opinion, it is not necessary for us to decide as to what the expression 'or otherwise' would mean or include under this rule. It would be sufficient for us to restrict our consideration to the question whether the order for security, as has been ordered herein, by the learned Judge could be made within the scope of the expression 'or otherwise' in the said rule.

17. The expression 'or otherwise' has on various occasions since long time past been used by the legislature from time to time in connection with various statutes. In considering the very same expression 'or otherwise' in several decided cases the *ejusdem generis* rule has been applied and in several others the same principle has not been applied. Undoubtedly, the application or non-application of the *ejusdem generis* principle must depend on the construction of the language used in each of the particular statutes where the said expression has been used.

18. In my opinion, it cannot be said that any such decision would be an authority for the proposition with which we are concerned here. Nor is it necessary, as observed above, for us to go into that question. It is sufficient for us to construe the said expression for a very limited purpose viz., whether such an

order for the deposit of money is contemplated within the meaning of the said expression or otherwise, as provided in O. 9, R. 9 of the Code. In order to decide this question it would be necessary to construe and compare the provision of O. 9, R. 9 with that of O. 9, R. 13 where in using similar expression some significant difference has been maintained. The said O. 9, R. 13 reads as follows:—

"13. Application to be made to the Court which passed the decree. — The rule requires an application by the defendant for an order to set aside the decree. The application under the rule ought to be made to the Court which passed the decree though the presiding Judge may be different. Where, however, by reason of territorial re-adjustment, the Court itself becomes different the defendant is not debarred from applying to the Court which is seized of the matter." In respect of this Rule also there are two limbs. The first limb gives a right to the defendant to apply for an order to set aside the *ex parte* decree. Under this Rule he has to satisfy the Court either that the summons was not duly served or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing. If he can so satisfy the Court then he is entitled to an order for setting aside the said *ex parte* decree but upon condition as to be imposed by the Court. The second limb provides for the Court's power to set aside the decree as against the defendant "upon such terms as to costs, payment into Court or otherwise as it thinks fit". As regards the imposition of the terms, this part of the order is discretionary. The Court has to decide by using its discretion as to what would be the terms which should be imposed upon the defendant in setting aside the said *ex parte* decree. It is interesting to note that a significant difference in the language and expression has been used in respect of the imposition of the terms under this Rule. Here not only the terms as to costs are for the Court's consideration but the question of 'payment into Court' has also to be taken into consideration. The difference in the language, in our opinion, is quite significant in respect of the two Rules being R. 9 and R. 13. A different consideration would arise when the defendant is in default. Even though he satisfies the Court either that the summons was not duly served or that he was prevented by any sufficient cause when the suit was called on for hearing, the Court, under suitable

circumstances, is still empowered to consider the question of payment into Court and direct him to do so as has been specifically provided for under R. 13 because that amount when so deposited might go to help the plaintiff in realising his dues as and when he would obtain the decree against the defendant.

19. As stated above, different considerations arise when it involves the defendant in the suit. If the Court would find that the defence as made out is illusory and the plaintiff is most likely to succeed in the suit but the defendant is trying to delay the matter by applying for restoration of the suit after setting aside the *ex parte* decree, say for some technical defect in effecting the service, the Court can very well direct the defendant to deposit some amount by way of security in order that the plaintiff might not suffer prejudice. Ultimately when the plaintiff succeeds in the suit and gets a decree at a later point of time he can look to the said security in realising his decretal dues.

20. In my opinion, even though the expression 'or otherwise' has also been used in R. 13 yet the legislature thought it necessary to expressly add the words 'payment into Court' along with the expression 'or otherwise' in order to signify that this is a special consideration which attaches in the case of R. 13 and, accordingly, in view of the absence of the expression 'payment into Court' in R. 9 it would surely be legitimate to hold that the legislature intended that the use of such a term viz., "payment into Court" is not called for in respect of the provision which empowers the plaintiff to apply for restoration of the suit when it is dismissed for default of appearance. In Maxwell on The Interpretation of Statutes, Twelfth Edition, at page 282 it is stated 'From the general presumption that the same expression is presumed to be used in the same sense throughout an Act or a series of cognate Acts, there follows the further presumption that a change of wording denotes a change in meaning.' That being the position, we must hold that the expression 'or otherwise' in R. 9 cannot include any term as to payment into Court as has been directed by the learned trial Judge in this case.

21. I set out herein below the following cases which were placed before us for the consideration of the expression 'or otherwise' in different statutes. In some of these cases, the principle of

ejusdem generis rule has been applied and in some others it has not been applied.

22. Among statutes where the said expression 'or otherwise' has been used and where the Courts have applied the principles of *ejusdem generis* rule, some relate to fiscal statutes and some others relate to penal statutes as well. See *Kochuni v. States of Madras & Kerala*, AIR 1960 SC 1080 at p. 1097; *M. Narayanan v. State of Kerala*, AIR 1963 SC 1116; *George v. Controller of Estate Duty, Mysore*, AIR 1967 SC 849 at p. 851; Maxwell on The Interpretation of Statutes, Twelfth Edition at p. 298; *Attorney General v. Seacombe*, (1911) 2 KB 688 which was relied on by the Supreme Court in AIR 1967 SC 849 at p. 851.

23. Mr. Sinha, on the other hand, has relied on the following decisions where the *ejusdem generis* rule has not been applied in construing the expression 'or otherwise' in some of the statutes. See *Baij Nath Prasad v. State of U. P.*, AIR 1968 All 288 at p. 289; *National Association of Local Government Officers v. Bolton Corporation* L. R. 1943 AC 166 at p. 174; *Morant v. Taylor*, (1876) 1 Ex. D 188. As observed above, it is not necessary for us to go into details and decide that question in this application except only for the very limited purpose, as aforesaid.

24. Mr. Sinha has next argued that the appeal is premature because until the default clause became operative it could not be said that the conditional order was an order rejecting the application. The learned counsel contends that until the period for payment expires, the order would remain as an order allowing the application for restoration in which case no appeal would lie. In my opinion, such a contention cannot be accepted. The effect of a conditional order, such as is set out above, is that the order amounts to rejection of the application and not in an order allowing the application and if that be the position it would become a judgment within the meaning of Cl. 15 of the Letters Patent of 1865 and on that basis it would become appealable.

25. A Bench of this Court in the case of *Chattu Lal Misser v. Marwari Commercial Bank Ltd.*, 30 Cal WN 298 considered the effect of an order of a similar nature and observed at p. 303: (AIR 1926 Cal 668 at p. 670) as follows:—

"The effect of that order was that if the security was not given as directed a

decree would be drawn up as a matter of course without any further application to the learned Judge.

In my opinion, it was a judgment finally deciding that the defendant was not to be allowed to defend the suit unless he complied with the conditions contained in the order."

26. In another Bench decision of this Court in the case of *Mitra Mukherjee and Co. v. Ajit Kumar Sarkar*, AIR 1963 Cal 9 the effect of such a conditional order had been considered. It was observed at page 11 as follows:—

"The result of the order is that if security is not furnished a decree against the defendants would be drawn up and as a matter of fact a decree has been drawn up and the suit finally disposed of. It is absurd to suggest that such an order is not appealable or that there is any reason to hold that the appeal from the order directing security to be furnished is not maintainable. The effect of non-compliance with the order, as I have already pointed out, is to deprive the defendants of a valuable right, namely, to defend the suit and clearly in such a case it cannot be said that the order directing security, in default whereof a decree was to be drawn up against the defendants is not appealable."

27. With respect I entirely agree with the above views as expressed in the above decisions and, accordingly, hold that the appeal is not premature and the order appealed from is a judgment within the meaning of Cl. 15 of the Letters Patent. That being the position, it is not necessary for me to consider whether the order appealed from is without jurisdiction on the ground that such an order directing security to be furnished by the plaintiff could not be made under O. 9, R. 9 of the Civil P. C. and that, under such circumstances, it is always appealable whenever the order is passed without jurisdiction.

28. It must be held that the learned trial Judge was satisfied that sufficient grounds had been made out for recalling the order for dismissal and for restoring the suit; and that being the position the learned Judge could not have asked the plaintiff to furnish security for the restoration of its suit. The position might have been different if security would have been ordered by way of costs but the learned Judge has not given any such indication in making the said order for security.

29. Lastly, Mr. Sinha contends that since the order of the learned Judge has gone in his client's favour he should be allowed to uphold the same on the ground that in the facts and circumstances of this case no sufficient grounds were made out whereby the learned Judge could be satisfied that there was sufficient cause for the plaintiff's non-appearance when the suit was called on for hearing. According to Mr. Sinha the order can be supported without filing a cross-objection by his client. In my opinion, such a contention of Mr. Sinha is fallacious and cannot be accepted. Mr. Sinha contends that he is relying on the conclusion arrived at by the learned Judge. In my opinion, the learned Judge could have come to his conclusion and made the conditional order only after he had satisfied himself about the sufficient cause being made out by the plaintiff for his non-appearance. It was only under such circumstances that the learned Judge could have made such a conditional order. If Mr. Sinha would be allowed to challenge the finding of the learned Judge regarding his satisfaction about the plaintiff's making out the sufficient cause for non-appearance then Mr. Sinha would in effect be permitted to challenge the conclusion and not to support it; because, in the event of Mr. Sinha's contention being upheld then the conclusion arrived at by the learned Judge could not remain effective. If Mr. Sinha's contention is right that the learned Judge was wrong in arriving at his satisfaction that there was sufficient cause for the plaintiff's non-appearance then in that event the whole order will necessarily be different because Mr. Sinha's attack would go to demolish the entire order. That being so, in my opinion, Mr. Sinha cannot be permitted to reopen the question of the Court's satisfaction as to the existence of sufficient cause. I, accordingly, reject the contention of Mr. Sinha on this point.

30. That being the position, the appeal must be and is hereby allowed. The order of dismissal of the suit is set aside and the suit is restored to the list. Let the suit be mentioned before the trial Court for fixing an early date and the matter be proceeded with thereafter.

31. In any event, the plaintiff-appellant must bear and pay the costs to the defendant-respondent in respect of the application for restoration and for costs thrown away, if any, by reason of the dismissal for default of appearance being

set aside. There will be no order as to costs of this appeal.

HAZRA, J.:— 32. I agree with my Lord that his appeal should be allowed. As some interesting points have been urged in this appeal I wish to express my views also.

33. It is not necessary to state the facts as my learned brother has dealt with the same in his judgment. I will only say that the appellant is a foreign company incorporated in Canada. The appellant company as plaintiff instituted a suit in this Court on Sept. 23, 1973 claiming, *inter alia*, for a decree adjudging a bond dated Oct. 31, 1963 and the extensions of the bond as void and an order directing the bond to be delivered up and cancelled. There was also a prayer for perpetual injunction restraining the defendant No. 1, Punjab National Bank Limited and its agents and servants from giving effect to the bond or from making any payment thereunder to the State of Uttar Pradesh.

34. After filing the suit the plaintiff obtained an interim order restraining the State of Uttar Pradesh from giving effect to the bond or from making any payment under it till the disposal of the suit. After the interim order the State of Uttar Pradesh was added as a party to the suit. The plaint was amended to include relief against the second defendant.

35. The suit appeared in the peremptory list for hearing on several days. Several adjournments were taken. Ultimately, the suit appeared in the peremptory list on June 7, 1976. On June 8, 1976 the suit was called on for hearing. As the witnesses from Canada were not available the learned counsel for the plaintiff wanted leave of the Court to retire. Such leave was granted and the suit was dismissed on June 8, 1976 by the learned Judge. On June 9, 1976, a petition was filed by the constituted attorney of the plaintiff at Calcutta for setting aside or recalling the order of dismissal of the suit on June 8, 1976. In the petition prayer was also made for adjournment of the suit for a period of two months or for such other time as this Court may deem fit and proper in order to enable the petitioner to get its witnesses from Canada or to take out an application for issue of commission. Prayer was also made for injunction restraining the defendant, its agents and servants from giving effect to the bond dated October 31, 1963 or acting in terms there-

of or in accordance therewith. Prayer for stay of operation of the order dated June 8, 1976 was also made.

36. In the petition it is stated, *inter alia*, that on June 8, 1976 M/s. Orr, Dignam & Co. received a Telex message from the petitioner in reply to the request made to the petitioner by Mr. Silverston, a senior partner of M/s. Orr, Dignam & Co. who was then in U. K. A copy of the Telex message is annexed to the petition and the same is set out hereunder.

"We have been informed this morning by Mr. Silverston from London England about court action scheduled tomorrow Re: Yamuna Hydel Projects since we have received no prior notification we ask that the action be deferred until we receive legal advice to prepare Mr. (50) Silverston is contacting you directly with the same instructions we will wait for further advice from you O. G. Opier, Vice-President, Foundation Overseas Ltd. L Yonge Street Toronto Canada Tel. 416 361 4836."

The case of the petitioner is that there was and is sufficient cause for the petitioner for not being able to appear at the time of hearing and the said order dated June 8, 1976 should be set aside or recalled. In that application the learned Judge, on June 25, 1976, made the following order:

"It is ordered that upon the plaintiff depositing on or before the second day of July next the sum of Rupees Seven Lacs and fifty thousand in cash only with the Registrar of this Court the order of dismissal of suit dated the Eighth day of June instant be recalled and that this suit shall appear in the list on the fifth day of July next and it is further ordered that the interim order of the appeal court shall continue till one week from the date hereof and that the parties herein be at liberty to mention before this Court for having an early date fixed for hearing of this Court and it is further ordered that in default of furnishing such security within the time as aforesaid this application shall stand dismissed. And it is further ordered that in any event the plaintiff do pay to the parties appearing as aforesaid their respective costs of and incidental to this application to be taxed by the Taxing Officer of this Court. And it is further ordered that all parties concerned do act on a copy of the minutes of this order signed by an officer of this Court being served upon them."

37. Against this order dated June 25, 1976 this appeal has been preferred.

38. The first question for consideration in this appeal is whether the order dated June 25, 1976 is an appealable order.

39. Mr. Goutam Chakraborty for the appellant has submitted that this is a conditional order and as such it is appealable. He has referred to decisions in *Mitra, Mukherjee and Co. v. Ajit Kumar Sarkar*, AIR 1963 Cal 9 and *Narayan Putapa v. Vaikunt Subaya*, AIR 1927 Bom 1. He has also submitted that the order of the learned Judge is a judgment within the meaning of Cl. 15 of the Letters Patent, because, the effect of the order is that it is a final order and as such it is appealable. He has referred to the Full Bench decision of this Court in *Nurmul Hoda v. Amir Hasan*, AIR 1972 Cal 449. He further contends that the order of the learned Judge was without jurisdiction and as such void, because in an application to set aside the order of dismissal of the suit under O. IX, R. 9 of the Civil P. C. the learned Judge passed an order to deposit in cash the sum of Rs. 7,50,000 with the Registrar of this Court on or before July 2, 1976. The order so far as it provided that in default of depositing of such security the application shall stand dismissed is also without jurisdiction, because, the learned Judge was not competent to make an order for furnishing of security in an application for restoration of the suit under O. IX, R. 9 of the Civil P. C.

40. Mr. R. L. Sinha for the respondent, the State of Uttar Pradesh, on the other hand, has contended that under O. IX, R. 9 of the Civil P. C., the Court can make an order setting aside the dismissal upon such terms as to costs or otherwise as it thinks fit. The words 'or otherwise', according to Mr. Sinha, imply that the Court has power to pass any order other than an order for costs and so the learned Judge was competent to make the order granting security. He has also contended that there was no 'sufficient cause' for non-appearance of the plaintiff when the suit was called on for hearing.

41. An order under O. IX, R. 9 of the Civil P. C. rejecting an application for an order to set aside the dismissal of a suit is appealable under O. XLIII-C of the Civil P. C. An order made by a Judge of the Original Side of the Court rejecting an application for restoration

is also a judgment within the meaning of Cl. 15 of the Letters Patent and as such it is appealable. The order of the learned Judge in the instant case is a conditional order. The effect of the conditional order is that if the sum of Rs. 7,50,000 is not deposited in cash in Court within seven days the application shall stand dismissed. The said sum of Rs. 7,50,000 is stated in the order as 'such security'. Thus the effect of non-compliance of the condition mentioned in the order is that the application for restoration of the suit is rejected unless the security to the extent of Rs. 7,50,000 is deposited in Court within the time mentioned in the order. The further effect of non-compliance of the condition is to deprive the plaintiff of a valuable right, viz., right to proceed with the suit. Therefore, in my view, the order is a judgment within the meaning of Cl. 15 of the Letters Patent. The order finally determines the rights of the parties by dismissing the suit, unless the condition is complied with. So, appeal lies against the order on the same principle as laid down in the case of *Mitra, Mukherjee and Co. v. Ajit Kumar Sarkar*, AIR 1963 Cal 9 and the case of *Chattu Lal Misser v. Marwari Commercial Bank Ltd.*, 30 Cal WN 298 : (AIR 1926 Cal 668).

42. The other question raised before us is whether the learned Judge was competent to pass an order under O. IX, R. 9 of the Civil P. C. imposing a condition that a sum of Rs. 7,50,000 must be deposited in Court by the plaintiff within seven days as security.

43. Order IX, R. 9 of the Civil P. C. does not provide for payment of security. It does not even say that the Court can order payment or deposit of money in Court by the plaintiff. It only says that the Court can set aside the dismissal 'upon such terms as to costs or otherwise as it thinks fit.'

44. The power of the Court to make payment into Court which appears in O. IX, R. 13 of the Civil P. C. is significantly absent in O. IX, R. 9. Order IX, R. 13 provides that the Court may set aside ex parte decree 'upon such terms as to costs, payment into Court or otherwise as it thinks fit'. Therefore, prima facie, the learned Judge was not competent to make an order for payment into Court or deposit the sum of Rs. 7,50,000 under O. IX, R. 9 of the Code as terms for restoration of the suit of the plaintiff which was dismissed.

45. Reference may be made in this connection to the decision of the Supreme Court in the case of *Official Trustee of West Bengal v. Sachindra Nath Chatterjee*, AIR 1969 SC 823. In that case Supreme Court laid down the law thus:

"Before a Court can be held to have jurisdiction to decide a particular matter it must not only have jurisdiction to try the suit brought but must also have the authority to pass the orders sought for." Here, question arises wherefrom the Court derived the authority or power to pass the order for furnishing security or payment into Court to the extent of Rs. 7,50,000?

46. On this point Mr. Sinha has argued that under O. XXV of the Civil P. C., the Court may, at any stage of the suit, of its own motion, order the plaintiff to give security for payment of costs likely to be incurred by the defendant. Did the Court make the order for security having regard to O. XXV of the Code? Obviously, this is not so. Because under O. XXV of the Code if the Court makes an order suo motu for security to be furnished by the plaintiff for payment of the cost of the suit of the defendant the Court must record the reasons for such an order. In the instant case no judgment has been delivered. The order is not a speaking order. The learned Judge was dealing with an application under O. IX, R. 9 of the Civil P. C. So, I am unable to accept the contention of Mr. Sinha on this point.

47. Mr. Sinha has also argued that the words 'or otherwise' in O. IX, R. 13 of the Code give the Court power or authority to make the order for giving security to the extent the Court has done. According to him, the Court has power to make any order other than to order for payment of cost by reason of the words 'or otherwise' in O. IX, R. 9.

48. Mr. Chakraborty on the other hand has argued that the words 'or otherwise' must be construed by applying 'ejusdem generis rule'. He has referred to several cases, viz., (1) *Narayanan v. State of Kerala*, AIR 1963 SC 1116 at p. 1118; (2) *Kochuni v. State of Madras*, AIR 1960 SC 1080; (3) *George Da Costa v. Controller of Estate Duty*, AIR 1967 SC 849 at p. 851 and (4) *Maxwell on the Interpretation of Statutes*, 12th Edition pages 298 and 300.

49. Mr. R. L. Sinha, on the other hand, has submitted that 'Ejusdem Generis Rule' is not applicable. Mr. Sinha has

also cited several cases; viz., (1) *Bai Nath Prosad v. State of U. P.*, AIR 1968 All 288; (2) *National Association of Local Government Officers v. Bolton Corporation*, 1943 AC 166 and (3) *Morant v. Taylor*, (1876) 1 Ex D 188 at p. 193.

50. Now, the question is what do the words 'or otherwise' mean in O. IX, R. 13 of the Civil P. C. There is no case directly on the point. The cases cited by the learned counsel are all cases on different statutes and constructions of the words 'or otherwise' were made under entirely different context. So it is not necessary to discuss the cases.

51. I shall now turn to O. IX, R. 9 of the Code and consider its applicability on the facts of the case before us. The words "shall make an order setting aside the dismissal" in O. IX, R. 9 indicate that the Court is bound to set aside the order of dismissal if the Court is satisfied that there was sufficient cause for non-appearance of the plaintiff when the suit was called on for hearing. The subsequent words "upon such terms as to costs or otherwise as it thinks fit" give power to the Court to pass the order setting aside the order of dismissal on terms. The legislature has given a discretion to the Court as to the terms on which the order for setting aside shall be passed in the case before it. The Court may pass order on terms as to payment of cost or 'otherwise'. The meaning of the word 'otherwise', according to *Oxford Advanced Learners' Dictionary of Current English* is "in another or different way". The word 'otherwise' means according to *Bleak's Law Dictionary*, Fourth Edition page 1253 "in a different manner, in another way, or in other ways". So, although there is a discretion to impose terms, such discretion is as to costs in one or other way. In the instant case, as the petitioner satisfied the Court that there was sufficient cause for setting aside the order of dismissal, the Court could impose terms as to costs or any amount as to costs in another or different way. On the facts of this case the defendant could not claim any amount other than costs from the plaintiff. The Court has not said in the order that the Court is ordering such payment as costs. The Court could not impose a term for payment in Court of Rs. 7,50,000 in cash as costs or as security. Cost means either taxed cost or assessed cost. Such large amount cannot be either taxed or assessed cost. So, although there is great force in the contention of Mr. Chakra-

borty it seems to me that it is not necessary to decide the question as to whether "Ejusdem Generis Rule" will apply in construing the words 'or otherwise', because whether the rule applies or not, under the facts and circumstances of the case, there is no doubt in my mind that the learned Judge could not pass such order for deposit of the sum of Rupees 7,50,000 or for furnishing the said amount as security under O. IX, R. 9. I am unable to accept the submission of Mr. Sinha on this point.

52. Mr. Sinha then argued that there was no sufficient cause. I do not agree. It is also difficult to follow how this argument can be made. If there was no sufficient cause then the learned Judge should have dismissed the petition for setting aside the order of dismissal. In that case question imposing any terms would not arise. But the learned Judge imposed terms as he was satisfied that there was sufficient cause for restoration of the suit. There is no reason for me to differ from the view of the learned Judge on the point that there was sufficient cause for non-appearance. In any event, I am of the same opinion. The telex dated June 8, 1976 and the cause title of the plaint indicate that the address of the plaintiff was changed. From the above fact one can reasonably infer that the letters of Orr, Dignam & Co. did not reach the plaintiff in time. But with regard to the exercise of discretion by the learned Judge with regard to the terms for setting aside the order of dismissal, it seems to me that the learned Judge failed to exercise his discretion judicially in accordance with the provisions of O. IX, R. 9.

53. In the premises, I also agree with the order passed by my Lord in this appeal.

Appeal allowed.

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M. M. DUTT AND SHARMA, JJ.

12, I. C. Bose Road Tenants' Association, Appellant v. Collector of Howrah and others, Respondents.

F. M. A. T. No. 1760 of 1977, D/- 7-9-1977.

(A) Constitution of India, Art. 226 — Who can apply — Whether an association of tenants of premises sought to be acquired has locus standi to challenge

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declaration under S. 6 of Land Acquisition Act. (Land Acquisition Act (1894), S. 6).

The condition precedent to the granting of any relief under Art. 226 is the existence of a fundamental or legal right of a person and the infringement of such right. The right which is the foundation of an application under Art. 226 is a personal and individual right. The legal right may be a statutory right or a right recognised by the law. (Para 4)

After the notification under S. 4 of the Land Acquisition Act, stating that lands comprised in certain premises were likely to be acquired was published, the tenants of the said premises formed themselves into an Association and got it registered. Thereafter, the association (appellant herein) in its own name filed a writ petition challenging the declaration under S. 6 of the Land Acquisition Act.

Held: the persons who will be affected by the acquisition of the lands comprised in the said premises are the tenants occupying the same besides the owner thereof, but surely not the appellant. The appellant has no legal right and therefore there is no question of the infringement of a legal right. The appellant has no interest in the land and premises sought to be acquired and is not, therefore, a person aggrieved, and has no locus standi to maintain the writ petition. AIR 1976 SC 1163, Distinguished. (Para 4)

(B) Constitution of India, Art. 226 — W. B. Societies Registration Act (26 of 1961), S. 19 (1) — Writ petition by Society in its own name — Not maintainable — Society can only sue in the name of its President, Secretary, or authorised Office-bearer. (Para 5)

(C) Land Acquisition Act (1898), S. 6 (1) Second Proviso — General Clauses Act (1897), S. 3 (31) — Calcutta Metropolitan Development Authority is local authority — Fund in its hands is local fund.

Fund in the hands of the Calcutta Metropolitan Development Authority (C. M. D. A.) is a local fund within the meaning of S. 3 (31) of the General Clauses Act and the C. M. D. A. is a local authority. (Para 8)

There can be no doubt that the C. M. D. A. is an authority and comes within the expression "other authority" under S. 3 (31) of the General Clauses Act. The C. M. D. A. is a statutory authority and has been created by the Calcutta Metropolitan Development Authority Act, 1972.

It has power to act within a specified area for the development of that area. Under the statute by which it has been created it is legally entitled to the control or management of its fund. If a statutory authority which has power to act within a specific or local area for the development of that area, which is one of the governmental functions ordinarily entrusted to a municipality or a corporation by a statute, is entrusted with power to control and manage its own fund, such fund must be held to be a local fund within the meaning of S. 3 (31) of the General Clauses Act. AIR 1963 SC 1890, Distinguished. (Paras 7, 8)

(D) Land Acquisition Act (1894), S. 31 (3) — Land Acquisition Rules, R. 18 — Do not provide for alternative accommodation in cases of acquisitions under the Act. (Para 9)

Cases Referred: Chronological Paras
 AIR 1977 SC 276 : 1977 Lab IC 52 4
 AIR 1976 SC 1163 : 1976 Lab IC 773 4
 AIR 1975 SC 1331 : 1975 Lab IC 881 7
 AIR 1963 SC 1890 7

K. K. Moitra and Adyanath Ghosh, for Appellant; Susul Kr. Biswas and Supro-kash Banerjee, for Respondent.

M. M. DUTT, J.:— This appeal is directed against the judgment of M. N. Roy J. whereby the Rule Nisi obtained by the appellant on its application under Art. 226 of the Constitution was discharged.

2. The appellant who is described as "12, I. C. Bose Road, Tenants' Association" challenged a declaration under S. 6 of the Land Acquisition Act, 1894 which was preceded by a notification under S. 4 of the said Act. The notification under S. 4 was published on Dec. 2, 1974. It was *inter alia* stated therein that the lands comprised in the premises Nos. 12 and 16, I. C. Bose Road were likely to be needed for public purpose, namely, for the construction of the northern approach road in connection with the re-construction of the Buckland Bridge at Howrah at the expenses of the Calcutta Metropolitan Development Authority (hereinafter referred to as the C. M. D. A.). After hearing the objections filed by the interested persons including the tenants of the said premises under S. 5-A of the said Act, the declaration under S. 6 was published on December 29, 1975. In the declaration also it was stated that the acquisition would be made at the expenses of the C. M. D. A.

3. It was contended by the appellant in the writ petition that the C. M. D. A.

was neither a local authority nor a company, nor the money that would be spent by it for the acquisition of the lands comprised in the said premises formed part of the public revenues of the State Government as contemplated by the second proviso to S. 6 (2) of the said Act and accordingly, the acquisition sought to be made by the declaration under S. 6 was illegal, inoperative and void. At the hearing of the Rule Nisi, two preliminary objections were taken on behalf of the respondents, namely, that the appellant had no locus standi to maintain a writ petition challenging the declaration under S. 6 and that a majority of the members of the appellant having filed claims under S. 9 of the said Act, they had waived their right to call in question the legality of the acquisition. The learned Judge upheld the preliminary objections of the respondents and held that the appellant had no locus standi to maintain a writ petition and that as most of its members filed claims for compensation under S. 9, they had forfeited their right to challenge the acquisition. He also held that the C. M. D. A. was a local authority within the meaning of the second proviso to S. 6 (2) of the said Act read with S. 3 (31) of the General Clauses Act. Upon the said findings, he discharged the Rule and hence this appeal.

4. We may first of all consider the locus standi of the appellant to maintain a writ petition. After the notification under Section 4 was published on December 2, 1974, the tenants of the said premises formed themselves into an Association which is the appellant before us. The appellant has been registered under the West Bengal Societies Registration Act, 1961 and its registered office is at 12, I. C. Bose Road Howrah. Art. 226 provides for remedy for the infringement of a fundamental or legal right of a person. The condition precedent to the granting of any relief under Art. 226 is the existence of a fundamental or legal right of a person and the infringement of such right. The right which is the foundation of an application under Art. 226 is a personal and individual right. The legal right may be a statutory right or a right recognised by the law. The principles of law in this regard have been recently restated by the Supreme Court in *Mani Subrat Jain v. State of Haryana*, AIR 1977 SC 276. In that case, the Supreme Court has observed that it is elementary that no one can ask for a mandamus without a legal

right. There must be a judicially enforceable right as a legally protected right before one suffering a legal grievance can ask for a mandamus. A person can be said to be aggrieved only when a person is denied a legal right by some one who has a legal duty to do something or to abstain from doing something. In the instant case, the persons who will be affected by the acquisition of the lands comprised in the said premises are the tenants occupying the same besides the owner thereof, but surely not the appellant. The appellant has no legal right and therefore there is no question of the infringement of a legal right. The appellant has no interest in the land and premises sought to be acquired and is not, therefore, a person aggrieved. The learned Judge has rightly held that the appellant has no locus standi. The decision of the Supreme Court in *Union of India v. Jyoti Chit Fund and Finance*, AIR 1976 SC 1163 has been relied on by the appellant. In that case, it was held that Government was a trustee in regard to the provident fund dues, pensions and other compulsory deposits till they were paid to the Government servant and the Government was entitled to maintain an objection to the attachment made of such dues, pensions, deposits, etc., under S. 60 of the Code of Civil Procedure. In our view, that case has no bearing on the question of locus standi of the appellant to maintain a writ petition.

5. Apart from what has been stated above, the appellant has another difficulty in regard to its locus standi. It has been already noticed that the appellant is a registered Society under the West Bengal Societies Registration Act, 1961. Under sub-s. (1) of S. 19 of the said Act every Society may sue or may be sued in the name of the President, the Secretary, or any office-bearer authorised by the Governing Body in this behalf. In view of S. 19 (1), the Society itself has no locus standi to maintain an action and consequently a writ petition. The writ petition was filed by the appellant as the petitioner and not by the President, Secretary or any office-bearer authorised by the Governing Body of the appellant. The appeal also has been filed by the appellant in its own name. On this ground also the writ petition is not maintainable, though this point has not been taken by the respondents either before the learned trial Judge or before us.

6. So far as the other preliminary objection against the maintainability of the

writ petition founded on the forfeiture or waiver of the rights of the members of the appellant by asking for payment of compensation is concerned, it may be pointed out that there are some conflicting decisions of this Court on the point. We do not think that it is necessary for us to decide the same, for it has been already held by us on other grounds that the appellant had no locus standi to ask for any relief under Art. 226 of the Constitution.

7. In spite of the above finding as to absence of locus standi of the appellant we propose to consider the contention of the appellant that the C. M. D. A. is not a local authority and accordingly, the declaration under S. 6 (1) is illegal and inoperative. The second proviso to S. 6 (1) provides as follows:

"Provided further that no such declaration shall be made unless the compensation to be awarded for such property is to be paid by a company, or wholly or partly out of public revenues or some funds controlled or managed by a local authority."

Under the proviso, therefore, a declaration can only be made if the compensation is paid by a company, or wholly or partly out of public revenues or some fund controlled or managed by a local authority. It is not disputed that the C. M. D. A. is not a company and the money that may be paid by it on account of compensation does not form part of the public revenues. Unless, therefore, the C. M. D. A. is a local authority the declaration under S. 6 (1) will not be a valid one. The term "local authority" has not been defined in the Land Acquisition Act, but it has been defined in S. 3 (31) of the General Clauses Act which is as follows:

"(31). The "local authority" shall mean a municipal committee, district board, body of port commissioners or other authority legally entitled to, or entrusted by the Government with, the control or management of a municipal or local fund." There can be no doubt that the C. M. D. A. is an authority and comes within the expression "other authority" under S. 3 (31). In interpreting Art. 12 of the Constitution, the Supreme Court in *Sukhdev Singh v. Bhagatram*, AIR 1975 SC 1331 observed that the expression "other authorities" in Art. 12 was wide enough to include within it every authority created by a statute and functioning within the territory of India, or under the control of the Government of India.

Further it was observed that the expression 'other authorities' would include all constitutional or statutory authorities on whom powers were conferred by law. It is also not disputed by the appellant that the C. M. D. A. is an authority or "other authority" within the meaning of S. 3 (31). It has, however, been strenuously urged on behalf of the appellant that the C. M. D. A. is not legally entitled to, or entrusted by the Government with the control or management of a municipal or local fund. It is also argued that the fund in the hands of the C. M. D. A. is not a local fund. In support of its contention that the C. M. D. A. is not a local authority, strong reliance has been placed on behalf of the appellant on a decision of the Supreme Court in *Valjibhai Muljibhai v. State of Bombay*, AIR 1963 SC 1890. In that case, the question that came up for consideration was whether the Bombay State Transport Corporation was a local authority within the meaning of the second proviso to S. 6 (1) of the Land Acquisition Act read with S. 3 (31) of the General Clauses Act. S. 29 of the Bombay State Road Transport Act, 1950 provides that the corporation shall for all purposes be deemed to be a local authority. It was held by the Supreme Court that the Bombay State Transport Corporation was a company and not a local authority in spite of the provision of S. 29. As the Bombay Act did not receive the President's assent it could not override the definition of 'local authority' as contained in S. 3 (31) of the General Clauses Act. It was observed by the Supreme Court as follows (at p. 1894):

"It will be clear from the definition that unless it is shown that the State Transport Corporation is an 'authority' and is legally entitled to or entrusted by the Government with control or management of a local fund it cannot be regarded as a local authority. No material has been placed before us from which it could be deduced that the funds of the Corporation can be regarded as local funds. It was no doubt submitted by the learned Attorney General that the Corporation was furnished with funds by the Government for commencing for its business; but even if that were so, it is difficult to appreciate how that would make the funds of the Corporation local funds." Relying on the said observation of the Supreme Court, it has been urged on behalf of the appellant that the fund of the

C. M. D. A. does not constitute a local fund.

8. The C. M. D. A. is a statutory authority and has been created by the Calcutta Metropolitan Development Authority Act, 1972 which is an Act to provide for the establishment of an Authority for the formulation and execution of plans for the development of the Calcutta Metropolitan Area, for the co-ordination and supervision of the execution of such plans and for matters connected therewith or incidental thereto. Under the Act of 1972, the C. M. D. A. is to act within an area as described in the schedule of the Calcutta Metropolitan Planning Area (Use and Development of Land) Control Act, 1965. Under S. 3 (2) of the 1972 Act, the C. M. D. A. is a body corporate with perpetual succession and a common seal with power to acquire, hold and dispose of property, and to contract, and may sue and be sued in its name. Under S. 6 it may with the previous approval of the State Government borrow any money for carrying out the purposes of the Act or for servicing any loan obtained by it. Section 7 provides that there shall be a fund for the C. M. D. A. to which shall be credited such monies as may be paid to it by the State Government under the Taxes of Entry of Goods into Calcutta Metropolitan Area Act, 1972, and all monies borrowed by the C. M. D. A. and such other monies as may be paid to it by the State Government or any other authority or agency. Section 8 provides for sinking fund of the C. M. D. A. Under Cl. (c) of S. 15, it will be responsible for the supervision of the execution of any project for the development of any area within the Calcutta Metropolitan area, the expenses of the whole or any part of which are met from its fund. The C. M. D. A. is, therefore, a statutory authority which has power to act within a specified area for the development of that area. Under the statute by which it has been created it is legally entitled to the control or management of its fund. In our view, if a statutory authority which has power to act within a specific or local area for the development of that area, which is one of the governmental functions ordinarily entrusted to a municipality or a corporation by a statute, with power to control and manage its own fund, such fund must be held to be a local fund within the meaning of S. 3 (31) of the General Clauses Act. In *Valjibhai's* case referred to above, the Supreme Court found that the

said transport corporation was not an authority within the meaning of S. 3(31) and there was no material before the Supreme Court to show that the fund of the corporation was a local fund. In our view, the said decision of the Supreme Court does not help the contention of the appellant. In the view which we take, there can be no doubt that the fund in the hands of the C. M. D. A. is a local fund within the meaning of S. 3(31) of the General Clauses Act and the C. M. D. A. is a local authority. The learned Judge, in our opinion, has rightly overruled the contention of the appellant that the C. M. D. A. was not a local authority.

9. Lastly, it is contended on behalf of the appellant that the respondents are to provide the members of the appellant with alternative accommodation. We are afraid, there is no provision in the Land Acquisition Act in regard to alternative accommodation. Reliance has been placed on behalf of the appellant on S. 31(3) of the Land Acquisition Act and R. 18 of the Rules framed thereunder in support of its contention for alternative accommodation. In our opinion, neither S. 31(3) nor R. 18 can, by any stretch of imagination, be said to provide for alternative accommodation in cases of acquisitions under the Land Acquisition Act as contended on behalf of the appellant. No other point has been urged on behalf of the appellant.

10. For the reasons aforesaid, the judgment of the learned Judge is affirmed and this appeal is dismissed, but in view of the facts and circumstances of the case, there will be no order for costs.

SHARMA, J.:— I agree.

Appeal dismissed.

AIR 1977 CALCUTTA 441

SALIL KUMAR DATTA, J.

Sm. Brinda Bala Debi, Petitioner v. Gour Mahoto and others, Opposite Parties.

C. R. No. 3850 of 1976, D/- 25-8-1977.

(A) Bengal Money-lenders Act (10 of 1940), S. 38 — Application under — Maintainability.

Where the applicant prayed for taking of account, for declaration that there was nothing due on loan and for declaration

of amount due under loan if it was found that loan was not satisfied.

Held, that the application for such alternative declaration was maintainable under S. 38. (Para 7)

(B) Bengal Money-lenders Act (10 of 1940), Ss. 38 and 2(9) — Application under S. 38, against legal representatives of deceased lender — Maintainability.

The word "lender" in S. 2(9) includes legal representatives of deceased lender on whom the estate of the deceased lender including debt and its security devolves by operation of law. An application under S. 38 against L. Rs. of deceased lender is therefore maintainable. (Para 9)

(C) Bengal Money-lenders Act (10 of 1940), S. 38(2) — Appeal — Decision on maintainability of an application under S. 38 is not a declaration about amounts paid and payable to lender — No appeal lies against such decision — Revision lies. (Para 10)

Cases Referred: Chronological Paras
AIR 1945 Cal 214: 49 Cal WN 143 6
(1943) 47 Cal WN 894 6

Amiya Kumar Chatterjee and Abhijit Kumar Banerjee, for Petitioner; Tarak Nath Roy, for Opposite Parties.

ORDER:— This Rule is directed against the order dated August 30, 1976 passed by the learned Munsif at Purulia rejecting the petitioner's application under S. 38 of the Bengal Money-lenders Act, 1940. The facts in short are as follows:—

The petitioner borrowed a sum of Rs. 1,200/- by executing an usufructuary mortgage deed dated March 3, 1967 in favour of the lender late Balaram Mahoto in respect of 1 acre of kamali land. The said lender and on his death his heirs, the opposite parties had been in possession thereof by cultivation. According to the petitioner, the lender and his successors had realised Rs. 2,100 for paddy and Rs. 700 for straw in all Rs. 2,800/- during 1967 to 1973 i.e. more than double the principal. As such the petitioner was entitled to a declaration that nothing is due on the kotkobala (usufructuary mortgage deed). The application was accordingly filed on April 16, 1974 for a taking account of the said loan and for declaration that nothing was due to the lender or his heirs. In case the Court found that the loan was not fully satisfied, there was the alternative prayer for determination of the amount still payable by the

borrower petitioner. The application was registered as Misc. Case No. 53 of 1974.

2. The opposite parties contested the application contending that the transaction was not a loan and consequently the application under S. 38 of the Act was not maintainable. It was also contended that the opposite parties were not the lenders under the Act and as such no relief was available against them on the said application. Further the annual income from the land less costs for production was Rs. 100/- for paddy and Rs. 5/- for straw, which for six years amounted to Rs. 630/- only. The application accordingly was liable to be dismissed.

3. The learned Munsif by the impugned order held that though the application was otherwise maintainable, the definition "lender" defined in S. 2 (9) does not include the heirs and successors-in-interest. The application under S. 38 of the Act was accordingly not maintainable and as a result the Misc. Case was dismissed. The present rule is against this order.

4. Mr. Amiya Kumar Chatterjee appearing with Mr. Abhijit Kumar Banerjee, learned Advocates for the petitioner contended that the learned Munsif committed an error in the exercise of his jurisdiction in holding that no relief under the Act was available against the legal heirs and successors-in-interest of the lender. He submitted that on correct interpretation, the word 'lender' should have been held as including his legal heirs and successor-in-interest who accordingly would be amenable to appropriate orders on the application under S. 38 of the Act.

5. Mr. Tarak Nath Roy learned Advocate for the opposite parties contended that the application for declaration that the lender and/or his legal heirs are indebted to the borrower on accounting is not maintainable in law. Further, the definition of "lender" in the Act does not include his heirs or successors-in-interest, so that the application under S. 38 is not maintainable and the borrower may have his remedy under the ordinary law of the land.

6. Mr. Roy referred to the decision in *Srikanta Kumar v. Atul Krishna*, 49 Cal WN 143: (AIR 1945 Cal 214) in which it was held that an application for settlement of debts under the Bengal Agricultural Debtors Act, 1936 made by an applicant while denying the debt itself was not maintainable in law. Mr. Roy re-

ferred to an earlier decision in *Smt. Meherunnisa Bibi v. Satis Chandra*, (1943) 47 Cal WN 894 wherein the Court held that in a proceeding under S. 38 of the Act, there can at most be a declaration that nothing is due under the loan but no declaration of any amount due from the lender to the borrower is permissible under the Act.

7. In the case before us the borrower in his application has prayed for taking account of the loan, for declaration that there is nothing due on the loan and also for declaration of the amount due under the loan if it is found that the loan has not been satisfied. There is no illegality in such prayer, as the Court is competent under the Act on an application under S. 38, which provides "for taking accounts and for declaring the amount due to the lender", also to declare on accounting that no amount is due to the lender. The application for such alternative declaration is thus maintainable in law.

8. The formidable contention urged on behalf of the opposite parties, which found favour with the learned Munsif, is that the word "lender" in sub-s. (9) of S. 2 of the Act "means a person who advances a loan and includes a money lender". It is said that while the word "borrower" in sub-s. (2) of S. 2 "means a person to whom a loan is advanced and includes a successor-in-interest of surety", these words are excluded from the meaning of the word "lender" not without significance. We shall now examine the contention with reference to other relevant provisions of the Act.

9. Section 28 of the Act in sub-s. (1) provides that when a loan is "assigned" to any person by the lender or his assignee, before such assignment, notice is to be given that the debt, agreement or security is affected by the operation of the Act. In sub-s. (3) it is expressly stated that the expression "assigned" in this section means an assignment inter vivos other than assignment by operation of law. In S. 29 it is also provided that the provisions of the Act shall continue to apply as respects any debt due to a lender or money-lender in respect of loans advanced by him, as also the benefit of agreement made or security taken in respect of such debt or interest, notwithstanding that the debt or the benefit of the agreement or security may have been assigned to any assignee, and references in this Act to a lender or money-lender shall accordingly be construed as includ-

ing such assignee, subject to certain limitations and except where the context otherwise requires. It is thus obvious that while S. 28 applies to assignment inter vivos and not to assignment by operation of law, there is no such prohibition in respect of the provisions of S. 29, so that its provisions will apply to assignments by operation of law. Assignment by operation of law includes inter alia involuntary sales in execution, assignments upon bankruptcy as also cases of succession which is assignment by devolution of interest. Accordingly relief in respect of a debt by a lender in accordance with the provisions of the Bengal Money Lenders Act, 1940 will be available to a borrower against the legal representatives of a deceased lender on whom the estate of the deceased lender including the debt and its security devolves by operation of law. This interpretation is consistent with the beneficent objects the Act is intended to achieve.

10. Mr. Roy took a further objection contending that under sub-s. (3) of S. 38 an appeal is provided against a declaration under sub-s. (2), so that no application in revision lies against the impugned order. The contention, it appears, is unsustainable as an appeal lies against a determination contemplated in sub-s. (2) which has the force and effect of a decree as provided in the section itself. A decision on the maintainability of the application under S. 38 is not a declaration in respect of amounts paid and payable to the lender. As such a revision lies against such order as contended by Mr. Chatterjee.

11. The application of the petitioner under S. 38 of the Act against the legal representatives of the deceased lender is thus maintainable in law. The Rule accordingly is made absolute and the impugned order of the learned Munsif is set aside. The application will now be disposed of by the learned Munsif in accordance with law. Let the records be sent down at once.

12. There will be no order for costs in the Rule.

Rule made absolute.

AIR 1977 CALCUTTA 443

MRS. MONJULA BOSE, J.

Corporation of Calcutta, Plaintiff v. Pulin Chandra Daw and others, Defendants.

Suit No. 389 of 1960, D/- 19-8-1977.

Limitation Act (1908), S. 14 — Benefit of exclusion of period — When can be claimed.

In S. 14 the words "or other cause of a like nature" however liberally construed, must be read so as to convey something ejusdem generis or analogous to the preceding words "from defect of jurisdiction". Read along with the expression "is unable to entertain", such words would denote, that the defect must be of such a character as to make it impossible for the Court to entertain the earlier suit or application either in its inception or at all events as to prevent it from deciding it on the merits. AIR 1944 Lah 130, Rel. on. (Para 13)

Held, on facts, that the claim of the plaintiff in the prior suit having been adjudicated upon and disposed of on merits, it could not be said that the previous suit was misconceived or that the Courts were under any infirmity or there was any defect of jurisdiction or any defect of like nature which prevented the Courts from entertaining the earlier suit. The cause of action in the earlier suit was also not identical. The plaintiff therefore could not claim the benefit of excluding the period spent in prosecuting the earlier proceedings under S. 14. Case law referred. (Paras 14, 15, 17)

Cases Referred: Chronological Paras

AIR 1972 Cal 420: 1972 Tax LR 2501	9
AIR 1971 SC 2313	8
AIR 1954 Cal 202	13
AIR 1949 Cal 24	8
AIR 1944 Lah 130	13
AIR 1942 Mad 713	13
AIR 1935 Mad 731: 68 Mad LJ 487	12
AIR 1929 PC 103	8
(1876) ILR 1 Cal 202	16

P. K. Roy with P. K. Ghosh, for Plaintiff; J. Mitra, for Defendants.

ORDER:— The point of law which arises for determination in this suit, is whether the plaintiff can take advantage of S. 14 of the Lim. Act, 1908 by reason of earlier proceedings and thereby save limitation?

2. The plaintiff instituted this suit on March 21, 1960. The case in the plaint is inter alia that in May 19, 1919, the then

Corporation of Calcutta acquired premises No. 12, Naya Ratna Lane, Calcutta (hereinafter referred to as the said premises) for development purposes. The predecessor in interest of the defendants the then owners of the said premises, made an application for retention of a portion of the said premises as not being required for the said development purposes under S. 375 (2) of the Calcutta Municipal Act, 1899, then in force. After several proceedings it appears the owners as directed, elected to pay an annual fee of Rupees 1,641/- and the then Corporation of Calcutta refrained from acquiring the surplus land. It is alleged that the owners failed to pay the said exemption fee from March 24, 1951 till March 23, 1959 and the plaintiff as the successor in interest of the Corporation constituted under the 1899 Act become entitled to a sum of Rupees 13,128.00 p. for the said period with interest thereon at 6% p. a. aggregating to a sum of Rs. 15,884.88 p., which amount the plaintiff seeks to recover in this suit.

3. It is contended that no part of the plaintiffs claim is barred by limitation as the plaintiff had been prosecuting an earlier proceeding founded on the same cause of action with due diligence and good faith. A suit, being Suit No. 815 of 1952 was instituted by the Corporation in Feb., 1952 against the defendants for recovery of arrears of exemption fee for a period from March 1939 till March 1957, claiming the same to be a charge on the said premises. A mortgage decree was passed on January 12, 1956 by the trial Court in favour of the plaintiff on the basis that the said fee formed a charge on the said premises. On appeal, the decree was partly set aside on May 13, 1959 by the Appeal Court, which held that the said fee did not form a charge on the said premises.

4. The defendants filed a joint written statement in this suit. The defendant No. 2 died during the pendency of this suit and his heirs and legal representatives have been substituted in his place and stead as the defendants Nos. 2 (a), 2 (b), 2 (c), 2 (d) and 2 (e). The substituted defendants have also filed an additional written statement.

5. The defendants contend that the major part of the plaintiff's claim is barred by limitation. They deny that the plaintiff's cause of action in this suit is the same as in the earlier proceedings.

6. Mr. J. Mitra, learned counsel for the defendants conceded that the defen-

dants were liable to pay the stipulated exemption fee from March 24, 1957 till March, 1959 aggregating Rs. 4,923/- and the said claim was not barred by limitation.

7. The only issue raised and settled at the trial was:— "Is the claim of the plaintiff for the period between March 24, 1951 and March 23, 1957 barred by limitation?" No oral or documentary evidence was adduced by the parties who contended that the answer to the issue would depend upon the construction of S. 14 (1) of the Lim. Act, 1908. The material part of the said section reads as follows:—

14. Exclusion of time of proceeding bona fide in Court without jurisdiction— (1) In computing the period of limitation prescribed for any suit, the time during which the plaintiff has been prosecuting with due diligence another civil proceeding, whether in a Court of first instance or in a Court of appeal, against the defendant, shall be excluded, where the proceeding is founded upon the same cause of action and is prosecuted in good faith in a Court which, from defect of jurisdiction, or other cause of a like nature, is unable to entertain it,

2.

Explanation I

Explanation II

Explanation III — For the purposes of this section misjoinder of parties or of causes of action shall be deemed to be a cause of a like nature with defect of jurisdiction.

8. Mr. P. K. Roy learned counsel appearing with Mr. P. K. Ghosh, for the plaintiff cited several decisions in support of his contention that the said section applied in the facts and circumstances of the present case and cited the decision *Ramdutt v. E. D. Sasoon & Co.* reported in AIR 1929 PC 103. It was held in this case that time taken for prosecuting a claim in good faith before an Arbitrator having no jurisdiction should be excluded when computing the period of limitation. To show that the same principle would be applicable even where proceedings are taken before a competent court of jurisdiction which for some reason or other is unable to pass a decree, Mr. Roy cited *S. K. Dutt v. Purnachandra Sinha* reported in AIR 1949 Cal 24 at p. 44 and *India Electric Works Ltd. v. James Mantosh* reported in AIR 1971 SC 2313 and contended that the phrase "other cause of a like nature" in the section must be construed liberally. Explanation III to the section contemplated cases of mis-

joinder and non-joinder though strictly speaking, such cases could hardly be regarded as a defect of jurisdiction. Mr. Roy submitted that in the instant case, although there was no prima facie defect of jurisdiction, the fact that in the earlier proceedings a mortgage decree was wrongly passed on the basis of an erroneous finding of a charge, which was ultimately reversed by the Appeal Court which passed only a money decree, made the earlier proceedings defective in a manner as to bring it within the purview of the said section and he contended that the said period between the date of institution of the said suit in February 1952 and the final disposal thereof in Appeal in May, 1959, should be excluded when computing the period of limitation.

9. Mr. Roy lastly cited the case of Corporation of Calcutta v. Hindusthan Construction Co. Ltd. reported in AIR 1972 Cal 420 for the proposition, limitation in such a case would run from the date of the judgment of the Appeal Court.

10. He contended further, that in the absence of any issue, the prior proceedings must be held to have been prosecuted in good faith and the plaintiff should get the benefit of the said section.

11. Mr. J. Mitra, learned counsel for the defendants has contended on the other hand that to get the benefit of the said section the plaintiff had to establish that the subsequent proceedings were founded on a cause of action, same as in the earlier proceedings, and further that the prior suit could not be entertained by the Court by reason of a defect of jurisdiction or any other cause of a like nature. Mr. J. Mitra laid emphasis on the part of the section viz. that the Court must be unable to entertain the earlier proceedings.

12. Mr. Mitra next relied upon the decision in Siddalingana Gowd v. Bhimana Gowd reported in 68 Mad LJ 487 at pp. 489 and 490: (AIR 1935 Mad 731 at pp. 732-733) for the proposition that for the application of S. 14 of the Lim. Act, the proceeding must have failed on the ground of want of jurisdiction or other defect of like nature. In the decision cited the plaintiff's claim was prima facie barred by limitation, but the plaintiff claimed the benefit of S. 14 in respect of the period during which the matter was pending in second appeal and in respect of the period during which they were prosecuting diligently earlier proceedings

by way of a claim for restitution, and the Court held "the mere fact that the plaintiffs might have honestly believed that they could get all that they are entitled to by way of proceeding in restitution will not suffice to give them the benefit of S. 14."

13. Moreover in the instant case, both the Trial Court and the Appeal Court decided the earlier suit on merits, the only finding of the Appeal Court was that S. 357 of the Calcutta Municipal Act, 1899 did not create any charge in favour of the plaintiff and the plaintiff was not entitled to claim a charge. As such, neither Court was prevented from entertaining the proceedings. Mr. Mitra places reliance on that part of the Judgment of the Appeal Court where it was stated as follows:—

"As I have held that the plaintiff respondent is not entitled to get a mortgage decree, it becomes necessary for the purpose of determining the amount for which a decree may be passed in favour of the plaintiff respondent, to consider the question as to which Article of the Lim. Act govern this claim. The learned counsel for the parties have agreed that Art. 120 is applicable to the facts of this case and they are also agreed that the sum of Rs. 9,846/- is the sum to which the plaintiff respondent is entitled in the event of this court holding that the plaintiff is not entitled to a mortgage decree but only to a money decree. The appeal is therefore, allowed, in part".

In support of his contentions Mr. Mitra further cited the case of Madan Mohan Jew v. Bejoyabati Dassi reported in AIR 1954 Cal 202. Here the Court held that if an application under O. 21, R. 89 of the Civil P. C., was dismissed on the ground that the required deposits have not been made in time, such dismissal would be on merits and not due to "defect of jurisdiction or other cause of a like nature" within the meaning of S. 14 of the Lim. Act. In such a case the applicant could not exclude time spent in prosecuting the earlier application for computing the period of limitation for a subsequent application under O. 21, R. 90. Mr. Mitra also cited Rajabapayya v. Basvayya reported in AIR 1942 Mad 713 where the plaintiff having failed in his petition for insolvency, filed a suit on the same cause of action. The Court held that S. 14 of the Lim. Act, 1908 was not attracted as the Insolvency Court had in fact entertained the earlier application on merits. Mr. Mitra contended that the case of India

Electric Works Ltd. (Supra) cited on behalf of the plaintiff was in the defendant's favour. Mr. Mitra lastly cited *Jai Kishen Singh v. Peoples Bank of Northern India* reported in AIR 1944 Lah 136 (FB) which was noted in the case of *India Electric Works Ltd.* It was held in that case that in S. 14 of the Lim. Act, the words "or other cause of a like nature" however liberally construed, must be read so as to convey something ejusdem generis or analogous to the preceding words "from defect of jurisdiction". Read along with the expression "is unable to entertain", such words would denote, that the defect must be of such a character so as to make it impossible for the Court to entertain the earlier suit or application either in its inception or at all events as to prevent it from deciding it on the merits.

14. On a careful consideration of the respective contention of the parties I find the defendant's case to be of more substance. In my view the claim of the plaintiff in the prior suit having been adjudicated upon and disposed of on merits, it can hardly be said that the previous suit filed in 1952 was altogether misconceived, or that the Courts were under any infirmity or there was any defect of jurisdiction or any defect of like nature which prevented the Courts from entertaining the earlier suit.

15. It also appears to me that the cause of action in this suit being a claim for arrears of exemption fees from March, 1951 till March, 1959 is not identical with the cause of action in the earlier proceeding which comprised a claim for arrear fees from March, 1939 till March, 1957.

16. For the proposition that a claim for each year's rent constituted by itself a separate and entire cause of action Mr. Mitra cited *Nobo Doorga Dossee v. Foyzbux Chowdhury* a case reported in (1876) ILR 1 Cal 202 and also relied on a passage in Mulla's Code of Civil Procedure (13th Edition) at p. 58.

17. For the reason above, I hold that the plaintiff's claim for arrears of fees from March, 1951 till March, 1957 is barred by limitation and the plaintiff is not entitled to exclude the period spent in the earlier proceedings in Suit No. 815 of 1952 and the appeal from the decree therefrom for computing the period of limitation under S. 14 of the Indian Limitation Act, 1908. I answer the only issue accordingly, in the negative and in favour of the defendant.

18. There will however be a decree in favour of the plaintiff for the undisputed sum of Rs. 4,923/- being arrear fees from March 1957 to March, 1959, interim interest and interest on Judgment thereon at the rate of 6% per annum and costs. The only issue raised having been answered in favour of the defendant, I was at first not minded to allow costs to the plaintiff, but the said sum of Rs. 4,923/- admittedly due has not been deposited in Court, and the plaintiff being a public body whose statutory dues have remained unpaid without any justification I allow such costs.

Order accordingly.

AIR 1977 CALCUTTA 446

T. K. BASU, J.

Bhabatosh Battacharyya and another, Petitioners v. First Industrial Tribunal and others, Respondents.

Matter No. 228 of 1976, D/- 1-8-1977.

Constitution of India, Art. 226 — Scope — Interference with award of Industrial Tribunal — Non-exercise of jurisdiction — What amounts to.

Unless it is found that the Industrial Tribunal has committed an error of law or acted without jurisdiction or in excess of jurisdiction or contrary to the principles of natural justice the High Court cannot interfere with the Award. In other words, even if it is found that the Tribunal had gone wrong in appreciating the evidence that is not a ground of interference under Art. 226.

The Tribunal took up the dispute referred to it for adjudication. The Tribunal went into the evidence tendered by both the parties both oral and documentary. Having considered all the evidence, the Tribunal came to the finding that, on the materials on record, it was not possible for it to come to any positive conclusion and answer the question referred to it for adjudication.

Held that, that was not a failure to exercise a jurisdiction vested in it by law. (Paras 10, 9)

Cases Referred: Chronological Paras
AIR 1970 SC 1334: 1970 Lab IC 1071 10

Nigam Chakraborty, for Petitioners; Biswarup Gupta, for Respondent No. 4.

ORDER:— In this Rule the petitioner challenges an Award dated the 29th September, 1975 passed by the First Indus-

IU/IU/D407/77/ABU

trial Tribunal, Calcutta. The facts relating to the making of the Award may be briefly noted.

2. In the year 1965, the petitioner joined the respondent No. 4 Alkali and Chemical Corporation of India Limited in its Engineering Purchase Supply and Distribution Department as a Grade 'D' Clerk. Thereafter the petitioner was upgraded to Grade 'C' in the year 1967. Between 1967 and 1968 one S. K. Mondal a Supernumerary Staff of Grade 'A' who had been working in the Raw Materials Procurement Unit during this period was sent on deputation to the Central Engineering Department of the respondent No. 4 at its Head Office at Calcutta. During this period of deputation of Shri Mondal, the petitioner admittedly performed the duties and functions which were previously being done by Shri Mondal in the Raw Materials Procurement Unit. Thereafter sometime in 1970 the petitioner No. 1 was promoted from Grade C to Grade B.

3. Thereafter both the petitioner No. 1 and the petitioner No. 2 which is the Workers' Union made representations to the Company for promotion or upgrading of the petitioner No. 1 to Grade 'A'. This was not done. Thereafter a dispute was sought to be raised with the Labour Commissioner, West Bengal regarding this question.

4. By an order dated the 22nd June, 1973 passed by the State Government the following dispute was referred to the First Industrial Tribunal for adjudication.

"To what grade Sri B. Bhattacharjee is entitled to be placed in conformity with the nature of job entrusted to him and from what date? What relief, if any, is he entitled to?"

On this reference the First Industrial Tribunal came to the following conclusion in its Award. "As a result of my finding as above, I hold that it is not possible to find out in which grade Shri B. Bhattacharjee is entitled to be placed. As a result he is not entitled to any relief. But this will not preclude Shri Bhattacharjee from receiving officiating pay, etc., if the job is considered by the company to be an A grade job in future".

It is this Award of the First Industrial Tribunal which is challenged before me in the present application.

5. Mr. Nigam Chakraborty, learned Advocate appearing on behalf of the

petitioners challenged the Award on several grounds. In the first place, he sought to contend that the Tribunal had failed to exercise a jurisdiction which is vested in it by law. In other words, it was the contention that a dispute having been referred to the Tribunal it was its duty to adjudicate thereon. Mr. Chakraborty submitted that the Tribunal had failed to exercise his jurisdiction. He also placed strong reliance on the fact that Shri S. K. Mondal who was admittedly a member of the 'A' grade Staff of the respondent No. 4 having been sent on deputation the petitioner performed his duties and functions. In such circumstances, the Tribunal should have held that the petitioner No. 1 was entitled to be placed in 'A' grade post. He further submitted that a Works Study Report which is referred to in the Award of adjudication was not filed. It was further submitted that one Shri Rajaraman whose name is mentioned in the Award was not examined. Lastly he submitted that there was no evidence that the job that the petitioner No. 1 was doing was not an 'A' grade job.

6. Mr. Biswarup Gupta, learned Counsel appearing for the respondent No. 4 drew my attention to certain parts of the Award which are worth setting out:

"Shri Bhattacharjee examined himself as P. W. 1 in his examination-in-chief he did not specify what are his jobs and what are their nature. He was also silent as to the jobs of other A grade Assistants in other Import Sections of the company. Annexure C/2 to the written statement has been marked Ext. 6. It has not been claimed by Shri Bhattacharjee in his deposition that the jobs detailed in Ext. 6 are jobs done by him. Assuming that these are the jobs entrusted to Shri Bhattacharjee I have to ascertain from other materials on record that these jobs are comparable to the jobs of other A grade Assistants in Import Licence Section of the company. Unfortunately there is absolutely no material on record that what are the jobs of the A grade Import Licence Assistants of the Company. The Tribunal is not in a position to evaluate and assess the jobs done by a particular Assistant unless there are other comparable materials before the Tribunal. Being faced with this problem this Tribunal is not in a position to arrive at the finding what should be gradation of Shri Bhattacharjee in accordance with the jobs entrusted to him."

The Tribunal goes on to observe as follows:

"In this context the conduct of Shri Bhattacharjee is also very material. It is admitted that Shri Bhattacharjee was transferred to Plastics (S & D) Department in 1968. He raised the claim that he should be upgraded for the first time on 23rd July, 1971. From 1968 to 1971 Shri Bhattacharjee made no grievance relating to his grade. Of course, he told in his deposition that he claimed to be posted in A grade orally. But that claim is not substantiated by subsequent correspondence between him and the management. It is also interesting to note that on 16th October, 1969 Shri B. Bhattacharjee applied against a vacancy in B grade. It will appear from Ext. 7, the Memorandum of Settlement between the company and the union, that there is a provision for deputation allowance. During these long years Shri Bhattacharjee never claimed any deputation allowance. These facts are loud enough to say that Shri Bhattacharjee's claim to A Grade post is an afterthought."

7. Relying on these observations in the Award, Mr. Biswarup Gupta submitted that on this state of evidence before the Tribunal it was not possible for it to come to the conclusion as to whether the petitioner No. 1 was entitled to be put in 'A' grade as claimed by him. It was further pointed out by Mr. Gupta that the Works Study Report on which the petitioner No. 1 himself relies says that the petitioner No. 1 is fit for 'B' grade job.

8. In my view, the contention of Mr. Gupta for the respondent No. 4 should succeed. As the Tribunal has itself recorded the petitioner No. 1 who examined himself was entirely unable to furnish any evidence before the Tribunal as to the precise nature of the jobs which he was performing. He was further unable to provide any material to the Tribunal as to what types of jobs which were being performed by the 'A' grade Assistants of the Company. In that state of evidence I am unable to see how the Tribunal could have come to a finding that the petitioner was fit to be placed in an 'A' grade job.

9. I reject the contention of Mr. Chakraborty that the Tribunal had failed to exercise a jurisdiction vested in it by law. As would appear from the facts narrated above the Tribunal took up the

dispute referred to it for adjudication. The Tribunal went into the evidence tendered by both the parties both oral and documentary. Having considered all the evidence, the Tribunal came to the finding that, on the materials on record, it was not possible for it to come to any positive conclusion and answer the question referred to it for adjudication. That, in my view, is not a failure to exercise a jurisdiction vested in it by law.

10. I also accept the contention of Mr. Biswarup Gupta that conclusion of the learned Tribunal is based on an application of the evidence before it. It is well settled, as pointed out by Mr. Gupta, that the Tribunal has jurisdiction to decide rightly or wrongly. Reference was made in this connection to the decision of the Supreme Court in the case of *M/s. Parry and Co. Ltd. v. P. C. Pal* reported in AIR 1970 SC 1334 as an authority for this proposition. In my view no detailed discussion of the law in this subject is called for. Unless I find that the Tribunal has committed an error of law or acted without jurisdiction or in excess of jurisdiction or contrary to the principles of natural justice I cannot interfere with the Award. In other words even if I find that the Tribunal had gone wrong in appreciating the evidence that is not a ground of interference in this jurisdiction under Art. 226 of the Constitution of India.

11. In my view, the finding of the Tribunal pertains entirely to the domain of appreciation of evidence and does not disclose any error of law or perversity. I may further add that on the state of the evidence I find difficult to see as to what other conclusion the Tribunal could have come to.

12. In that view of the matter the contention raised on behalf of the petitioner fails.

13. In the result, this application fails and is dismissed. The Rule is discharged. All interim orders are vacated.

There will be no order as to costs.

Petition dismissed.

AIR 1977 CALCUTTA 449**A. N. SEN AND****BIMAL CHANDRA BASAK, JJ.**

M/s. Shah Prabhudas Gulabchand and another, Appellants v. Eurasian Equipments & Chemicals Ltd. and another, Respondents.

Appeal No. 425 of 1976, Suit No. 139 of 1976, D/- 2-6-1977.

Civil P. C. (1908), S. 20 — Choice of forum by agreement for one place — Cause of action against one of defendants (non-party to agreement) arising in another place — Place of suing.

The specific provision in the contract between the plaintiff and the defendant made the contract subject to Bombay jurisdiction. The bank who was not a party to the contract was also made party (defendant No. 3) to the suit. The branch office of the bank was at Calcutta but the head office was at Bombay and part of cause of action against the bank also arose in Bombay. The balance of convenience for trial of the cause of action at least against defendants Nos. 1 and 2 was entirely in favour of Bombay Court.

Held, the place of suing in respect of enforcement of any claim under the contract was restricted to Bombay Court. The mere fact that the bank was impleaded as a party to the suit and the plaintiff had transaction with its branch at Calcutta would not entitle the plaintiff to file the suit at Calcutta. The question of balance of convenience of the defendant-bank in the facts and circumstances of the case lost a great deal of its importance. AIR 1971 SC 740, AIR 1970 Cal 342 and AIR 1977 Cal 20, Relied on.

(Para 11)

Cases Referred: Chronological Paras

AIR 1977 Cal 20	6
AIR 1971 SC 740	6
AIR 1970 Cal 342	6, 7
AIR 1962 Andh Pra 452	6
AIR 1956 Cal 33	9, 11
1912 AC 212: 105 LT 650	9

H. K. Mitter with P. Chatterjee, for Appellants; P. K. Roy, for Respondents; B. K. Chatterjee, for Dena Bank.

A. N. SEN, J.: This appeal arises out an order passed by Ajay K. Basu, J. on the 22nd November, 1976 dismissing the application of the appellants who happened to be defendants Nos. 1 and 2 in the suit for stay of the suit filed by the plaintiff in this Court, for an injunction restraining the plaintiff from proceeding

with the suit, for revoking leave under Cl. 12 of the Letters Patent and for other reliefs.

2. The plaintiff instituted this suit in this Court on the 26th April, 1976. In the suit, the prayer of the plaintiff is for a decree for Rs. 7,58,322.48 p. and in the alternative (i) a decree against the defendants Nos. 1 and 2 or alternatively against the defendant No. 3 for Rupees 1,77,106.44 p. with interest thereon @ 12% per annum or at such other rate as may be prescribed from June 28, 1973 till the institution of the suit, (ii) an enquiry into the damages as pleaded in para. 11 of the plaint and decree for such sum as may be found due to the plaintiff, interest and other reliefs.

3. The plaintiff also prayed for leave under Cl. 12 of the Letters Patent and under O. II, R. 2 of the Civil P. C. The plaintiff entered into a contract with the defendant No. 2 who is the sole proprietor of the defendant No. 1. The said contract was in writing and under the said contract the plaintiff agreed to buy and the defendants were to sell 10,000 Kgs. of Chloramphenicol Powder I. P. to be supplied during the months of April, May, June, July and August, 1973 @ 2,000 Kgs. each month at the agreed price of Rs. 340/- per Kg. F.O.B. Bombay. Under the terms of the said agreement between the parties the plaintiff was to open in favour of the defendant No. 1 a confirmed irrevocable revolving Letter of Credit for Rs. 34,00,000/- equivalent to the value of 10,000 Kgs. of the said merchandise. The said contract contains a clause to the following effect:

"This contract is subject to Bombay jurisdiction."

4. In this suit the plaintiff's cause of action against the defendants Nos. 1 and 2 is that the defendants instead of supplying Chloramphenicol Powder have supplied Talcum Powder in breach of the said contract between the parties and on the basis of such cause of action the plaintiff has asked for refund of the money paid in respect of the said supply and also for damages. The plaintiff in this suit has impleaded Dena Bank as a party defendant being defendant No. 3. The cause of action of the plaintiff against Dena Bank is that in the event it be held that the defendants Nos. 1 and 2 had supplied proper materials then the said materials which went into the custody of Dena Bank must have been changed in the custody of the Dena Bank.

5. The defendants Nos. 1 and 2 thereafter made this application for stay of this suit and also for revocation of leave under CL 12 of the Letters Patent. The said application of the defendant No. 2 was opposed by the plaintiff and also by the defendant No. 3. The learned trial Judge was pleased to dismiss the said application of the defendants Nos. 1 and 2 by his order under appeal. It appears that the learned trial Judge did not deliver any judgment.

6. The principal contention of the appellants before us has been that in view of the specific provision in the contract between the plaintiff and the defendant No. 2 that the contract is subject to Bombay jurisdiction, this Court should not entertain this suit. Reliance has been placed on the decision of the Supreme Court in the case of *Hakam Singh v. M/s. Gammon (I) Ltd.*, AIR 1971 SC 740 and also decision of the Division Bench of this Court in the case of *Sri Rajendra Mills Ltd. v. H. V. M. Haji Hasan Dada* reported in AIR 1970 Cal 342. Reliance has also been made in this connection on two other decisions, one of which is reported in AIR 1977 Cal 20 and the other is a decision of the Andhra Pradesh High Court, reported in AIR 1962 Andh Pra 452.

7. Mr. Mitter, appearing on behalf of the appellants, has contended that in view of the specific covenant in the contract and in the light of the decisions in the above cases, the learned Trial Judge should have made an order staying the suit in this Court. He has further argued that the fact that Dena Bank has been impleaded as a party to this suit does not make any material difference and in support of this contention he has placed particular reliance on the decision of the Division Bench of this Court in AIR 1970 Cal 342 and he has drawn our attention to the following observation at page 342:

"It appears, however, as we have already stated, that the instant suit could have been instituted either at Howrah or at Salem and the plaintiff, by reason of the above contract, had validly waived its right to institute the suit except at Salem. In such circumstances, it is not open to the plaintiff to object to the order for return of the plaint for presentation to the Court at Salem. It is not also open to defendant No. 2 to object to the same course as the choice of forum in case of alternative forums, lies with the plaintiff and the plaintiff having debarred or precluded itself from going to any

other Court except the Court at Salem which would be a proper Court as against defendant No. 2 also, it would not be just to allow the plaintiff, at the instance of any other party or under cover of its objection, to institute the suit except in the Court at Salem."

8. Mr. Mitter has also submitted that the balance of convenience in the facts and circumstances of this case is overwhelmingly in favour of the cause being tried in Bombay.

9. Mr. Roy, appearing on behalf of the plaintiff, does not dispute the proposition that if the contract contains a specific provision or covenant as to any particular forum where suits or proceedings are to be instituted in respect of or arising out of the said contract, the said covenant should normally be enforced unless there is good ground for not enforcing the same. Mr. Roy has contended that in the instant case as Dena Bank is a party to the suit the plaintiff could not possibly file the suit at Bombay. It is his contention that the suit as framed cannot be instituted in Bombay, as Bombay Court has no jurisdiction to entertain the suit against Dena Bank. He has also argued that the balance of convenience is overwhelmingly in favour of this Court for the trial of the case in so far as the plaintiff and the defendant No. 3, Dena Bank are concerned. Mr. Roy has submitted that the plaintiff had transaction with the particular branch of Denk in Calcutta and the said branch constitutes a separate entity and the suit in relation to any transaction with the said branch should be filed in a Court within whose jurisdiction the said branch is situated. In support of this contention that each branch of a bank constitutes a separate entity, Mr. Roy has relied on the decision of Privy Council in the case of *The King v. Irvine Lovitt*, reported in 1912 AC 212 and also on the decision of P. B. Mukharji, J in the case of *Hansraj Bajaj v. The Indian Overseas Bank Ltd.*, AIR 1956 Cal 33.

10. Mr. Chatterjee, appearing on behalf of the Dena Bank has submitted before us that so far as the bank is concerned the cause of action arises within the jurisdiction of this Court and the balance of convenience for trial of the cause of action in this case against the bank is overwhelmingly in favour of this Court.

11. In our opinion, in view of the specific provision in the contract making the contract subject to Bombay Jurisdic-

tion the application of the defendants should succeed. The decisions relied on by Mr. Mitter clearly lends support to this view. The mere fact that the Dena Bank has been impleaded as a Party to this suit does not entitle the plaintiff to file this suit in this Court in breach of the specific provision contained in the contract. It cannot be said in the instant case that the Bombay Court will have no jurisdiction to try this suit against Dena Bank. The head office of Dena Bank is at Bombay and it also appears on the basis of averments made in the plaint that Part of the cause of action against Dena Bank also arises in Bombay. The plaintiff and the said defendants entered into the said contract containing the said specific provision regarding their choice of forum. Apart from the said specific provision in the contract, it also appears from the facts and circumstances of this case that the balance of convenience for trial of the cause of action at least against the defendants Nos. 1 and 2 is entirely in favour of the Bombay Court. As the plaintiff who has the choice of forum is obliged to institute this suit in the Bombay Court in view of the specific covenant in the contract, the fact that Dena Bank who is not a Party to the contract is also made party to the suit does not authorise or entitle the plaintiff to file the suit in this Court on the basis of the said contract in breach of the specific provision contained therein. In view of the provision contained in the said contract, the choice of forum of the plaintiff is restricted only to Bombay Court in respect of enforcement of any claim under the contract or on the basis of the contract containing this special provision regarding forum. The question of balance of convenience of the defendant No. 3 in the facts and circumstances of this case, loses a great deal of its importance and the question of balance of convenience of the defendant No. 3 has also to be considered in the background of the entire facts and circumstances of this case. It cannot be disputed in our opinion that the Bombay Court has jurisdiction to try and entertain the suit. Even, the decision of P. B. Mukharji, J in AIR 1956 Cal 33 makes this position abundantly clear. We are further of the opinion that on a consideration of the entire facts and circumstances of this case, the balance of convenience for trial of the cause as a whole is overwhelmingly in favour of the Bombay Court.

12. In that view of the matter, the appeal succeeds. The order passed by the learned Trial Judge is set aside. There will be an order in terms of prayer (a) of the Notice of Motion and there will be an order staying the suit and all further proceedings thereon in this Court in terms of prayer (b).

13. In the facts and circumstances of this case we direct that each party will pay and bear its own costs.

BIMAL CHANDRA BASAK, J.:— I agree.

Appeal allowed

AIR 1977 CALCUTTA 451

SABYASACHI MUKHARJI, J.

Bhagatram Goyal, Plaintiff v. Gupta Cables Pvt. Ltd., Defendant.

Suit No. 45 of 1977, D/- 7-7-1977.

(A) Civil P. C. (1908), S. 151 — Inherent jurisdiction — Disputed question of facts — Cannot be decided summarily under this jurisdiction. (Paras 3 & 4)

(B) Civil P. C. (1908), S. 151 — Inherent jurisdiction — Stay of suit — Principles stated.

The court will prevent vexatious proceedings which would have the effect of preventing the due administration of justice and the general principle is that Court can and will interfere, when there is vexation and oppression to prevent the administration of justice being perverted for an unjust end. (Para 5)

The principles to be followed in such a matter are, firstly, mere balance of convenience is not sufficient ground for depriving the plaintiff of his choice of forum. Secondly, the court will have to be satisfied that by such stay the plaintiff will not suffer any injustice whereas action if continued the defendant in defending the action will be victim of such injustice as would amount to vexation and oppression which vexation or oppression will not arise if the suit is stayed. (1906) 1 KB 141, AIR 1956 Cal. 33, AIR 1976 Cal. 18, Followed.

(Paras 5 and 8)

(C) Civil P. C. (1908), S. 20 — Jurisdiction of suits — "Subject to jurisdiction of Court at particular place" — Effect of clause in contract on jurisdiction of competent Court.

It is well settled that the clause excluding the jurisdiction or vesting the jurisdiction of a particular forum does

not oust the jurisdiction of the appropriate court. The jurisdiction of the Court to try a suit is vested in it by the letters patent or by the Constitution. The parties could not by any private agreement confer or take away the jurisdiction, but the Courts could compel the parties to abide by their contract if there is such a contract and if there is no circumstance indicating otherwise, the Courts would compel the parties to abide by their contracts. AIR 1962 An Pra 452, AIR 1977 Cal 449, Relied on. (Para 6)

Where therefore the plaintiff's suit in Calcutta High Court was sought to be stayed on the ground that the parties had contracted to raise disputes in Bhubaneswar Court itself and that the cause of action arose at Bhubaneswar itself.

Held, the defendant had registered office at Calcutta or Howrah and that he had some business connection with Calcutta or Howrah. Some witnesses of the defendants were available at Calcutta at some point of time and that though the defendant might face some inconvenience to defend the suit in Calcutta still such inconvenience would not amount to such vexation as would be described to oppression on it. So the suit could not be stayed under S. 151 of C. P. C. (Para 8)

Cases Referred: Chronological Paras

AIR 1977 Cal 449	6
AIR 1976 Cal 18 : (1976) 1 Cal LJ 275	5
AIR 1962 Andh Pra 452	6
AIR 1956 Cal 33	5
(1906) 1 KB 141 : 75 LJ KB 218	5

P. K. Das with P. Chatterjee, for Plaintiff; P. K. Sen with G. S. Gupta, for Defendant.

ORDER:— On the 27th of January, 1977 the plaintiff filed this suit in this Court against the defendant claiming a decree for Rs. 1,17,100/-, for interim and further interests and for other incidental and consequential reliefs.

2. The suit is by the plaintiff who alleges that he is the sole proprietor of a business and he states that he resides at Bhubaneswar in the State of Orissa and carries on business in the State of Rajasthan. The suit is against the defendant, which is a private limited company. It is alleged in the plaint that the company carries on business, inter alia, at Bhubaneswar in the State of Orissa but has its registered office at No. 3 Jadulal Mullick Road, Calcutta within the jurisdiction of this Court. The plaint is based on certain monetary transactions and accounts stated. The accounts were con-

tained in two documents in which there were the following endorsements: "Subject to Bhubaneswar Jurisdiction." It is apparent from the plaint that the cause of action as pleaded in the plaint, arose at Bhubaneswar and/or at places outside the jurisdiction of this Court. After the institution of this suit on the 27th January, 1977, writ of summons was served before the 13th May, 1977. On the 25th May, 1977, application was made under Chapter 13-A of the Original Side Rules of this Court for a summary judgment and thereafter on the 1st June, 1977 this application was made by the petitioner, the defendant herein. It is stated that after the institution of the suit another suit has been instituted on the basis of a counter claim by the defendant in the appropriate Bhubaneswar Court. In this application the defendant claims that the plaint be rejected or taken off the file and/or for stay of the suit. The prayers of the defendant are made on the following three reasons:

(a) It was stated that the registered office of the defendant was not within the jurisdiction of this Court, but at the material time the same had been transferred to Howrah and as such this Court had jurisdiction to entertain the suit.

(b) It was urged that the plaintiff was not the sole proprietor of the business firm but was a partner thereof and the firm in question was an unregistered one, and as such incompetent to institute proceedings. Therefore, it was urged that the suit was liable to be dismissed.

(c) It was lastly but mainly contended that the entire cause of action had arisen outside the jurisdiction of this Court at Bhubaneswar and it would be vexatious to try the suit here and the suit should be stayed in exercise of the inherent power of the Court or under S. 151 of the Code of Civil Procedure.

3. So far as the question whether the registered office is within the jurisdiction of this Court or not, there is serious dispute as to facts. The defendant denies that fact and states that the registered office had been duly transferred to Howrah. It refers to the appropriate resolutions and also to the copy of the letter which it wrote to the appropriate authorities for recording the transfer of the registered office. The entries in the Register of Companies however have not been produced. The plaintiff, who is still a share-holder and at one point of time was a Director of the defendant company, disputes this contention and this allega-

tion. My attention was drawn to certain correspondence in which the plaintiff wanted to assert that the registered office had not been transferred from the place within the jurisdiction of this Court. In my opinion, a dispute of this nature should not be resolved in this application. If necessary such a dispute can be resolved as a preliminary issue at the trial of the suit. Therefore, I would not dismiss or stay the suit on this ground, but I would reserve the trial of this issue as a preliminary issue at the time of the hearing of the suit.

4. It was, then contended, as mentioned hereinbefore, that the suit was bad because the firm to which the plaintiff belongs, was an unregistered partnership firm and the plaintiff was merely a partner thereof. My attention was drawn to certain bills and vouchers and correspondence with Bank wherein the plaintiff and his son have signed describing themselves as partners of the firm. This again is disputed by the plaintiff. This is a question of fact. In my opinion, this question cannot also at this stage be summarily determined but should be tried as an issue at the time of hearing of the suit.

5. The main question in this case, however, is whether the suit should be stayed in the interest of justice. The principles upon which this power of the Court to stay suits is exercised are well settled. The decisions dealing with this point were again referred to me. The Court will prevent vexatious proceedings which would have the effect of preventing the due administration of justice and the general principle is that the Court can and will interfere when there is vexation and oppression to prevent the administration of justice being perverted for an unjust end, it was so observed in the case of *Logan v. Bank of Scotland*, (1906) 1 KB 141 at pages 149-150. The Court will stay a suit where to continue a suit will cause such injustice to the defendant applicant as would amount to vexation and oppression to him. This was the view expressed by P. B. Mukharji, J., as His Lordship then was, in the case of *Hansraj Bajaj v. The Indian Overseas Bank Ltd.*, AIR 1956 Cal 33 at p. 35. Some of these authorities were reviewed by me in the case of *Jokai Assam Tea Co. Ltd. v. V. S. Barg*, 1976-1 Cal LJ 275: (AIR 1976 Cal 18), wherein it was stated that the Court had power under S. 151 of the Code to stay an otherwise competent suit. This power, however, had to be exercised sparingly and only for the ends of justice

or to prevent abuse of the process of the Court, and strictly within principles which the Courts have evolved. The first principle is mere balance of convenience is not sufficient ground for depriving the plaintiff of his choice of forum. The Second principle is the Court will have to be satisfied that by such stay the plaintiff will not suffer any injustice whereas the action if continued the defendant in defending the action will be the victim of such injustice as would amount to vexation and oppression which vexation and oppression will not arise if the suit is stayed. The facts of this case will have to be judged in the light of the aforesaid principles, referred to hereinbefore.

6. There is a further aspect of the matter, namely, that in this case the plaintiff has referred to though not relying thereon that there had been adjustment of account and in the document of such adjustment of account there is the expression "subject to Bhubaneswar jurisdiction." In the case of *Libra Mining Works v. Baldota Brothers*, AIR 1962 Andh Pra 452 the Division Bench of Andhra Pradesh High Court was considering the claim on a contract where a clause contained the expression "this contract is subject to Bombay jurisdiction". The Court held that the clause denoted that the parties had agreed to have the disputes arising out of the contract settled by the Courts in Bombay. The contract constituted contracting out of the right to bring actions in other competent courts. The aforesaid observations of the Andhra Pradesh High Court were relied on and approved of by the Division Bench of this High Court in an unreported decision in the case of *Shah Prabhudas Gulabchand v. Eurasian Equipments and Chemicals Ltd.* (Appeal from Suit, No. 189 of 1976: (reported in AIR 1977 Cal 449). It is well settled that clause excluding the jurisdiction or vesting the jurisdiction of a particular forum does not oust the jurisdiction of the appropriate court. The jurisdiction of the Court to try a suit is vested in it by the Letters Patent or by the Constitution. The parties could not by any private agreement confer or take away the jurisdiction but the Courts could compel the parties to abide by their contract if there is such a contract and if there is no circumstance indicating otherwise the Courts would compel the parties to abide by their contracts. In the instant case, however, this expression in the document is not, in my opinion,

conclusive or decisive because this cause of action, as such, in its entirety is not based on the accounts stated or on any contract of this nature. But, this factor, in my opinion, may be taken into consideration along with other factors whether the suit should be stayed or not.

7. It has been alleged in the petition on behalf of the plaintiff that the suit should be stayed for the reasons which are enumerated in paragraph 10. It has been stated that the plaintiff is a permanent resident of Bhubaneswar and this fact is not denied. It is further stated that he had never resided in Calcutta. This, however, has been controverted. It is further alleged that the defendant does the whole of its actual business of production and manufacturing of cables and all contracts at Bhubaneswar. It is also alleged that the office of the defendant was in West Bengal. There is however some controversy whether it is at Watkins Lane, Howrah or at 3, Jadulal Mullick Road, Calcutta. But, undoubtedly, it is in the State of West Bengal. According to the defendant, the said office was only for the purpose of making formal correspondence and licence. The cause of action wholly arose at Bhubaneswar and all the dealings and transactions referred to in the plaint took place at Bhubaneswar. The settlement of account was also alleged to have been at Bhubaneswar. Therefore, the entire facts leading to the present cause of action took place at Bhubaneswar. The defendant petitioner has also given a list of several witnesses who may be relevant and material for the purpose of proving the facts in dispute in the instant case. It has been alleged that these witnesses are residents of Bhubaneswar and would be available at Bhubaneswar. The books, papers and documents including the letters which are relevant are also stated to be in Bhubaneswar. It has therefore been submitted that it will be oppressive and vexatious for the defendant to defend the action at Calcutta. It is further alleged that this would be inconvenient to the plaintiff. On behalf of the plaintiff it has been submitted that the books of accounts, papers and documents should be available at the registered office and therefore it has been urged that those documents cannot be available at Bhubaneswar. On the other hand, on behalf of the defendant it was submitted that such papers, books of accounts and documents could be kept at the relevant Branch Office and in fact, were kept there.

My attention was drawn to the relevant provisions of the Companies Act, 1956 which, according to the defendant, permitted such books of accounts, documents and papers being kept at places outside the registered office in the facts and circumstances of the case. My attention was also drawn to the Articles of the Association which permitted the Managing Director to keep such books of accounts, papers and documents at places outside and it was submitted that the Board of Directors had also decided to keep those documents and papers outside. The defendant also stated that the plaintiff had alleged in certain other proceedings beforehand that the books, papers and document were at the factory office at Bhubaneswar.

8. On these facts, the question, whether the suit should be stayed in this Court, will have to be determined. As mentioned hereinbefore, the true test is not the comparative convenience or inconvenience for the trial at a particular place. The balance of convenience is not sufficient ground for depriving the plaintiff of his choice of forum. Bearing that principle in mind it can safely be said from the facts as they appear, that the balance of convenience is in favour of trial of the suit at Bhubaneswar. It can also fairly be said, on the averments made, that the plaintiff will not be inconvenienced or the plaintiff will not suffer any injustice if the suit is tried at Bhubaneswar. But the only question that has to be decided is whether the defendant in defending the action will be victim of such injustice as would amount to vexation and oppression. It is not merely a question whether it will be inconvenient for the defendant to defend but whether the prosecution of the suit will amount to vexation and oppression of the defendant. Admittedly, the defendant has some business connection with Calcutta or Howrah. Its registered office is at Calcutta or at Howrah. Some of the witnesses defendant has mentioned, were available at some point of time at Calcutta in connection with attending the Board Meeting. On the allegations made in this case, though I am inclined to think that it would be inconvenient for the defendant to defend the suit in Calcutta, such inconvenience would not amount to such vexation as could be described as oppression on it. If that is not the position, then, in my opinion, by exercise of inherent power of S. 151 of the Code of Civil Procedure the suit

should not be stayed at this stage. I would, therefore, direct as follows:

9. The defendant will be at liberty to file the written statement within a fortnight from this date but whether the defendant has registered office at Calcutta and whether the plaintiff is entitled to maintain this action being an unregistered firm or not, the defendant will be entitled to raise these issues along with other issues in the written statement and will be entitled to claim that these be tried as preliminary issues of the suit.

10. Costs of this application will be cost in the suit.

Application dismissed.

AIR 1977 CALCUTTA 455

REMENDRA MOHAN DATTA AND
SALIL KUMAR HAZRA, JJ.

Bejoy K. Swaika, Petitioner v. Shyam Sunder Swaika and others, Respondents.

Suit No. 191 of 1972, D/- 25-4-1977.

Arbitration Act (1940), Ss. 39, 41 —
Letters Patent (Calcutta), Cl. 15 — Order
of Court directing registration of award
— If appealable.

Application for setting aside the award made by the Umpire was dismissed by the Court. The Court, thereafter, directed the award to be registered.

Held, that the Court had jurisdiction to pass such order and that was not appealable under Section 39 read with S. 41 of the Arbitration Act. Even if the order was passed in the suit, it did not determine any of the rights of the parties finally. Hence such order is not appealable also under Cl. 15 of the Letters Patent.

(Para 8)

Cases Referred: Chronological Paras

AIR 1974 SC 1066	6
AIR 1971 Cal 65	6

B. K. Bachawat, for Petitioner; Saraf, for Respondents.

HAZRA, J.:— This is a petition for an order that (a) leave be given to the petitioner to file the Memorandum of Appeal on his undertaking (i) to have the order dated Apr. 22, 1977 drawn up and completed within the period of limitation and to include the same in the Paper Book to be filed herein; (ii) to have a list of dates relevant for the purpose of limitation prepared and to have the same included in the paper Book to be filed

herein; and (iii) to have the order to be made herein included in the Paper Book, (b) stay of operation of the order dated Apr. 22, 1977, (c) The respondent No.1 and/or his group, their servants, agents and/or assigns be restrained by an order of injunction from giving effect to or from acting under the order dated Apr. 22, 1977 in any way or manner whatsoever and (d) ad interim order in terms of prayer (b) and (c).

2. We will record that on Friday last, i.e., Apr. 22, 1977 after the order was passed by the learned Judge, Mr. B. K. Bachawat appeared before us for Bejoy Kumar Swaika and made an oral application that his client would be seriously prejudiced by the order of the learned Judge unless stay of operation of the order was passed immediately by us on the undertaking of his client to the effect that he would make necessary application to file a Memorandum of Appeal without certified copy of the order on Monday, Apr. 25, 1977 for stay of operation of the order. On the submission of Mr. Bachawat and in the presence of the learned counsel for Shyam Sunder Swaika and his group we stayed the operation of the order of the learned Judge till today without prejudice to the rights and contentions of the parties.

3. Mr. Bachawat is now moving this application and is praying for further stay of operation of the order. Mr. Saraf for Shyam Sunder Swaika and others submits that the order dated Apr. 22, 1977 is not an appealable order. In any event, the petitioner will not be prejudiced by the order and so the order should not be stayed. The minutes of the order dated Apr. 22, 1977 of S. Mukharji, J. is as follows:

"P. & A. Suit No. 191 of 1972
Shyam Sunder Swaika v.
Bejoy Kumar Swaika
Cor: S. Mukharji, J.
22-4-1977

THE COURT: The Registrar O. S. is directed to send the interim order Award dated 29-12-1976 for registration thereof to the Registrar of Assurance, Calcutta in course of tomorrow the 23rd Apr. 1977 at the costs of the plaintiff.

Registrar O. S. and parties to act on a signed copy of the minutes on the undertaking of the plaintiff's Advocate on Record to draw up and complete the order."

4. Mr. Bachawat submits that the Court had no jurisdiction to pass the order dated Apr. 22, 1977 as the order was passed in the Partition and Administration

Suit No. 191 of 1972 Shyam Sunder Swaika v. Bejoy Kumar Swaika in which reference had been made for arbitration under S. 21 of Arbitration Act. We are unable to accept the submission of Mr. Bachawat, because under S. 23 (2) of the Arbitration Act "where a matter is referred to arbitration, the Court shall not, save in the manner and to the extent provided in this Act, deal with such matter in suit." Under S. 25, the provisions of other chapters of the Arbitration Act shall so far as they can be made applicable apply to the arbitration under this Chapter. Chapter IV relates to arbitration in suits. Admittedly, in the instant case an interim award has been made by the Umpire Mr. D. K. De, Barrister-at-Law. Bejoy Kumar Swaika has made an application for setting aside the interim award. Order has been passed by S. Mukharji, J. dismissing the said application. Against that order an appeal has been preferred. In that appeal we passed an ad interim order on Mar. 23, 1977 to the following, effect:

"The Court: After hearing the parties and taking into consideration the facts and circumstances of the case we think that the proper order at this stage would be to restrain the respondents herein from obtaining the Judgment upon Award in respect of the Award filed by the Umpire, Mr. D. K. De, till the disposal of the appeal and we feel that the appeal should be expedited as follows:

Index will be settled within a week from date. Type-written or cyclostyled paper book to be filed within three weeks from date and the appeal to appear in the peremptory list on 19-4-1977. Costs costs in the appeal.

The above order will not in any way prejudice the parties to perform their rights and obligations under the award."

5. Thus, there was no order by us prejudicing the parties to perform their rights and obligations under the award. We only restrained Shyam Sunder Swaika from obtaining judgment upon award.

6. Mr. Saraf contends that under S. 23 of the Registration Act, the award shall not be accepted for registration unless presented for that purpose to the Registrar within four months from the date of making of the award. He invited our attention to a Bench decision of this Court in Aditya Kumar v. Narayandas AIR 1971 Cal 65 at p. 70 where this Court said:

"The document, that is the Award cannot now be registered under the Regis-

tration Act in view of the provisions in S. 25 of that Act. Much longer than 4 months have elapsed from the date on which the Award was signed by the Arbitrator. Provisions in S. 25 of the Registration Act are imperative and that time cannot be extended by Court."

He also invited our attention to the decision of the Supreme Court in Ratan Lal Sharma v. Purshottam Harit, AIR 1974 SC 1066 : (1974) 1 SCC 671 and contended that the award requires registration and if it is not registered it would be inadmissible in evidence for the purpose of pronouncing judgment in accordance with the award.

7. It is not disputed before us that the award has to be registered. So on the oral application of Shyam Sunder, the learned Judge made the above order for registration.

8. We accept the submission of Mr. Saraf that the learned Judge had jurisdiction to pass the order and that the order of the learned Judge is not appealable under S. 39 read with S. 41 of the Arbitration Act. Even if the order was passed in the suit as contended by Mr. Bachawat, then in view of the fact that the order complained of has not determined any of the rights of the parties finally, we hold that the order is not appealable under Cl. 15 of the Letters Patent. From whichever point of view, the matter is looked into, we are satisfied that the order is not appealable and as such we cannot grant leave to file Memorandum of Appeal in terms of prayer (a) of the petition.

9. We will record that we have heard the learned counsel for both the parties and we are further satisfied that in any event the petitioner will not be prejudiced by the order of the learned Judge, because the award has to be presented for registration within the time as provided under S. 23 of the Registration Act, read with Ss. 24, 25 and 26.

10. In the premises, the prayers made in the petition are rejected. This petition is dismissed with costs. It is recorded that Mr. Saraf's clients are not admitting the allegations in the petition.

11. Although we are dismissing this petition we are making it clear that since we passed an order on Apr. 22, 1977 staying the operation of the order of S. Mukharji, J. dated Apr. 22, 1977 till today and as the time for sending the award for registration under that order expired on Apr. 23, 1977, we are extend-

ing the time for registration till tomorrow. Let the Registrar O. S. act on a signed copy of the minutes, on the undertaking of Advocate on Record of Shyam Sunder Swalka to draw up and complete the order.

R. M. DATTA, J:— I agree.

Petition dismissed

AIR 1977 CALCUTTA 457

**PRADYOT KUMAR BANERJEE AND
RAMKRISHNA SHARMA, JJ.**

The State of West Bengal, Appellant v. Dhanesh Bijoy Sahana and others, Respondents.

A. F. O. D. Nos. 921-922 of 1964, D/- 18-3-1977.*

Land Acquisition Act (1894), S. 23 (2) — Award of additional compensation — Duty of collector and court — Additional Compensation must be awarded even in absence of claim made therefor.

The Land Acquisition Collector and the Land Acquisition Judge, while fixing the compensation for certain land, omitted to award the sum of fifteen per cent on the market value of the land. In appeal by the State it was contended that as no cross-objection to the appeal was filed the plea in respect of the additional compensation could not be raised.

Held that the award of the additional compensation is a must for the court in view of the compulsory nature of the acquisition. Hence it was not necessary that any cross-objection be filed to agitate the claim. (Para 5)

Cases Referred: Chronological Paras

AIR 1972 Cal 225 : 76 Cal WN 296 3

AIR 1971 SC 2015 3

AIR 1930 PC 201 : 34 Cal WN 599 : 31

Cri LJ 701 3

(1902) 6 Cal WN 406 3

N. C. Chakravarty and N. G. Das, for Appellant; P. N. Mitter; and S. K. Dutta, for Respondents.

BANERJEE, J:— These two appeals at the instance of the State of West Bengal arise out of a land acquisition reference. By notification dated 20th February, 1958, part of C. S. plot No. 244 of Khatian No. 212, Mouza Kenduadihi, was sought to be acquired. F. A. 921 of 1964 is in respect of garden, area being 2-70 acres

*(Against decree of D. P. De, Dist. J., Zillah Bankura, D/- 23-3-1963).

IU/IU/D319/77/AYP/WNG

and F. A. No. 922 of 1964 is in respect of Bastu and Tara land being 1.41 and 0.42 acres respectively. In making the reference to the Court under S. 18 of the Act, the Land Acquisition Collector stated that the valuation has been assessed on the basis of the sale figures of land sold in the Mouza and those have been obtained from the Registration Department and as per provision of the Land Acquisition Act. It is stated that the land was valued at Rs. 8,500/- per acre. The referring claimant not being satisfied filed an application under S. 18 of the Land Acquisition Act for reference. It must be stated that the lands were acquired under the relevant provision of the Act II of 1948. The Land Acquisition Collector assessed the valuation of the land in question at the rate of Rs. 142/- per cottah. The Land Acquisition Judge raised it to Rs. 300/- per cottah and thereupon this application was made. It must be pointed out that after the valuation has been fixed neither the Land Acquisition Collector nor the District Judge gave 15% compensation under S. 23 (2) of the Land Acquisition Act. It appears that the referring claimant did not claim the 15% compensation in his application for reference. The learned Judge, while he disposed of the reference, stated that the Land Acquisition Collector awarded at the rate of Rs. 142/- per cottah and that there was no material before the Court on what basis the Collector arrived at the valuation fixed by him.

2. Mr. Chakravarti on behalf of the appellant contended that the learned Judge was wholly wrong in stating that there was no material before the Court to indicate the Collector's basis for arriving at the valuation fixed by him. He argued that in his reference to the Court under S. 18 of the Act it has been specifically stated that the valuation has been assessed on the basis of the sale figure in the Mouza and as such there was indication how the valuation was arrived at.

3. Mr. Mitter on behalf of the respondent however contended that under S. 19 (1) (d) of the Land Acquisition Act the ground on which compensation has been determined must be stated. In the order of reference one basis has been given under S. 19 (1) (d) of the Land Acquisition Act. S. 19 (1) (d) is in the following terms:—

"19 (1) (d), if the objection be to the amount of the compensation the grounds

on which the amount of compensation was determined."

It has been held in the cases reported in (1902) 6 Cal WN 406, 34 Cal WN 599 : (AIR 1930 PC 201), (Benjamin Knowles v. The King) and 76 Cal WN 296 : (AIR 1972 Cal 225), that the Land Acquisition Collector must give the basis on which the valuation has been assessed. In the present case, it is stated that the valuation was assessed on the basis of sale figures in the Mouza and those have been obtained from the Registration Department but unfortunately when the respondent's witness came to the box neither did he say what was the value of the land nor did he file any document upon which the valuation was fixed by him. On the other hand he said that he has fixed the valuation. Ext. A which is a statement of structure and valuation does not show any detail as to the valuation of the land. No document was filed by the respondent to justify the valuation at the rate of Rs. 142/- per cottah. On the other hand the respondent has filed two documents in support of his contention that the valuation of the land should be assessed at Rs. 300/- per cottah. One of the documents which is Ext. 2 shows a sale of 5 cottas of land in the vicinity at the rate of Rs. 300/- per cottah. In our opinion, Ext. 1 does not give any clue and that being a document of 1948 cannot be any basis for coming into the valuation of the land in question. But Ext. 2 is a very relevant document. In our opinion, Ext. 2 gives a guidance to the Court for fixing the valuation of the land in question. It is true that the valuation of a small plot may not be a criterion for coming to the decision in respect of a larger area and it has been held by the Supreme Court in the case reported in AIR 1971 SC 2015 (Collector of Lakhimpur v. B. C. Dutta) that the large area of land cannot possibly fetch a price at the same rate at which small plots are sold. The witness No. 1 for the petitioner stated that there are two roads by two sides of the acquired plot. There are residential houses near the acquired plot. There is a school and Bankura Sammilani College. He also stated that the acquired land is worth Rs. 300/- per cottah. These facts have not been challenged at all in cross-examination by the respondent. In fact, reading the evidence of P. W. 1 and the Kobala together we are not inclined to vary the order of the learned Judge for the fixation of price of the land in question on this score. We,

therefore, affirm the fixation of valuation by the learned District Judge in respect of the land in question at the rate of Rs. 300/- per cottah.

4. Mr. Mitter then contended that the learned District Judge should have allowed 15% compensation under S. 23 (2) of the Land Acquisition Act which the referring claimant is entitled to.

5. Mr. Chakraborty however contended that as the respondent has not filed any cross-objection to the appeal, the respondent is not entitled to raise this plea at all. Mr. Mitter contended that it is a duty of the Court or the Collector to give 15% compensation to the awardee and it is not for the referring claimant to apply for it. More so the provision of S. 8 (2) (a) of the Act II of 1948 was held to be ultra vires by this Court. In that view of the matter it is argued by Mr. Mitter that this question does not arise. In S. 23 (2) of the Land Acquisition Act it is stated that the Court shall award 15% compensation over the awarded money for the compulsory acquisition of the land in question. Section 23 (2) is in the following terms:—

"23 (2). In addition to the market value of the land as above provided, the Court shall in every case award a sum of fifteen per centum on such market value, in consideration of the compulsory nature of the acquisition".

Therefore, in our opinion, the award of 15% compensation is a must for the Court in every cases in consideration of the compulsory nature of the acquisition. In our opinion, the learned District Judge and the Land Acquisition Collector were wrong in not awarding 15% compensation and in that way failed in their duty to make the award in accordance with Section 23 (1) and (2) of the Land Acquisition Act and as the Appellate Court against the said award, it is our duty also to give effect to the statutory provision. It is not necessary, therefore, in our opinion, that any cross-objection should be filed for the purpose of agitating the claim for 15% compensation above market value of the land in question.

6. Before we allowed Mr. Mitter to argue this point about 15% solatium, Mr. Chakraborty wanted notice and the matter was adjourned, and thereafter we heard Mr. Mitter and Mr. Chakraborty on this point. After hearing Mr. Chakraborty and Mr. Mitter on this point we are of the opinion that the respondents must get 15% solatium under S. 23 (2) of the Land Acquisition Act.

7. We, therefore, dismiss the appeals filed by the State Government but vary the awards to the extent that over and above the awarded money, the respondents will get 15% solatium. The appellant must pay the 15% compensation of the market value and the said sum will carry an interest at the rate of 6% from the date of the award till the date of payment.

8. It is stated before us that the compensation money awarded in F. A. No. 922 of 1964 has already been withdrawn by the respondents on furnishing Bank guarantee. The Bank guarantee will stand dissolved after two months.

9. There will be no order as to costs.

R. K. SHARMA, J.:— I agree.

Appeal dismissed.

AIR 1977 CALCUTTA 459

**SALIL KUMAR DATTA AND
GANENDRA NARAYAN RAY, JJ.**

Kesoram Industries & Cotton Mills Ltd., Petitioner v. Union of India and others, Opposite Parties.

A. F. O. O. No. 234 of 1975, D/- 21-2-1977.

(A) Constitution of India, Arts. 226 and 31 (1) — Writ of Mandamus — Maintainability of petition — No specific pleading that applicant's legal right was affected but right under Art. 31 (1) was in fact violated — Petition held maintainable.

Where a Company was given certain Cash assistance for exports in pursuance of Government circulars and the Government adjusted it against other liability alleging that the payment was wrongly made, it was held that such adjustment would offend the provisions of Art. 31 (1) and affect company's legal right to property and the application for issuance of appropriate writs was maintainable though it was not specifically pleaded that the Company's legal right had been affected. (Para 10)

(B) Evidence Act (1872), S. 115 — Estoppel — Undertaking to export certain percentage of total production — Subsequent assistance promised by Government — Withdrawal of such promise — Does not give rise to estoppel.

A Company was granted a licence by Government to import capital goods, one of the condition of licence being to ex-

port 15 per cent of its production and for due performance thereof the company had executed a written undertaking. Subsequent to the execution of the undertaking by the Company Government promised cash assistance to the Company. Withdrawal of such promise for cash assistance would not give rise to question of estoppel against Government on the ground that the Company exported its products on the basis of the subsequent promise and but for such promise it would not have exported the goods. AIR 1971 SC 1021, Ref. (Para 11)

(C) Contract Act (1872), S. 72 — Adjustment of mutual claims — Unilateral adjustment not permissible — Government paying certain amount as cash assistance to company but adjusting the amount against other liabilities on ground that the amount was wrongly paid — Adjustment held not permissible. (Original Order D/- 27-6-1974 (Cal), Reversed).

In the instant case the Government paid certain amount as cash assistance to a company in respect of exports during certain period. The Government was liable to pay to the company further sum in respect of subsequent exports. The Government adjusted the amount paid against its subsequent liability alleging that the amount was wrongly paid.

Held that when there is a dispute about mutual claims and no consent agreement between parties there cannot be an adjustment by unilateral action of one party. To allow one party unilaterally to adjust his alleged claims, which are disputed, against his debts to such other party will be to reverse the process of law and to put the aggrieved party to approach a court of law to remedy the illegal and wrongful act of the offending party. (Para 14)

In the absence of relevant documents which the Government having custody of the documents was required to produce before the Court and on the face of the circular about the cash assistance, it was not possible on the materials on record to hold that the adjustments depriving the company of their property in the form of money were patently with the authority of law. (Para 15)

When a dispute has been raised in respect of the cash allowance till such dispute is resolved by adjudication under the process of law, the Government on its own cannot make adjustments of such payments against other funds of the company lying with it. (Para 16)

In the view taken about the right of the Government to recover the cash assistance, the adjustment in the way done was set aside. (Original Order D/- 27-6-1974 (Cal), Reversed). (Para 16)

Cases Referred: Chronological Paras

AIR 1971 SC 1021	11
AIR 1968 SC 718	11

R. C. Deb, Prasanta Kumar Ghosh and Goutam Chakravarti, for Petitioner; Noni Coomar Chakravarti, Surathi Mohan Sanyal, for Opposite Parties.

SALIL KUMAR DATTA, J.:— This is an appeal from the judgment and order of Murari Mohun Dutt, J. dated June 27, 1974 whereby the connected Rule was discharged. On June 11, 1962 the Government of India granted an import licence to the appellant company for the import of capital goods (Plants and Machinery) valued at Rs. 35 lakhs for the manufacture of cast iron spun pipes. The licence was subject inter alia to the condition that the company would have to export 15% of its total production for six years starting from the date of regular production. The export obligation, as required, was secured by an undertaking of the company dated Aug. 4, 1965. It will appear from its statement of export performance, the production commenced from Jan. 1966 when the requisite export commenced and continued thereafter.

2. By a circular dated Aug. 17, 1966 the Government of India informed the Secretary, Export Promotion Council that it was decided to grant cash assistance against exports effected from June 6, 1966 the date of devaluation of the Indian rupee, on specified engineering products. Under that circular, there is no dispute (vide para. 12 of the petition, the company's claim in respect thereof is admitted in the affidavit-in-opposition para. 10 as substantially correct) that cast iron spun pipes, classified under ferrous castings would be entitled to cash assistance at the rate of 20%. The Joint Chief Controller of Imports and Exports of the Government (hereinafter referred as JCCI & E) issued cheques from time to time of sundry amounts as such cash assistance in favour of the company and during the period from July 1966 to June 1967 in all a sum of Rs. 2,81,267.00 as cash assistance was paid to the company by Sept. 18, 1967.

3. On June 4, 1969, JCCI & E informed the company that according to the then policy, no cash assistance was admissible against exports in discharge of export

obligation in C. G. cases i.e. capital goods licences issued with prospective export obligation. By letter dated Dec. 28, 1970 the company was informed by JCCI & E that for export of Rubber Rings the company was considered entitled to cash assistance of Rs. 2,59,935/- for April-June, 1969, Rs. 1,76,256/- for July-September, 1969, for Rs. 1,00,497/- for October-December, 1969 and Rs. 59,579/- for January-March, 1970 all at 10%. Thereafter the company was informed by the said letter as follows:—

"You were paid an amount of Rupees 2,81,267/- against export of July, '66-June, '67 though you were under C. G. Licence obligation. So the entire amount of Rs. 2,81,267/- has been adjusted from the above cases viz. full amount of your A-J '69 exports i.e. Rs. 2,59,935/- and the balance amount of Rs. 21,332/- from your export of July-September, 1969. (Annexure 'K' to the petition).

4. It may be noted here that from a letter of June 12, 1970 issued by the Engineering Export Promotion Council to the Company, it appears that—

"... .. in supersession of the above instructions, on the above subject (i.e. Grant of Cash assistance against exports made in fulfilment of export obligations imposed on C. G. Licences), it has been decided to allow cash assistance under the scheme of cash assistance to registered exporters, in terms of instructions issued from time to time, against exports, effected on or after 1st April, 1966, onwards in cases when C. G. licences have been issued subject to export obligations and also subject to such conditions, as may be imposed in this regard"

The company's case is that on basis of the Government circular dated Aug. 17, 1966 the company had since exported engineering goods namely cast iron spun pipes and fittings on the faith and belief that it would "get the cash assistance mentioned in the circular." The company relied on the basis of the aforesaid circular declaring the Government policy and effected exports and thereby suffered detriment. Further the cash assistance were treated by the company as trade receipts and shown as such in its books of account whereon income-tax was paid. The decision to withhold and adjust cash assistance was wrongful, illegal, unwarranted, arbitrary and discriminatory.

5. On the above allegations and contentions, the petitioner moved this court

in constitutional writ jurisdiction praying for writs quashing the impugned decision of the Government withholding the cash assistance on exports during the relevant period as also the adjustment of its rightful dues against such cash assistance already paid. A writ in the nature of mandamus was also prayed for restraining the Union of India and its concerned authorities from giving effect to impugned circulars or decisions. On this application this Court issued a Rule on the said respondents to show cause why appropriate writ prayed for should not issue and such orders should not be passed as would be deemed fit and proper.

6. The respondents showed cause to the Rule by filing an affidavit-in-opposition affirmed by Bimal Kanti Biswas, Deputy Chief Controller of Imports and Exports. It was stated therein that the company accepted the terms of licence for import of plant and machinery providing for export of 15% of its annual production and executed an undertaking for securing such export. Further when the licence was granted there was no scheme for cash assistance. Accordingly as there was no alteration of position to its detriment by the company, there was no question of any estoppel or equity on the Government for grant of the said cash licence. The respondents had no concern with the alleged payment of income-tax on such cash assistance shown incorrectly as Trade receipts. The Export Promotion Scheme was applicable to normal exports without any tied condition under "export obligation scheme", as it was not the policy of the Government to give cash assistance when there was an obligation for export. The Government subsequently decided on representation that exports made on or after April 1, 1969 in fulfilment of export obligation would qualify for cash assistance. The company was given credit of the same subject to adjustment of payments made by inadvertence without knowledge of export obligation which fact was suppressed by the company. In respect of all grants of cash assistance prior to April 1, 1969 for exports in discharge of obligation, adjustment were made against future entitlements of cash assistance after April 1, 1969. The allegations that orders, circulars, decision directing that the company was not entitled to such cash assistance against tied exports prior to April 1, 1969 were arbitrary, illegal or discriminatory were denied. It was further stated that these were administrative or executive

acts for which no writ of certiorari was available. It was submitted that the petition was wholly misconceived and should be dismissed.

7. In its affidavit-in-reply the allegations and contentions in the affidavit-in-opposition were denied while those in the petition were reiterated. It was disputed that the Export Promotion Scheme was applicable only to normal exports without any tied condition of export. There was nothing in the licence imposing restriction on cash assistance and it was denied that the company was not entitled to any cash assistance since withdrawn and adjusted. It was further denied that there was any suppression of export obligation or that payment was made by inadvertence under the Export Promotion Scheme of 1962-63 and subsequent years, such cash assistance by way of incentive was granted to all exporters. The company reiterated that the decision was arbitrary, illegal and discriminatory.

8. Before the learned Judge, as also before us, the Export Promotion Scheme current for the relevant period was not produced. It was held that even though the scheme was not there on the assumption that there was no restriction or limitation in respect of cash assistance to which the company was entitled for obligated export, it could not be said that there was any alteration of position to its detriment by the company in exporting goods on the representation of cash assistance. The learned Judge was further of the opinion that the cash assistance subsequently withdrawn could not be treated as trade receipts. The Rule accordingly was discharged. The appeal before us is against this decision.

9. Mr. Noni Coomar Chakravarti learned Advocate for the respondents raised a demurrer contending that the company had neither pleaded nor established any legal right, which could be remedied by issuance of any writ in a proceedings under Art. 226 (1) of the Constitution. And it was not established that the company had a statutory right to cash assistance nor that there was any violation of any statutory provisions by the respondents. The application it was submitted accordingly was patently not maintainable in law.

10. It is true there is no specific pleading that the company's legal right had been affected by the impugned adjustment. Even so, the company, it is the admitted position, became entitled to

considerable amount by way of cash assistance for exports after April 1, 1969 and such amounts were its property over which it had the full right of disposal or appropriation. By adjustment of the said property against the amount of cash assistance on its exports prior to the said date, the company was deprived of its property, according to the company, without any authority of law. Such action thus offended the provisions of Art. 31 (1) of the Constitution and the Company's right to the said amounts if wrongfully adjusted could thus be enforced in proceedings for issuance of appropriate writs. The application accordingly, in our opinion is maintainable in law.

11. The next point urged by Mr. R. C. Deb is that the Company acted upon the promise of cash assistance held out by the respondents and showed the amount so paid by Government in discharge of its promise as trade receipts whereon income-tax was paid. In the petition it was also stated that the company exported goods on the basis of assurance of cash assistance. The company thus altered its position it was submitted, to its detriment. Accordingly the Government was bound by its promise and could not after the promise was acted upon be allowed to resile from its promise and saddle the company with the liability as if such promise was never made. Reference was made to the decisions in *Union of India v. Anglo Afghan Agencies*, AIR 1968 SC 718 and *Century Spinning & Manufacturing Co. Ltd. v. Ulhasnagar Municipal Council*, AIR 1971 SC 1021. In the latter case following the earlier case it was observed:—

"Public bodies are as much bound as private individuals to carry out representations of facts and promises made by them relying on which other persons have altered their position to their prejudice"

In the case before us, the company was granted a licence to import capital goods namely plant and machinery for manufacturing spun pipes. One of the conditions of licence was to export spun pipes as would be manufactured by that plant and machinery imported to the extent of 15% of its production and for due performance of the obligation, the company executed a written undertaking. It could not accordingly be said that the company exported its products on the basis of the promise for cash assistance and but for such promise it would not have exported the goods, thereby altering its position to

its detriment. In fact when the licence for import of plant and machinery with export obligation was given no question of grant of cash assistance against export arose as the grant was directed to be given by the circular of Aug. 17, 1966 with effect from June 6, 1966. It could not therefore be said that there was such representation of an existing fact which raised an estoppel or a representation of a future act which could be enforced at law or in equity. As to the Company's case that it entered the cash assistance as trade receipt, in its books of account and paid income-tax thereon, it is obvious that such entry as alleged to have been made was not based on any representation that it was to be treated as such. It was treated as such by the company on its own, prima facie on its mistaken conception and also it has not been shown to our satisfaction that such cash assistance is to be deemed as income assessable under the Income-tax Act, 1961. Accordingly in agreement with the learned Judge we hold that there was no question of any estoppel or any right in the company enforceable against the Government at law or in equity.

12. Mr. Deb lastly contended that the respondents had no right to recover or adjust the cash assistance alleged to have been paid by them by inadvertence against the admittedly legal dues of the company lying with them. Such adjustment according to him, was not permissible in law when the right to recover the cash assistance was disputed nor was any authority of law shown to establish the right to withdraw the cash assistance paid during the relevant period. Mr. Chakravarti contended on the other hand that when there are mutual demands between the parties, there was nothing wrong or illegal in straightway making adjustment of mutual claims between the parties.

13. Section 72 of the Contract Act, 1872 provides that "a person to whom money has been paid or anything delivered, by mistake or under coercion, must repay or return it." There can thus be no dispute about the legal liability of person to repay money paid or any thing delivered to him by mistake or under coercion. But before the liability is fastened, there must be no dispute that the person receiving the money had no right to such money paid or the thing delivered.

14. As to adjustment also, there can be little dispute that when there are

mutual claims between the same parties in respect of same accounts, if not of other, accounts, an adjustment is permissible in law which is also permissible on consent or by agreement express or implied. When however there is a dispute about mutual claims and no consent or agreement between parties can there be an adjustment by unilateral action of one party? We are inclined to think that it is not; to allow one party unilaterally to adjust his alleged claims, which are disputed on (by?) the other against his debts to such other party will be to reverse the process of law and to put the aggrieved party to approach a court of law to remedy the illegal and wrongful act of the offending party.

15. In the case before us, by the circular issued by the Government of India in the Ministry of Commerce dated 17th Aug., 1966 the Government decided to grant cash assistance against exports effected from June 6, 1966 of specified engineering products in the context of devaluation of Indian rupee. This circular is Annexure 'D' to the petition and appears to be complete in all respect with list of products and percentage of assistance annexed. Item (29) of Group III is in respect of iron and steel casting which include spun pipes, cash assistance being at the rate of 20% of f.o.b. value on export. In this circular there is no provision that the cash assistance would not be available even when the exporter was under obligation to export a specified percentage of its production. The Export Promotion Scheme valid and current for the relevant period was not produced before the Court to establish that the scheme was applicable to normal exports without any tied condition under "Export obligation scheme." In the affidavit in opposition, it was stated that it was not the policy of the Government to give cash assistance where exports had been made in fulfilment of export obligation. Unfortunately no document was produced before the court to establish the Govt.'s intention based on authority as alleged that no assistance including cash assistance against exports prior to April 1, 1969 made in fulfilment of export obligation was to be granted. In the relevant circular of Aug 17, 1966 (Annexure 'D' to the petition) which set out the decision of the Government extending cash assistance to various products as listed therein with specific percentage of assistance no condition had been attached confining cash assistance only to normal exports

free from any obligation as claimed. Admittedly such cash assistance was given to exports from April 1, 1969 even when there was the export obligation for the aforesaid period. In absence of relevant documents which the respondents having custody of the documents was required to produce before the Court and on the face of the aforesaid circular it is not possible for us on the materials on record to hold that the impugned adjustments depriving the appellant of their property in the form of money were with the authority of law in so far as the case before us is concerned.

16. Further as we have already seen, when a dispute has been raised in respect of the cash allowance in respect of export prior to April 1, 1969, till such dispute is resolved by adjudication under the process of law, the Government on its own cannot make adjustments of such payments against other funds of the company lying with it. Such action appears to be arbitrary and without the sanction of law.

17. We concur with the findings of the learned Judge that there was no question of estoppel and that the company could claim no legal right at law or in equity against adjustment on basis of promise or representation. We however feel that in the view we have taken about the right of the Government to recover the cash assistance, the adjustment in the way done should be set aside. We accordingly allow the appeal and set aside the order discharging the Rule and make the Rule absolute. The order of the Government dated Dec. 28, 1970 Annex. 'K' to the petition adjusting the cash assistance on exports prior to April 1, 1969 against subsequent cash assistance is set aside and the respondents are restrained from giving effect or further effect to the same. Let appropriate writs issue accordingly. The respondents however will be at liberty to recover from the company, the impugned cash assistance if recoverable, in accordance with law. There will be no order for costs in the appeal.

G. N. RAY, J.:— I agree.

Appeal allowed.

AIR 1977 CALCUTTA 464

**SALIL KUMAR DATTA AND
GANENDRA NARAYAN RAY, JJ.**

**Dr. R. D. Anklesaria, Petitioner v.
Mrs. Kamala Roy, Opposite Party.**

Civil Rule No. 3725 of 1976, D/- 1-4-1977.

Civil P. C. (1908), O. 6, R. 17 — Amendment on basis of subsequent events— Suit for eviction on ground of rebuilding after demolition — Application for amendment of plaint for adding grounds of subletting and wrongful user (known subsequent to filing of original plaint) was allowed.

The suit for eviction of tenant (governed by the W. B. Premises Tenancy Act) on determination of tenancy was initially filed on the ground of rebuilding after demolition. During the pendency of the suit an amendment of plaint was sought for on the additional ground of illegal subletting of a portion of the premises and wrongful user. The plaintiff had no knowledge about subletting and wrongful user before presentation of the original plaint. In the circumstances, the application for amendment was allowed as the proposed amendment would not change the nature and character of the suit viz. suit for eviction of a tenant. (Para 8)

A tenant governed by the Transfer of Property Act simpliciter and a tenant governed by the W. B. Premises Tenancy Act stand on altogether different footing. In the case of a statutory tenant under the W. B. Premises Tenancy Act, an act of subletting and/or wrongful user attract the provisions of S. 13 of that Act and such tenant is liable to be evicted on the ground of subletting/wrongful user even if such subletting/wrongful user is made after the determination of contractual tenancy. Accordingly, the nature and character of the suit is not changed. (Para 8)

Further, there was no disentitling factor for deciding the suit on the basis of subsequent events, diligently brought to the notice of the trial Court, undoubtedly having fundamental impact on the right of relief or the manner of moulding it. In such circumstances, the court cannot ignore the subsequent events on the salutary principle of avoiding multiplicity of proceedings, shortening the

course of litigation and achieving the ends of justice. Case law discussed.

(Para 8)

Cases Referred: Chronological Paras

AIR 1977 Cal 49	8
(1976) 80 Cal WN 269	8
AIR 1975 SC 1409	8
AIR 1975 Delhi 46	8
AIR 1973 SC 171	7, 8
AIR 1973 Cal 448	8
AIR 1968 SC 1165	8
AIR 1952 Punj 221	7
AIR 1941 FC 5	8
AIR 1922 PC 249	8

Chandi Das Roy Chowdhury, Rabindra Nath Datta and D. Lahiri, for Petitioner; A. Chaudhuri and Amal Mitra, for Opposite Party.

G. N. RAY, J.:— This Rule is directed against Order No. 69 dated August 16, 1976 passed by the learned Subordinate Judge, 4th Court, Alipore in Title Suit No. 97 of 1975 allowing the application of the plaintiff for amendment of the plaint.

2. The facts concerning the Civil Rule are inter alia that the plaintiff opposite party instituted a suit for ejectment against the defendant petitioner in respect of a portion of premises No. 1, Woodburn Road also known as 4A, Woodburn Park, Calcutta on the ground of building and rebuilding after demolishing the suit premises on the allegation that such building or rebuilding could not be carried out unless the defendant-petitioner was evicted from the suit premises.

3. The defendant opposite party entered appearance in the said suit and contested the said suit by filing a written statement inter alia contending that the alleged purpose of building and rebuilding was mala fide, motivated and not tenable in law.

4. During the pendency of the said suit the plaintiff opposite party made an application for amendment of plaint under O. 6, R. 17 of the Code of Civil Procedure for inserting paragraphs 8A to 8C inter alia to the effect that the defendant had without previous consent in writing of the plaintiff sublet a portion of the suit premises as also had transferred or assigned a portion of suit premises and the defendant or persons residing in the premises had done acts contrary to the provisions of clause (b) of sub-sec. (1) of S. 13 of the West Bengal Premises Tenancy Act, 1956 and that the suit premises though let out for residen-

tial purpose to the defendant was being used for purposes of trade and business, that is, for a purpose other than the purpose for which it was let out for more than four months without the consent in writing of the plaintiff.

5. The said application for amendment was opposed by the defendant and a petition of objection was filed by him to the aforesaid application for amendment of the plaint. In the said petition of objection, the allegations of the plaintiff were denied and it was contended by the defendant that the proposed amendment had been prayed to achieve the ulterior purpose of the plaintiff and the proposed amendment would also change the nature and character of the suit and as such the same should be rejected.

6. The learned Subordinate Judge by his aforesaid Order No. 69 dated August 16, 1976 allowed the said application for amendment of plaint *inter alia* on the finding that the proposed amendment will not change the nature and character of the suit. As aforesaid, the defendant petitioner challenged the said order of the learned Subordinate Judge in the instant Rule.

7. Mr. C. D. Roy Chowdhury the learned Advocate appearing for the defendant petitioner contended that the cause of action on which the suit for eviction was instituted by the plaintiff opposite party was requirement of the suit premises for building and rebuilding by the plaintiff, but by the proposed amendment an altogether different cause of action was sought to be introduced, namely eviction was sought for on the ground of subletting of the suit premises without the consent of landlord and for user of the suit premises for purposes different from the purpose for which the premises was let. Referring to a decision made in the case of *M/s. M. Laxmi & Co. v. Dr. A. R. Deshpande*, reported in AIR 1973 SC 171, Mr. Roy Chowdhury submitted that the court can take notice of subsequent events where in view of subsequent events and/or altered circumstances, original relief had become inappropriate or the judgment of the court cannot be carried into effect because of the altered circumstances. But Mr. Roy Chowdhury contended that introduction of subsequent events and/or altered circumstances cannot be permitted if such introduction results in changing the nature and character of the suit and/or changing the cause of action on which the suit was based. In this connection,

Mr. Roy Chowdhury referred to a decision made in the case of *Kesho Ram Passey v. Dr. P. C. Tandon* reported in AIR 1952 Punj 221. In the aforesaid case, a suit for ejectment was instituted on the ground of subletting by the defendant but in appeal the suit was remanded and the plaintiff sought to amend the plaint by adding two more causes of action namely the premises was sublet in 1947 and that the defendant had made structural alterations to the premises presumably after the suit was filed. It was held in that decision that the plaintiff could not be allowed to amend the plaint by adding new causes of action which had arisen after the filing of the suit. It was further held in the said decision that if the plaintiff had a grievance against the defendant for giving him other causes, he must pursue his remedy by another suit. Relying on this decision Mr. Roy Chowdhury submitted that in the amended petition it has not been specifically stated that the alleged illegal acts of subletting and user of the premises for a different purpose had been committed before the institution of the suit and in the absence of specific statement as to the time of commission of the alleged illegal acts, it should be presumed that the said illegal acts had been committed after the institution of the suit. Accordingly, the plaintiff cannot be permitted to introduce new causes of action occurring after the institution of the suit. Mr. Roy Chowdhury, however, conceded that the proposed amendment could have been made if the alleged causes of action namely subletting and wrongful user had occurred before the institution of the suit. It may be pointed out that on the principle of bar in changing 'cause of action' as alleged by Mr. Roy Chowdhury, the fact of subletting, whether made before or after the institution of the suit, hardly makes any difference.

8. Mr. Arijit Chaudhuri the learned Advocate appearing for the landlord opposite party, on the other hand, contended that the impugned order allowing the proposed amendment is quite legal and justified. The first decision referred to by Mr. Chowdhury in support of his case is by S. K. Datta J. in the case of *Tinkari Das v. Jamuna Bala Dasi* reported in AIR 1973 Cal 448. In the said case a suit for eviction of tenant on the ground of forfeiture of lease was initially made and during the pendency of the suit an amendment of plaint was sought

for on the ground that in the meantime the lease had expired by efflux of time and eviction was also prayed on the said ground of expiry of lease. In the said decision S. K. Datta J. referred to a number of decisions including the decisions made in the cases of Lachmeswar Prasad v. Keswarlal reported in AIR 1941 FC 5 and M/s. Laxmi & Co. v. Anantaram Deshpande reported in AIR 1973 SC 171 and Nair Service Society Ltd. v. K. C. Alexander reported in AIR 1968 SC 1165. After discussing the principles laid down in various decisions referred to by his Lordship it was held by S. K. Datta J. that for shortening the litigation and for ends of justice the Court was entitled to take into consideration the subsequent events even if there was change in the ground of eviction and the nature and character of the suit being suit for recovery of possession of the suit property on eviction of the defendant was not in any way affected. Mr. Chaudhary then referred to the decision of the Supreme Court in the case of Pasupuleti Venkateswarlu v. The Motor & General Traders reported in AIR 1975 SC 1409. In the said decision the Federal Court decision reported in AIR 1941 FC 5 and referred to by S. K. Datta J. in the AIR 1973 Cal 448 was relied on. Krishna Iyer J. giving judgment for the Court was pleased to observe to the following effect:

"..... It is basic to our processual jurisprudence that the right to relief must be judged to exist as on the date a suitor institutes the legal proceeding. Equally clear is the principle that procedure is the handmaid and not the mistress of the judicial process. If a fact, arising after the lis has come to court and has a fundamental impact on the right to relief or the manner of moulding it, is brought diligently to the notice of the tribunal, it cannot blink at it or be blind to events which stultify or render inept the decretal remedy. Equity justifies pending the rules of procedure where no specific provision or fairplay is violated, with a view to promote substantial justice—subject, of course, to the absence of other disentitling factors or just circumstances. Nor can we contemplate any limitation on this power to take note of updated facts to confine it to the trial Court. If the litigation pends, the power exists, absent other special circumstances repelling resort to that course in law or justice. Rulings on this

point are legion, even as situations for applications of this equitable rule are myriad. We affirm the proposition that for making the right or remedy claimed by the party just and meaningful as also legally and factually in accord with the current realities, the Court can, and in many cases must, take cautious cognisance of events and developments subsequent to the institution of the proceeding provided the rules of fairness to both sides are scrupulously obeyed."

Relying on the aforesaid decision, Mr. Chaudhary contended that the fact of subletting even if arising after he had come to court, has a fundamental impact on the right of relief or the manner of moulding it and the said fact has been diligently brought to the notice of the trial court and the court cannot ignore this fact of subletting. Mr. Chaudhary further contended that there was no disentitling factor for deciding the suit on the basis of subsequent events inasmuch as the suit was suit for eviction on the determination of tenancy of the tenant defendant and by the proposed amendment, nature and character of the suit was not changed. In this connection, Mr. Chaudhary referred to the decision of a Full Bench of the Delhi High Court in the case of Smt. Abnash Kaur v. Dr. Avinash Nayyar reported in AIR 1975 Delhi 46. It was held in the said decision that there was no inflexible rule that a cause of action arising subsequent to the filing of the petition for eviction cannot be added to the petition by way of amendment. Mr. Chaudhary also referred to the decisions made in the cases of Dwarka Prasad Mahawar v. Gopaldas Mahawar reported in (1976) 80 Cal WN 269 and Jitendra Nath Das v. Dr. Kalyan Kr. Banerjee reported in AIR 1977 Cal 49. In Dwarka Prasad's case, R. Bhattacharya J. allowed amendment of plaint for adding ground of unauthorised construction made during the pendency of the suit in an eviction proceeding against the tenant on the ground of default in payment of rent. In Jitendra Nath Das's case, the view of S. K. Datta J. who referred the case to Division Bench, was approved and it was held that in the suit for eviction of a tenant, the cause of action was the determination of the tenancy and addition of the ground of reasonable requirement of the suit premises to the original ground of default in payment of rent by way of amendment was quite justified. The decision of Delhi Full Bench and of R. Bhattacharya

J. as referred to above were also considered and relied on by the Division Bench of this Court in the aforesaid case of Jitendra Nath Das (AIR 1977 Cal 49). In this connection definition of 'tenant' under the West Bengal Premises Tenancy Act may also be referred to. A tenant whose contractual tenancy had been determined by a valid notice to quit but against whom no decree for eviction has been passed remains a 'tenant' under the Premises Tenancy Act. Consequently a statutory tenant who continues to be the tenant under the Premises Tenancy Act because of special definition of the 'tenant' is liable to be evicted under the said Act if he commits any illegal act of subletting and/or wrongful user of the suit premises within the meaning of S. 13 of the Premises Tenancy Act. In this context, a tenant governed by the Transfer of Property Act simpliciter and a tenant governed by the West Bengal Premises Tenancy Act stand on altogether different footing. In the former case, after the determination of the contractual tenancy the tenant ceases to be a tenant any further and as such raising of unauthorised structure by such person cannot attract the provisions of S. 108 of the Transfer of Property Act and no suit for eviction of a tenant for such wrongful act can be filed. But in the case of a statutory tenant under the West Bengal Premises Tenancy Act, an act of subletting attracts the provisions of S. 13 of the Premises Tenancy Act and such tenant is liable to be evicted on the ground of subletting even if such subletting is made after the determination of contractual tenancy. Accordingly, the nature and character of the suit namely the suit for eviction of a tenant is not changed in the case of a tenant governed by the Premises Tenancy Act. Lastly, it will be relevant to consider another salutary principle noted by the Privy Council on the question of amendment of plaint. Reference may be made to the decision in the case of *Ma Shwe Mya v. Maung Mo* reported in AIR 1922 PC 249. Privy Council laid down that in the absence of other disentitling factors if by reason of subsequent events certain rights accrue to the plaintiff, the plaintiff will be entitled to claim reliefs under those rights by amendment but it will not be open to permit a new case to be made on facts which were available to the plaintiff before the presentation of the original plaint but were not pleaded. This decision of the Privy Council has

been referred to from time to time in various decisions of different High Courts including this Court and also of the Supreme Court. Now turning to the facts of the case, it will be found that the plaintiff in her petition of amendment had stated inter alia that after receipt of a registered letter from the Commercial Tax Officer of the State Government on or about June 23, 1976 the plaintiff was surprised to note that the defendant had sublet the suit premises and the defendant had allowed others to carry out business in suit premises. Paragraph 7 of the said application for amendment of plaint runs as follows:—

"That your petitioner therefore prays that since additional new grounds for the eviction of the defendant has arisen after the filing of the suit and to avoid multiplicity of suits, it is in the interest of justice that your petitioner may be allowed to amend the plaint by adding the following paragraphs after paragraph 8 of the plaint."

In the petition of objection the defendant, although denied the allegation of subletting and/or carrying on business in the suit premises, did not allege that the plaintiff had knowledge of all the said facts before the presentation of the original plaint. It is thus evident that there is no disentitling factor for deciding the suit on the basis of subsequent events, diligently brought to the notice of trial Court, undoubtedly having fundamental impact on the right of relief or the manner of moulding it. As aforesaid, it has been persistently laid down by this court and also by the Supreme Court in the aforesaid decisions that in such circumstances, the Court cannot ignore the subsequent events on the salutary principle of avoiding multiplicity of legal proceedings, shortening the course of litigation and achieving the ends of justice. Needless to point out that the principle laid down in *Kesho Ram Passey's case* (AIR 1952 Punj 221) has not been approved by this court in a number of decisions referred to hereinbefore, and also in the Full Bench decision of the Delhi High Court (AIR 1975 Delhi 46).

9. For the reasons aforesaid, the Rule is discharged. There will, however, be no order as to costs.

S. K. DATTA, J.:— I agree.

Rule discharged.

AIR 1977 CALCUTTA 468

T. K. BASU, J.

Jay Krishna Saha and another, Petitioners v. D. N. Lal and others, Respondents.

Civil Rule No. 6015 (W) of 1974, D/- 20-1-1977.

(A) Gold (Control) Act (1968), S. 8 (5) — Act is prospective in operation.

Where gold sovereigns more than five in number and of total weight exceeding 50 grammes, are acquired by a family by gift before the Act came into force, there is no contravention of S. 8 (5).

(Para 15)

(B) Gold (Control) Act (1968), S. 16 (5) and (6) — Family consisting of husband and wife — Family owning gold sovereigns weighing more than 50 grammes and ornaments — Limit of holding without obligation to declare is 4000 grammes — Total holding of articles in such a case is not limited to 50 grammes — Scope of S. 16 (5) and (6).

Reading the provisions of S. 16 (5) of the Act, with S. 16 (6) thereof, they contemplate two classes of families. One class of family are those who own only "articles". The ceiling in such a case would be 50 grammes. Any holding in excess of 50 grammes will have to be declared before the authorities. The second class of family contemplated by those provisions are families which possess or own both articles and ornaments. In the case of such families, the ceiling is four thousand grammes without any obligation to furnish a declaration under the Act. There is no warrant for breaking up of this total holding of 4000 grammes of both articles and ornaments into any particular ratio or proportion. (1973) 1 Mad LJ 311, Foll. (Paras 22 & 23)

In the light of this interpretation, where the petitioners, husband and wife which constitute a family, are found on a search to possess gold sovereigns weighing more than 50 grammes along with ornaments, and there was no declaration of those sovereigns to the Gold Control Authority, the petitioners cannot be said to have contravened any of the provisions of S. 16 (1) read with S. 16 (5) and the show cause notice for confiscation under S. 7 (1) and penal action under S. 74, issued to the petitioners must be held to be without jurisdiction

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as not disclosing any offence under the Act. (Paras 25 & 26)

Cases Referred: Chronological Paras (1973) 1 Mad LJ 311 23

R. N. Bajoria and A. N. Mukherjee, for Petitioners; Malay Kumar Basu, for Respondents.

ORDER:— In this application, the petitioner challenges certain proceedings sought to be initiated by a notice under the Gold (Control) Act, 1968 (hereinafter referred to as the Act). The facts leading to the present application may be briefly noted.

2. On the 11th July, 1973, a search was made at the premises of Joy Krishna Saha and Charu Bala Saha who are related to each other as man and wife. In course of the search 226 pieces of gold sovereigns and a sum of Rs. 90,000 were seized. Statements were also recorded from both the petitioners. The statements of both the petitioners were almost identical. The gold sovereigns, according to them, were given to Charu Bala Saha by the father of her husband Joy Krishna Saha. The father of the husband died in the year 1956. They could not definitely say when this gift was made by the late father of the petitioner No. 1. Certain statements were made with regard to the cash but we are not concerned with that in the present application.

3. The only other fact that need be noticed in this connection is an allegation in paragraph 4 of the petition which is as follows:

"The ornaments belonging to your petitioner No. 2 were, however, not seized by the said Customs Officers and were left with your petitioner No. 2." It is to be noted that this allegation in the petition that certain ornaments belonging to the petitioner No. 2 were found in the course of the search but they were not seized has not been denied in the affidavit-in-opposition filed on behalf of the respondents.

4. Thereafter the petitioners were served with a notice to show cause why the 226 pieces of gold sovereigns which were seized as aforesaid should not be confiscated.

5. It is this notice dated the 29th December, 1973 issued under the provisions of the Act which is challenged before me in this application.

6. Before I deal with the respective contentions of the parties, it will be use-

ful to set out the notice which is in the following terms:

"Shri Jay Krishna Saha,
Bama Bhavan,
16/B, B. K. Pal Avenue,
Calcutta-7.
2. Smt. Charubala Saha,
wife of Jaykrishna Saha,
Bama Bhavan,
16/B, B. K. Pal Avenue,
Calcutta-7.

Subject:— Seizure of 226 pcs. of gold sovereigns bearing inscriptions indicating their foreign origin valued at Rupees 45,000 (approx. m. v.) wg. 180 3.40 gms. and Indian currencies from the premises No. 16/B, B. K. Pal Avenue occupied by Shri Jay Krishna Saha and his wife on 11-7-73 in contravention of the Gold (Control) Act, 1968. Notice to show cause.

1. In pursuance of an information received in this Customs House to the effect that contraband gold and sale proceeds thereof have been secreted in the premises at 16/B, B. K. Pal Avenue occupied by Shri Jay Krishna Saha, the officers of this department searched the said residential premises on the strength of search authorisation No. Gold Control Act 52/P and S/A No. 203 of 1973 on 11-7-73. As a result of the search 226 pcs. of gold sovereigns bearing inscription indicative of foreign origin were recovered from one small aluminium box kept inside a Godrej safe stored in the bedroom of Shri Jay Krishna Saha and his wife on the 3rd floor of the building. Further, Indian currency notes amounting to Rs. 90,000 were recovered from inside a secret chamber at the bottom of a steel almirah made by M/s. Bombay Steel Works placed in another bedroom on the same floor. As Shri Jay Krishna Saha was unable to produce any document in support of the legal importation/possession of the sovereigns and the Indian currencies in question the sovereigns were seized in the reasonable belief that those were smuggled and unauthorisedly acquired by Shri Jay Krishna Saha in contravention of the Customs Act, 1962 and also possessed in contravention of the provisions of the Gold Control Act, 1968. The Indian currencies were seized in the reasonable belief that those were the sale proceeds of the smuggled gold.

2. Shri Jay Krishna Saha made a voluntary statement to the Customs Officers on 11-7-73 in response to summons issued under S. 108 of the Customs Act

1962 stating that the Customs Officers seized 226 pcs. of gold sovereigns and Indian currency of Rs. 90,000 from the apartment on the 3rd floor of his residence at 16/B, B. K. Pal Avenue. The sovereigns under seizure were given to his wife by his father before his death in 1956. But he could not say wherefrom his father acquired the sovereigns. Neither he nor his wife had made any declaration before any authority with regard to the gold sovereigns under seizure. Regarding the Indian currencies under seizure he stated that out of the amount only Rs. 40,000 belonged to him and the remaining Rs. 50,000 belonged to his wife. Of the amount of Indian currencies belonging to him, Rs. 20,000 were savings made during the last few years whereas the balance amount belonged to his two brothers-in-law @ Rs. 10,000 each. The amount of Rs. 50,000 was given by his father, when he was alive, to his wife Smt. Charubala Saha as gift.

3. Smt. Charubala Saha, wife of Shri Jay Krishna Saha also stated voluntarily before the customs officer on the seizure in response to summons issued to her under S. 108, Customs Act, 1962 that her father-in-law, when he was alive, gave her a good number of sovereigns. The sovereigns were kept with her. At present the sovereigns were kept in Godrej safe on the 3rd floor of the residence. She never counted the number of the sovereign given by her father-in-law and she never used any one of them. Her husband knew about her receipt of the sovereigns. Her father-in-law also gave her Rs. 50,000 out of affection, a few months before his death. The amount was kept in a safe deposit vault hired jointly by herself and her husband. About 10/15 days ago the amount was brought from the vault and was kept inside the chamber at bottom of the steel almirah. She could not say why the Indian currencies were brought from the locker and were kept in the residence. There was no written document for the gift of Rs. 50,000 with her or with her husband. The sovereigns and money were given before the partition of India by her father-in-law. The keys for the Godrej safe and the steel almirah wherefrom the sovereigns and the Indian currency had been recovered were always held by her husband.

4. The copy of the statements given by Shri Jay Krishna Saha and Smt. Charubala Saha as referred to above is enclosed.

5. The sovereigns were weighed in the Indian Government Mint, Alipore and a sample was drawn in presence of Shri Jay Krishna Saha for assay on 24-8-73 to ascertain the purity of the gold sovereigns. The assay certificate (copy enclosed) indicates that the fineness of the gold is 916.2 per mille.

6. Under S. 8 (5) of the Gold (Control) Act, 1968 a person may accept by way of gift gold coins not exceeding five in number subject to the condition that the total holding of gold coins of the donee does not exceed fifty grammes.

7. Section 16 (1) provides that any person who owns, possesses or is in the custody or control of gold articles shall make a declaration to Gold Control Authority in the prescribed form as to the quantity, description and prescribed particulars of such articles owned, possessed, held and controlled by him subject to the relaxation and limitations of fifty grammes of gold coins (articles) provided in S. 16 (5) of the said Act.

8. Section 71 (1) of the Gold (Control) Act, 1968 (as amended) provides that any gold in respect of which any provision of this Act or any rule has been contravened shall be liable to confiscation.

9. Section 74 of the Gold (Control) Act, 1968 provides that any person who in relation to any gold does any act which act would render such gold liable to confiscation under this Act or abets the doing of such an act shall be liable to penalty.

10. Shri Jay Krishna Saha/Smt. Charubala Saha has failed to produce any document in respect of the declaration of the 226 pcs. of gold sovereigns wg. 1803.40 grammes to the Gold Control Authority. The gold sovereigns, therefore, appear to be liable to confiscation under S. 71 (1) of the Gold Control Act and Shri Jay Krishna Saha/Smt. Charubala Saha appears to be liable to penalty under S. 74 *ibid*.

11. Shri Jay Krishna Saha/Smt. Charubala Saha is, therefore called upon to explain and to show cause,

(i) Why the gold sovereigns under seizure should not be confiscated under S. 71 (1) of the Gold Control Act, 1968 and,

(ii) Why penal action should not be taken against him/her under S. 74 *ibid*.

12. The written explanation should be submitted to the undersigned within 10 days on receipt of this notice along with all the original or certified copies of evidence he/she relies on in support thereof.

13. He/she should clearly state in the written explanation whether he/she will desire to be heard in person before the case is decided.

14. He/she should note that in the event of failure to submit the explanation within stipulated time and/or to appear in the personal hearing when it is so fixed, the case will be liable to be adjudicated on the basis of evidence on record without any further reference to him/her.

15. The documents may be inspected on any working day on prior arrangements with the R. I. (T.) (adjudication).

16. The above notice is without prejudice to any other action that may be taken in this regard under Gold (Control) Act, 1968 or under any other law in force in the Union of India.

Enclo: (As above)

Sd/-

(A. K. Bandopadhyay)

Collector of Customs
Calcutta."

7. Mr. R. N. Bajoria, learned Advocate appearing on behalf of the petitioners, contended before me that, even if the allegations in the notice are taken to be true, they do not amount to any contravention of the provisions of the Act. He relied on the well-known proposition of law laid down by the Supreme Court in more than one case that if proceedings are initiated by a notice under an Act, and, assuming that the allegations in the notice are all true, they do not disclose any offence under the Act, such a notice must be held to be without jurisdiction and quashed.

8. Mr. Bajoria next submitted that the only factual basis of the notice which is set out hereinabove is the two statements made by the petitioners. In other words, apart from these two statements there is no other material indicated in the notice on the basis of which these proceedings are sought to be initiated. Further, there is no indication in the said notice that apart from what is contained in the said two statements the authorities were in possession of any other factual material.

9. Similarly there is no allegation in the impugned notice that any of the facts mentioned in the said two statements by the two petitioners are factually incorrect or untrue. In the circumstances, Mr. Bajoria submitted that the Court must proceed on the basis that the statements of the petitioners regarding

the possession of the gold sovereigns are true and correct.

10. On the above factual basis, Mr. Bajoria submits that taking all the allegations in the notice to be correct, it does not disclose any offence or contravention of the provisions of the Act. The impugned notice mentioned two substantive provisions of the Act viz. Section 8 (5) and S. 16 (1) thereof. Although the notice does not mention what exactly is the contravention of above provisions of the Act, Mr. Bajoria invited me to assume that these provisions have been allegedly contravened. On that basis Mr. Bajoria submitted that, on a proper construction of the above two provisions, it will be evident that the petitioners have not been guilty of any violation thereof.

11. Section 8 of the Act imposes certain restrictions on the acquisition, possession and disposal of gold. In S. 2 of the Act a distinction is made between the primary gold and 'articles' which means anything other than ornaments in a finished form and includes a gold coin. Section 8 (3) and (4) contain certain restrictions regarding the acquisition, ownership, possession etc. of 'articles' the meaning of which I have already indicated.

12. In this light the provisions of S. 8 (5) are significant and may be set out herein below:—

"8 (5) Notwithstanding anything contained in sub-secs. (3) and (4), a person may accept or transfer, by way of gift or exchange, gold coins, not exceeding five in number, if, together with the gold coins received by way of gift or exchange, the total holding of gold coins of the donee or transferee, as the case may be, does not exceed fifty grammes."

13. This sub-section clearly imposes a ceiling on the number of gold coins which may be accepted by gift which is five and on the total weight of gold coins in the possession of the donee which is 50 grammes.

14. Admittedly, the gold coins received by the petitioner No. 2 were far in excess of five and total weight was much in excess of 50 grammes as mentioned in S. 8 (5) of the Act. Mr. Bajoria however points out the very significant fact that these gold coins were, according to the petitioners, received by the petitioner No. 2 as a gift from a person who died in the year 1956. Obviously the gift must have taken place sometime before the year 1956 although the petitioners could

not mention the exact year as they did not remember it. Mr. Bajoria again points out that in the impugned notice there is no allegation that these statements as to the receipt of these gold coins by way of gift from a person who died in 1956 is incorrect or untrue. He next points out the fact that the Act came into force on 1st September, 1968, consequently, when the gift in the instant case took place, the present Act was not in force. Since the Act is prospective in operation, there can be no contravention of S. 8 (5) of the Act by the petitioners in the facts of the instant case.

15. In my view, this contention of Mr. Bajoria is sound and should be accepted. If there was any allegation in the impugned notice that the statement of the petitioners regarding the acquisition of the gold coins was incorrect or untrue or any indication that the authorities were in possession of any material to show that these gold coins were acquired by way of gift after the Act came into force, the position might have been otherwise. In view of the statements contained in the impugned notice however, it must be held that the petitioners have not contravened the provisions of S. 8 (5) of the Act.

16. The next branch of the argument centred round the provisions of S. 16 of the Act. Section 16 (1) provides that a person who owns, possesses or is in custody or control of any article or ornament at the commencement of the Act shall furnish a declaration in the prescribed form subject to certain conditions.

17. Section 16 (5) of the Act however prescribed certain circumstances in which no declaration under S. 16 (1) of the Act is necessary. Section 16 (5) of the Act is in the following terms:—

"(5) No declaration referred to in sub-sec. (1) or sub-sec. (3) shall be required to be made,—

(a) in relation to articles, unless the total weight of articles owned, possessed, held or controlled by,—

(i) a minor, who is not a member of a family, exceeds twenty grammes,

(ii) an individual (other than a minor), who is not a member of a family, exceeds fifty grammes,

(iii) a family, exceeds fifty grammes,

(iv) any person referred to in cls. (b) to (f) and (h) to (m) of sub-sec. (2), exceeds fifty grammes;

(b) in relation to any ornaments, or both articles and ornaments, where both articles and ornaments are owned, possessed, held or controlled, unless the total weight of such ornaments or both articles and ornaments, as the case may be, owned, possessed, held or controlled by,

(i) an individual who is not a member of a family exceeds two thousand grammes,

(ii) a family, exceeds four thousand grammes:

.....
Section 16 (6), which is also material for our purpose, provides as follows:—

“(6) For the purpose of this section, ‘family’ shall be deemed to consist of—

(i) the husband, wife and one or more minor children, or

(ii) any two or more of them, but shall not be deemed to include any other person.”

18. Relying on the above provisions contained in Ss. 16 (5) and 16 (6) of the Act, Mr. Bajoria contends that the limit of holding of the petitioners in the instant case without the requirement of a declaration under the Act must be held to be four thousand grammes. This is because the petitioners satisfy the definition of ‘family’ as mentioned in S. 16 (6) of the Act. This is because they are husband and wife which constitute a family.

19. It is next contended that since the petitioners own both articles and ornaments the ceiling of their holding of these things without any obligation to declare is four thousand grammes.

20. It was sought to be argued by Mr. Arun Kumar Dutt, learned Advocate on behalf of the respondents that there is nothing in the notice to show that the petitioners possessed any ornaments. This argument might have had some force if this case had to be decided on the basis of the statements contained in the impugned notice alone. But, as I have already mentioned above, the allegations in paragraph 4 of the petition that certain ornaments belonging to the petitioner No. 2 were found in course of the search but were not seized remains uncontradicted. In that state of affairs, the conclusion is inescapable that the petitioner No. 2 was the owner of a certain quantity of ornaments.

21. It is next sought to be argued by Mr. Arun Kumar Dutt, on behalf of the respondents that even if I come to the

conclusion that the petitioners between themselves were the owners of both ornaments and articles which I have already said include gold coins then I should hold that within a total holding of four thousand grammes which is permissible under the Act without declaration, the total holding of articles by family must be limited to 50 grammes and the permissible holding of ornaments without a declaration can be up to 3950 grammes. Otherwise it was submitted that if a family could keep 3999 grammes of articles and one gramme of ornaments it could evade the duty of declaration under the provisions of S. 16 of the Act. This, it was submitted, would make the working of S. 16 (5) (a) of the Act nugatory.

22. I am unable to accept this contention of Mr. Dutt. As I read the provisions of S. 16 (5) of the Act, with S. 16 (6) thereof, they seem to contemplate two classes of families. One class of family are those who own only ‘articles’. The ceiling in such a case would be 50 grammes. Any holding in excess of 50 grammes will have to be declared before the authorities. The second class of family contemplated by those provisions are families which possess or own both articles and ornaments. In the case of such families, the ceiling, in my view, is four thousand grammes without any obligation to furnish a declaration under the Act. In my view, there is no warrant for breaking up of this total holding of 4000 grammes of both articles and ornaments into any particular ratio or proportion. It seems to me that the Legislature intended that in case of families which merely keep articles like gold sovereigns they would have to be declared as soon as the total weight exceeds 50 grammes. The Legislature further intended that if a family owned both articles and ornaments, and it is a well-known fact which the Court can take judicial notice of, viz., that most Indian families own ornaments, that the obligation to furnish a declaration would be subject to a much higher limit viz., 4,000 grammes. I enquired of learned Advocates for both the parties as to whether it was possible to find out either from the Notes on Clauses which are furnished to the Members of Parliament along with the Bill before it becomes an Act or any Parliamentary debates if they threw any light on this aspect of the matter. Nothing however could be produced before me although I adjourned

this case from time to time on this ground. In the circumstances, I have given my own interpretation of the above provisions of this Act as indicated above.

23. Before I leave this discussion, reference may be made to a decision of a Division Bench of Madras High Court in the case of J. A- Abdul Hamid v. Collector of Central Excise, Madras, reported in 1973 (1) Mad LJ 311. Veeraswamy C. J. at paragraph 4 of the Report observes as follows:—

"But learned counsel for the respondent contends that cls. (a) and (b) of S. 16 (5) will have to be read and construed in conjunction with each other and harmoniously, and that, so read, cl. (b) only means that articles not exceeding 50 grams in weight taken with ornaments in total not exceeding 4,000 grams would be the limit. It is said that any other construction would defeat the intention of S. 16 (5) (a). We are unable to construe the provisions in the manner suggested. To do so, would be to insert words in cl. (b) of S. 16 (5) which are not there. What it speaks of are articles and ornaments, and, if both of them are owned, possessed, held or controlled by an individual or family, then the proper provision which will be attracted is cl. (b). There is no justification for the construction that the limit placed by S. 16 (5) (a) should be imported into cl. (b). There is no warrant for it in the language used."

24. The above interpretation given by the Madras High Court fully accords with my interpretation of the two sub-clauses of S. 16 (5) of the Act and I respectfully agree with the same.

25. In the light of the above interpretation of the law, it must be held that the petitioners cannot be said to have contravened any of the provisions of Section 16 (1) read with S. 16 (5) of the Act.

26. The contention of Mr. Bajoria that the impugned notice must be held to be without jurisdiction as not disclosing any offence under the Act should be upheld.

27. In the result, this application succeeds and the Rule is made absolute. There will be writ in the nature of mandamus directing the respondents to forthwith recall, cancel and withdraw the notice dated the 29th December, 1973 and to forbear from giving effect thereto in any manner whatsoever.

28. There will be no order as to costs of this application.

29. The petitioner is restrained by an order of injunction from taking any steps to obtain return of the gold sovereigns in question for a period of four weeks from today.

Rule made absolute.

AIR 1977 CALCUTTA 473

MRS. PADMA KHASTGIR, J.

Sri Iswar Dashabhujia Thakurani and others, Plaintiffs v. Sm. Kanchanbala Dutta and others, Defendants.

Suit No. 1347 of 1965, D/- 12-9-1977.

(A) Hindu Law — Religious Endowment — Dedication — A shebait can maintain suit on his own right or on behalf of deity in respect of debutter property, making other shebait as parties to suit. (Civil P. C. (1908), O. 31, R. 1).

A shebait has a right on his own to institute and proceed with the suit on behalf of the deity making other shebait as parties to the suit. In the case of a family endowment a member of the settlor's family as a prospective shebait even though he was not appointed by Court as guardian of deity, can maintain a suit on behalf of the deity making all other shebait as parties to the suit. A deity can also sue through a next friend who has no interest adverse to it and it is immaterial that such next friend happens to be one of the shebait. AIR 1966 Pat 235, AIR 1931 Cal 776 and AIR 1941 Cal 562, Rel. on. (Paras 17, 18)

(B) Hindu Law — Religious Endowment — Dedication — Complete or partial dedication — Ascertainment — True intention of parties to be gathered on a fair and reasonable construction of deed as a whole. (Deed — Construction).

In a case of absolute dedication, the property is given out and out to an idol or to a religious or charitable institution and the donor completely divests himself of all the beneficial interest of the property but where the dedication is partial, only a charge is created on the property or there is a trust to receive and apply a portion of the income for the religious or charitable purposes. If there is an express endowment there is no difficulty in coming to the conclusion whether the endowment is absolute or partial. It is only where there is an im-

plied endowment, the question of construing the same in the light of the intention of the settlor by construing various terms and conditions of the deed of dedication as a whole would arise and one will have to come to the conclusion after considering the same. Where the terms of dedication have been clearly and in an unambiguous language expressed, one does not have to search or go into all the facts and surrounding circumstances including the subsequent dealing of the property by the parties as also their conduct and mode of dealing with the said properties. AIR 1957 SC 797 and AIR 1963 SC 890, Rel. on.

(Para 20)

Held: In the instant case the intrinsic evidence of the document was reinforced by the subsequent conduct of the parties. The terms and conditions of the deed of dedication were not at all ambiguous but the intention of the testator had been clearly laid down in various terms and expressions used in the said document in unequivocal language. It would appear from the expressions used in the deed of dedication such as "I give absolutely all immovable properties to my deities" and "I stand completely divested myself of the rights in the property and my rights devolve in the said deities in my place and stead" that there was an absolute dedication and not a partial one. (Paras 21, 22)

(C) Hindu Law — Religious Endowment — Dedication — Total or partial dedication — Non-mutation of property — Effect.

Where there has been total dedication of property, non-mutation of the property, would not be a ground for holding that there has been no divestation of the property after the dedication, considering the dealing of the said property by the parties and their conduct. (Para 24)

(D) Evidence Act (1872), S. 108 — Presumption of death under — Arises at the end of 7 years and not at the time when suit is instituted.

Presumption of death arises at the end of 7 years and not at the time when the suit is instituted. The presumption is not rigid and may be proved before lapse of 7 years from the "proof of special circumstances". Such presumption may arise before end of 7 years if the deceased person has been exposed to specific peril of death". AIR 1926 Cal 1056, Rel. on. (Paras 27, 28)

(E) Hindu Law — Religious Endowment — Deed of dedication — Framing

of Scheme to carry out its terms and conditions — Though shebait should act jointly, division of functions and duties among themselves may be made for convenience. (Para 32)

Cases Referred: Chronological Paras

AIR 1966 Pat 235	17
AIR 1963 SC 890	19
AIR 1957 SC 797	19
AIR 1941 Cal 562:45 Cal WN 709	18
AIR 1931 Cal 776	17
AIR 1926 Cal 1056	29

ORDER:— This suit has been filed by the plaintiffs (1) Sri Sri Iswar Dashabhuja Thakurani (2) Sri Sri Iswar Govinda Jew Thakur and (3) Rash Behari Roy against the defendants (1) Sm. Kanchanbala Dutta (2) Gosta Behari Roy and (3) Brojo Behari Roy inter alia for appointment of the plaintiff No. 3 Rash Behari Roy as the next friend of the plaintiff deities, declaration that the properties mentioned in Annexure 'A' to the plaint are debutter properties belonging absolutely to the plaintiff deities, framing of a scheme, injunction, Receiver, accounts, etc.

2. The case of the plaintiffs is that the defendant No. 1 is a daughter and the plaintiff No. 3 and the defendant Nos. 2 and 3 are the sons of one Hari Mohan Roy. This Hari Mohan Roy owned and possessed two immovable properties at Calcutta, being premises No. 16A, Nandan Road and 20, Ahiritola Street and various properties at Mogra in the district of Hooghly. Full particulars of which will appear from Annexure 'A' to the plaint.

3. The said Hari Mohan Roy during his lifetime by a registered deed dated 9th June, 1935 dedicated all his properties to his family deities i.e. the plaintiffs Nos. 1 and 2 of this suit.

4. The salient terms and conditions as contained in the said deed of dedication (Arpananama) are the following:—

"(a) The first shebait would be the settlor Sri Hari Mohan Roy. After his death his three sons, namely, the plaintiff No. 3 and the defendants Nos. 2 and 3 and his daughter the defendant No. 1, would be the next shebait.

(b) Out of the income of the debutter properties in the first instance the revenues and taxes would be paid as also the amount necessary for the sheba of the said deities.

(c) Thereafter out of the surplus, the necessary amounts would be spent for the performance of 'Doi Jatra' and

'Durgatsav' every year and for daily puja of the said family deities.

(d) Out of the surplus funds remaining, moneys would be spent for the improvement and preservation of the debutter estate and for acquiring other properties for the debutter estate. None of the shebait would be entitled to sell or make a gift of any of the debutter properties and such properties would not be liable for any debts incurred by them.

(e) If any debutter properties were acquired by the Government then the shebait would purchase other properties of equivalent value for the debutter estate.

(f) The shebait would do all the acts necessary for the due performance of deba sheva and for the preservation and betterment of debutter estate."

5. Between 1935 and 1958 the said Hari Mohan Roy out of the funds of the said debutter estate erected buildings on some of the lands forming part of the debutter estate and also made various additions to the said estate. Full particulars of such additions would appear from the Annexure 'C' to the plaint. During the lifetime of the said Hari Mohan Roy some of the properties were compulsorily acquired by the Government and various proceedings are pending for realisation of the said compensation moneys.

6. A suit was filed by Gostha Behari Roy, the defendant No. 2 herein, being Suit No. T. S. 464 of 1957 in the 4th Court of Munsif at Alipur in 1957 against Hari Mohan Roy as shebait to the deities being plaintiff Nos. 1 and 2 herein. That suit was filed in respect of premises No. 16A, Nandan Road. By consent of the parties therein it was declared that Gostha Behari Roy was the tenant in respect of the said property at a monthly rent of Rs. 225 p.m. on and from 1st March 1955. The said terms of settlement were signed by Hari Mohan Roy as shebait of the plaintiff deities.

7. It is the common case of the parties to this suit that the said Hari Mohan Roy suddenly left his Mogra house on 24th June, 1959 and since then his whereabouts are unknown. At the time he left the house for good, his age was of about 80 years. So long as Hari Mohan Roy was at his Mogra house he acted as a shebait and performed the daily puja and other seasonal festivals as shebait of the plaintiff deities. After his depar-

ture from the house, the defendants in the suit have taken possession of the properties and according to the plaintiffs they are also treating the said properties as their personal properties. The plaintiff No. 3 Rash Behari Roy has further alleged that the defendants are wrongfully misappropriating the income from the lands and properties of the debutter properties to their own use and to the detriment of the debutter estate.

8. It is also the case of the plaintiff No. 3 that the defendants Nos. 1, 2 and 3 have wrongfully alienated some of the debutter properties. Full particulars of the instances of the above allegations have been given in paragraph 9 of the plaint. According to the plaintiff No. 3 there is no shebait and no person is there to look after and protect the interests of the deities. Defendants Nos. 1, 2 and 3 and the plaintiff No. 3 are the prospective shebait under the deed dated 9th June, 1935. The plaintiff No. 3 has specifically pleaded in paragraph 15 that the defendants are denying and/or interested in denying the title of the plaintiff deities to the said debutter properties. According to the plaintiff No. 3, he is the second son of Hari Mohan Roy and he has no interest adverse to that of the plaintiff deities and he is a fit and proper person to act as the next friend of the plaintiff deities. As such he should be appointed the same and he has filed an affidavit of fitness to that effect.

9. The defendant No. 1 Kanchanbala Dutta filed a written statement stating that as the said Hari Mohan Roy is sole shebait of the plaintiffs Nos. 1 and 2 and he is still alive on the date the suit was filed, as such the suit as framed without making him as party thereto is not maintainable at all. She has denied the right of the plaintiff No. 3 to act as the next friend of the plaintiff deities and also his right to file the present suit. She has disputed the particulars given in Annexures 'A' and 'C' to the plaint. It is her case that before the said Hari Mohan Roy left the house, he executed a general power of attorney in her favour. According to her, since the execution of the said power of attorney, she has been looking after and managing the properties at Mogra and the defendant No. 3 is looking after and managing the properties situated at Ahiritola Street and defendant No. 2 is looking after the property situated at 16A Nandan Road. She has denied that there has been any mis-

appropriation of rents and issues or profits of the debutter properties for her own use. She, in terms of the power of attorney, has let out a part of the debutter properties at Kola and realising the rents for the purpose of meeting the daily deb seva puja. She collects a sum of Rs. 500 per year from the paddy field. She has most emphatically denied that she has alienated any part of the debutter properties. According to her, Hari Mohan Roy is still the sole shebait and as the constituted attorney of the said Hari Mohan Roy she has the right to manage and look after the properties of the plaintiff deities.

10. The defendant No. 2 Gostha Behari Roy has filed a written statement mainly taking the point that the said debutter was a partial debutter, and not an absolute one. According to him, by a registered deed dated 9th June, 1935 the said Hari Mohan Roy created a trust in respect of all his ancestral and self-acquired properties providing for the preservation, maintenance and seva puja of the deities. He further disputed the particulars given in Annexure 'A' to the plaint. His positive case is that the dedication of the properties as mentioned in the Schedule to the said deed in favour of the said deities was partial and not an absolute dedication. It was merely a trust or a charge and was created only for the purpose of preservation and maintenance of properties, as Hari Mohan Roy was afraid that his sons and daughter would waste his properties. As such to achieve the said object, he created a trust or charge in favour of the deities by the deed dated 9th June, 1935. According to him, it was not the intention of the said testator that his properties be absolutely dedicated in favour of the plaintiff deities but his only intention was to create a charge in respect of the properties for seva puja of the deities. It was not the intention of Hari Mohan Roy to deprive his sons and daughter of the properties. According to the defendant No. 2, Hari Mohan Roy was not divested of the said properties and he continued to remain as the sole and absolute owner of all the properties, subject only to a charge and he treated the said properties as his personal properties even after the execution of the said deed dated 9th June, 1935. According to the said defendant, the properties do not belong to the plaintiff deities absolutely. Although this defendant has given various particulars of the various

financial help that he has given to his brothers and sister he has not substantiated the same by giving evidence. According to him, since 1954 he was occupying premises No. 16A Nandan Road as a tenant under the said Hari Mohan Roy. As the rent was doubled all on a sudden and a suit was filed against the tenants of that defendant, the defendant No. 2 thereupon filed a suit as stated above. According to him, the defendants Nos. 1 and 3 herein have approved in writing of the terms of settlement filed in the said suit at Alipur. The said document has been tendered and marked as an Exhibit in this suit. According to this defendant when at the end of the year 1959 all the hopes of return of the said Hari Mohan Roy were given up, his sons and daughters entered into an agreement or arrangement between themselves for partition and separate enjoyment of the said properties mutually amongst themselves, subject to a charge created in favour of the deities and according to him under the said agreement and arrangement, 16A Nandan Road was allotted to him. The plaintiff No. 3 also agreed to the said agreement of the sale of his share in No. 16A Nandan Road to the defendant No. 3 for a sum of Rs. 15,000 and the plaintiff No. 3 was given possession of the premises at 4D Palm Avenue Calcutta. Properties at Kola Mogra were allotted to the defendant No. 1 and since then she is in possession and actually residing there. Premises No. 20, Ahiritola Street was allotted to defendant No. 3 and he also paid a sum of Rs. 3,000 being the value of his 1/4th share to defendant No. 2 for the premises No. 16A, Nandan Road.

11. After hearing the parties through their respective lawyers, the following issues were framed:—

1. What is the effect of the Registered Deed dated June 9, 1935 executed by Hari Mohan Roy?

2. Did the said Hari Mohan Roy in fact divest himself of the premises No. 16A, Nandan Road, Calcutta after execution of the said Deed dated June 9, 1935?

3. Did the plaintiff No. 3 and the defendants enter into an agreement for partition or separate enjoyment of all the properties of Hari Mohan Roy mutually amongst themselves subject to a charge in favour of the plaintiff deities as alleged in sub-paragraph (d) of para.

10 of the written statement filed by the defendant No. 2?

4 (a). Did the plaintiff No. 3 and the defendant No. 3 enter into agreement for sale with the defendant No. 2 on May 10, 1962 and December 16, 1961 respectively in respect of their respective undivided 1/4th share in the premises No. 16A, Nandan Road, Calcutta as alleged in sub-para. (f) and (e) of para. 10 of the written statement filed by the defendant No. 2?

(b) Did the defendant No. 2 spend a sum of Rs. 25,000 for improvement, addition and alteration, repairs and payment of taxes of premises No. 16A, Nandan Road, Calcutta as alleged in paragraphs 11 and 12 of the written statement filed by the defendant No. 2?

(c) If so, to what effect?

5. Did Hari Mohan Roy executed a general power of Attorney dated 21st July, 1958 in favour of the defendant No. 1?

6(a). Did the defendant No. 1 realise rent from the tenants at the rate as mentioned in sub-para. (a), (b) and (c) of the para. 9 of the plaint? If so, at what rate?

(b) Did the defendant No. 1 settle the properties in her own name or in the name of her relation as alleged in sub-para. (d) of para. 9 of the plaint?

(c) Did the defendant No. 1 sell or transfer the properties as alleged in sub-para. (e), (f) and (i) of para. 9 of the plaint?

(d) If so, to what effect?

7. Is the suit bad for non-joinder of Hari Mohan Roy (Sole Shebait) as alleged in para. 1 of the written statement filed by the defendant No. 1?

8. To what relief, if any, are the plaintiffs entitled?

12. The defendant No. 2 Gostho Behari Roy has first of all taken the point through his counsel at the time of the argument that the deed of dedication D/- 9th June, 1935 is not a complete dedication but only a partial one. In the alternative he has submitted through his counsel, that even assuming there was a total dedication as his father Hari Mohan Roy did not divest himself of premises No. 16A, Nandan Road as such the said property should be kept outside the scope and purview of the deed of dedication. It is his case that although there was a direction under the deed of dedication for mutation of properties after the deed of dedication was made, such

mutation has not been done in respect of premises No. 16A, Nandan Road and that is the pointer to show that it was the intention of the settlor to keep the said property outside the scope of the deed of dedication. He has also taken the point that Rash Behari Roy has no right to be appointed as the next of kin of the plaintiffs nor has he any right to institute or continue the suit on behalf of the plaintiff deities. Lastly, he has taken the point that as Hari Mohan has not been made a party to the suit as such this suit is bad for non-joinder of parties.

13. The case of Kanchanbala Dutta is that the deed of dedication is not only valid but is a complete dedication. She has emphatically denied of mismanaging the debutter properties or having alienated any part thereof either in the name of her son-in-law or in the name of any other relative. Her positive case is that the presumption of death cannot be drawn in this case as the suit was filed on 2-8-65 and Hari Mohan Roy left his house on 24th June, 1959. As the complete period of 7 years time had not lapsed on the date when the suit was filed, so no presumption can be drawn under S. 108 of the Evidence Act. Hari Mohan Roy should be deemed to be alive. In the absence of making him a party this suit is not maintainable. She has justified her conduct of collecting rent as it is her case that there is a valid power of attorney granted by Hari Mohan Roy in her favour and she has been exercising her right under the said power of attorney. Moreover she was appointed a joint Receiver by this Hon'ble Court along with plaintiff No. 2. As such any collection made by her during that period was as an officer of Court so the collections made by her were perfectly legal and valid. Lastly she has submitted that if this Court decides to frame a scheme it should be framed in such a way so that all the brothers and sisters get a chance to have a turn or 'pala' periodically.

14. The defendant No. 3 Brojo Behari Roy neither filed written statement nor appeared at the time of hearing of the suit. The plaintiff's counsel submitted that although he has not been able to substantiate and give evidence on all the charges made in the plaint against the defendants but sufficient materials are before the Court to come to the conclusion that there is mismanagement in carrying out the duties of the debutter

estate. Moreover, in view of the stand taken by Gostha Behari Roy, the plaintiff deities' interest is in jeopardy and as such a scheme should be framed by the Court. The plaintiff has given evidence that Hari Mohan Roy completely divested himself of all the properties mentioned in Schedule 'A' to the plaint. Hari Mohan Roy himself collected rents and issues by granting receipts on behalf of the deities and describing himself as a shebait, so long as he was present. After Hari Mohan Roy left the house, rents were being collected by the defendants Nos. 1, 2 and 3 themselves as shebait and on behalf of the plaintiff deities. The case of the plaintiff is that Gostha Behari Roy has never made any cash payment under the consent decree but always adjusted the rent with the purported payments made by Gostha Behari Roy for and on behalf of the plaintiff deities, including payment of rates and taxes and alleged repair works. The plaintiff has stated that Gostha Behari Roy being a lawyer persuaded all the other parties to enter into an amicable settlement and partition of the debutter properties among themselves treating the same as secular properties and a document to that effect was executed on 10th May, 1962.

15. In this case the following main points have arisen for my decision:—

First of all whether the present suit filed by Rash Behari Roy for and on behalf of the plaintiff deities is maintainable.

16. Although there has been no issue to that effect but Mr. Gopal Law appearing on behalf of Gostha Behari Roy has submitted that the suit is not maintainable by his brother Rash Behari Roy. No evidence has been laid by any of the parties to the effect that Rash Behari Roy is not a fit and proper person to be appointed as the next of kin or that his affidavit of fitness should be ignored and no reliance be placed on such affidavit.

17. A Hindu deity is a juristic person and has the right to sue or be sued. There are preponderance of decisions to the effect that a shebait has a right on his own to institute and proceed with the suit on behalf of the deities making other shebait as parties to the suit. On the death of Hari Mohan Roy, Rash Behari Roy became one of the shebait jointly with other defendants. So on his own right Rash Behari Roy can, not only bring a suit but also proceed with

the suit on behalf of the plaintiff deities as a prospective shebait in case of family endowment even though not appointed by Court as guardian, can maintain a suit on behalf of the deity. This is more so when a prospective shebait brings a suit on behalf of the idol making all other shebait as parties to the suit. (AIR 1966 Pat 235, Ram Ratanlal v. Kashinath Tewari). In a case reported in AIR 1931 Cal 776 (Girih Chandra v. Upendra Nath) it has been held that a person interested in a private trust as a member of the family and who has further the prospect of holding the office of shebait, can maintain a suit challenging the alienation of debutter properties by a shebait. A future shebait can maintain a suit to have it declared that alienation made by a shebait is unauthorised and does not affect the deity.

18. Rash Behari Roy is not only a shebait but also a member of the setlor's family. In Nirmal Chandra v. Jyoti Prasad reported in 45 Cal WN 709: (AIR 1941 Cal 562) it has been held that a shebait as a party interested in the endowment can bring an action. In the first place a co-shebait can bring a suit on the principle that a suit on behalf of the deity can be brought by some of the co-shebait when the rest are unwilling to join the plaintiff or have done acts precluding them from doing so. In the second place it can be justified on the ground that the deity can sue through a next friend who has no interest adverse to it and it is immaterial that such next friend happens to be one of the shebait.

"In respect of a debutter in this country a founder or his heirs may invoke the assistance of a judicial Tribunal for the proper administration thereof on the allegation that the Trusts are not properly performed."

19. The second point for consideration arises, whether the dedication made by the deed of dedication dated 9th June, 1935 is an absolute or a partial one.

"Dedication of a property to a religious or charitable purpose may be either complete or partial. If the dedication is complete a Trust in favour of the public religious charity is created. If the dedication is partial a Trust in favour of the charity is not created but a charge in favour of the charity is attached and follows the property which retains its original, private and secular character. Whether or not a dedication is complete

would naturally be a question of fact to be determined in each case in the light of the material terms used in the document. In such a case it is always a matter of ascertaining the true intention of the parties. It is obvious that such intention must be gathered on a fair and reasonable construction of the document considered as a whole." (AIR 1957 SC 797, Dasaratharami Reddi v. Subba Rao).

"The golden rule of construction, it has been said, is to ascertain the true intention of the parties to the instrument after considering all the terms in the ordinary natural sense. To ascertain this intention the Court has to consider the relevant portions of the document as a whole and also to take into account the circumstances under which the particular words were used." (AIR 1963 SC 890, Ram Kishorelal v. Kamal Narayan).

20. In a case of absolute dedication, the property is given out and out to an idol or to a religious or charitable institution and the donor completely divests himself of all the beneficial interest of the property but where the dedication is partial only a charge is created on the property or there is a trust to receive and apply a portion of the income for the religious or charitable purposes. If there is an express endowment there is no difficulty in coming to the conclusion whether the endowment is absolute or partial. It is only where there is an implied endowment, the question of construing the same in the light of the intention of the settlor by construing various terms and conditions of the deed of dedication as a whole would arise and one will have to come to the conclusion after considering the same. Where the terms of dedication have been clearly and in an unambiguous language expressed the interpretation becomes easy, and one does not have to search or go into all the facts and surrounding circumstances including the subsequent dealing of the property by the parties as also their conduct and mode of dealing with the said properties.

21. In this case the intrinsic evidence of the document is reinforced by the subsequent conduct of the parties. It would appear from the expressions used in the deed of dedication such as— "I give absolutely all immovable properties to my deities" and "I stand completely divested myself of the rights in the property and my rights devolve in the said deities in my place and stead" that

there was an absolute dedication and not a partial one. The settlor Hari Mohan Roy not only dedicated the entire properties to the plaintiff deities but he has also made specific provisions in the deed itself that the entire income from the said property would be utilised solely for the deva seva and any surplus thereto would be spent for addition and/or improvement of the debutter properties.

22. In the present case I am of the opinion that the terms and conditions of the deed of dedication are not at all ambiguous but the intention of the testator has been clearly laid down in various terms and expressions used in the said document in unequivocal language. Moreover, apart from the deed itself the very conduct of the settlor from 9th June, 1935 till 24th June, 1959 when he left his residential house for good would show that he himself treated the entire properties as debutter, made additions and improvements to the debutter properties and also completely divested himself of all the said properties. He described himself and acted as the shebait of the plaintiff deities.

Pursuant to the power of attorneys granted by the settlor, two sons and daughter of the settlor acted as shebait of the said deities and have accepted the said dedication as a total debutter. Even Gostho Behari Roy in the suit filed by him before Alipore Court described his father Hari Mohan Roy as shebait and treated himself as a tenant in respect of the premises No. 16A, Nandan Road and agreed to pay a sum of Rs. 225 per month to the shebait of the deities. In fact the rent receipts, the deed of settlements the consent decree and all other exhibits in the suit go to show that not only the settlor himself but also all of his sons and daughter treated the said properties as debutter till the day when the sons and daughter of the settlor divided the said properties among themselves by treating the same as secular properties.

23. A specific provision has been made in the deed that after the death of Hari Mohan Roy his sons and daughter would be the shebait and as such shebait they shall never be competent to make any gift or sale or encumber in any manner the properties. I have the least doubt that it was the intention of the testator that the dedication would be absolute and his sons and daughter

would have no interests to the properties, save and except to act as shebait and carry out the terms and conditions contained therein.

24. The next point taken by Mr. Gopal Law appearing on behalf of Gostho Behari Roy is that premises No. 16A, Nandan Road does not belong to the plaintiff deities and does not form a part of the debutter estate as the testator did not divest himself of the said property. In support of his contention he has relied on the fact that the said property has not been mutated in the names of the plaintiff deities with the records of Corporation of Calcutta. According to him it was the intention of the settlor as also the parties to keep the said property outside the purview of the debutter estate. It is surprising that Gostho Behari Roy should take such a stand in this suit in view of his own conduct in the past. He himself has filed a suit in the Alipore Court treating himself as a tenant and making Hari Mohan Roy a party defendant and describing him as shebait of the debutter estate. The consent decree was also entered into by Hari Mohan Roy as a shebait of the plaintiff deities. Subsequently, the defendants Nos. 1 and 3 also consented to the arrangement arrived at under the said consent decree. In that document the defendants Nos. 1 and 3 have been described as shebaits of the plaintiff deities. Moreover, all the rent receipts in respect of No. 16A, Nandan Road have been granted in the capacity as shebaits of the plaintiff deities. Although Gostho Behari Roy has been in possession of the said property since 1954 and also considering the fact that he is a lawyer himself, he neither himself took any steps nor advised his father Hari Mohan Roy or other brothers to have the said property mutated in the name of the plaintiff deities in the records of the Corporation of Calcutta. There is a specific provision in the deed itself directing the shebaits to have the same done. On this lone ground of non-mutation I cannot hold that Hari Mohan Roy did not divest himself of the said property. Where there has been total dedication of property, non-mutation of the property, would not be a ground for holding that there has been no divestment of the property after the dedication, considering the dealing of the said property by the parties and their conduct.

25. The third point taken in this suit is that no presumption of death can be

drawn till after the expiry of 7 years' time on the date of filing of the suit. It has been contended that Hari Mohan Roy left the house on 24th June, 1959 and the present suit has been filed on 2nd August, 1965. As such the total period of 7 years' time had not lapsed and accordingly S. 108 of the Evidence Act would not be attracted.

26. Section 108 of the Evidence Act provides — "When the question is whether a man is alive or dead and it is proved that he has not been heard of for 7 years by those who would naturally have heard of him if he had been alive the burden of proving that he is alive is on the persons who affirm it."

27. It is the common case of the parties that Hari Mohan Roy has not been heard of by anybody since 24th June, 1959 till the day when the suit was heard. According to me, presumption of death arises at the end of 7 years and not at the time when the suit is instituted.

28. Under S. 108 of the Evidence Act presumption of death is not rigid and may be proved before lapse of 7 years from the "proof of special circumstances". Such presumption may arise before the end of 7 years "if the deceased person has been exposed to specific peril of death."

29. In a case reported in AIR 1926 Cal 1056 (In the goods of Ganesh Das Aurora) it has been held by C. C. Ghosh J. that the question for which presumption is made under S. 108 of the Evidence Act is whether a man is alive or dead when the question is raised. In other words, presumption of continuation of being alive ceases at the expiration of 7 years from the period when the person in question was last heard of.

30. Applying the above principles to the present facts of the case the presumption of death can be drawn in this suit. When Hari Mohan Roy left his residential house on 25th June, 1959 he was over 80 years of age and nobody in his family or others who are expected to hear of him have heard of him since then. This suit was heard in the year 1977 and it is in evidence that till then neither Hari Mohan Roy did come back nor was he heard of by any of the parties. As such, I have no hesitation in coming to the conclusion that such a presumption of death can safely be drawn. Moreover, it is for the defendants to displace such presumption by

giving evidence that he is still alive. In the present case none of the defendants gave any evidence to that effect.

31. Considering the facts that the plaintiff deities are not being properly looked after, specially the income of the debutter properties is not being collected properly and also considering the fact that the present shebait has chosen to divide the debutter properties among themselves and are fully enjoying the same without performing any duties as conferred upon them by the deed of dedication dated 9th June, 1935, I am inclined to frame a scheme in the manner following for the purpose of carrying out the various terms and conditions of the deed of dedication dated 9th June, 1935.

32. It is true that the shebait should act jointly but division of functions and duties among themselves may be made for convenience.

"Without detriment to the trust in order to avoid confusion or any unnecessary scramble, parties interested may arrange themselves for the discharge of the functions belonging to the office in turn. There is no breach of trust in such an arrangement nor any improper delegation of duties of the trustees." Dr. B. K. Mukherjee in Tagore Law Lectures on Hindu Law on Religious and Charitable Trust, page 242.

33. All the appearing parties at the end of arguments jointly submitted that if I am inclined to hold the dedication as a total dedication, in that event I should frame a scheme giving opportunity to each party in turn to carry out the deva seva and other works as provided in the said deed.

34. I answer the issues in the manner following:—

The deed dated 9th June, 1935 executed by Hari Mohan Roy created a complete debutter in favour of the plaintiff deities Nos. 1 and 2 and I answer Issue No. 1 accordingly.

Issue No. 2 is answered in the affirmative.

I answer Issues Nos. 3 and 4 (i) in the affirmative but in view of my finding on issues Nos. 1 and 2 in favour of the plaintiff deities Nos. 1 and 2, the same agreement is not binding on the plaintiff deities and is of no effect. As there has been no evidence adduced by the defendant No. 2, I answer Issue No. 4 (b) in the negative. As such answering Issue No. 4 (c) does not arise.

Issue No. 5 is answered in the affirmative but in view of the facts and circumstances of the case that has no effect now.

The plaintiff has failed to give any evidence in respect of issue No. 6 (a). As such, I answer the said issue in the negative. In the absence of any evidence being laid in respect of issues Nos. 6 (b) and (c), I answer the same in the negative. As such answering issue No. 6 (d) does not arise.

I answer Issue No. 7 in the negative, in view of my finding that the presumption of death of Hari Mohan Roy is drawn under S. 108 of the Evidence Act in the facts and circumstances of the case as stated above.

In respect of Issue No. 8 I frame a scheme strictly in accordance with the intention of the settlor as set out hereunder:

1. There would be a committee consisting of 4 shebait, namely, plaintiff No. 3 and defendant Nos. 1 to 3. The eldest of shebait at present being Sm. Kanchanbala Dutta, defendant No. 1, will have the final say in all matters regarding the management of the debutter estate created in favour of the plaintiffs Nos. 1 and 2. On the death of Sm. Kanchanbala Dutta, the next eldest shebait will have the same power and thereafter also in accordance with seniority in case of other shebait.

2. On the death of any of the existing shebait his or her eldest heir would become the shebait and also become automatically a member of the committee. The daily deva seva and also the periodical and annual festivals like 'Doljatra', 'Durga Puja' would be performed in turn by one of the shebait every year (from 1st January to 31st December). The first of such turn would come to the eldest descendant of Sri Hari Mohan Roy being Kanchanbala Dutta, defendant No. 1 at present from this day till 31st Dec., 1978 and thereafter to others in accordance with seniority and it will go on by rotation as indicated above.

3. The shebait whose turn would fall in a year would be entitled to collect all rents, issues and profits of all properties situated at Kola Mogra, 16A, Nandan Road and 20 Ahiritola Street and out of the said income pay the rates, taxes, statutory demands apply therefrom towards expenses of the deb sebas and the balance amount would be deposited in an account to be opened in a scheduled bank by all members of the commit-

tee in the name of the plaintiff deities which would be operated by the shebait whose turn of worship would fall in a particular year but would not withdraw more than a fixed sum which would be decided by the other shebait at a meeting to be held by all of them.

4. The shebait would, at the end of the year when his turn of worship is over, prepare and file accounts in the department after serving notice on all other shebait.

5. In case of any dispute or difference of opinion the shebait would be entitled to take opinion of the Court either by making a formal application or by writing a letter to the Registrar and act accordingly.

6. The shebait would be entitled to engage a purohit (priest) for the purpose of making arrangement of daily and periodical deb sevas. Expenses for such would be provided by the shebait whose turn of worship falls in a year.

7. The members of the committee, jointly should immediately apply and make every endeavour to collect the compensation money from the Government in respect of the debutter properties acquired by the Government and/or taken possession by anybody else.

8. Members of the committee would take immediate steps for mutation in the name of the plaintiff deities in respect of the properties at Mogra, 16 Nandan Road and 20 Ahiritola Street Calcutta.

9. Save as aforesaid, all the provisions and conditions of the deed of dedication dated 10th June, 1935 will remain in force and be binding on all the parties to the suit.

10. None of the shebait would be entitled to adjust the rent payable, with any expenses made by him unless approved of by all the members of the committee.

11. The shebait will maintain books of account, open to inspection, by any of the shebait after making appointment and by giving prior notice. The shebait will be at liberty to pay income-tax, wealth tax and other statutory liabilities if and when required to do so. The shebait will make every endeavour to increase the income of the debutter properties by fully utilising the same and the plans for such improvement and increase would be made by the members of the committee jointly at a meeting. In case of any dispute regarding the same, the opinion of the eldest surviving trustee should prevail although

the Court will have the ultimate say in the matter.

12. The shebait shall never be competent to make gift or sale or encumber in any manner the debutter properties.

13. The Receiver is discharged, although in future in case of any dispute the Court will re-appoint a Receiver over all the debutter properties.

14. The shebait will carry out necessary repairs of the properties.

35. The remuneration of the outgoing Receiver would be borne and paid by plaintiff No. 3 and defendants Nos. 1, 2 and 3 equally. According to the Receiver Mr. P. N. Dutt he has incurred a total expense of a sum of Rs. 3,700. Whatever money has been advanced by Shri Gostho Behari Roy would be deducted from his share of contribution already made to the Receiver.

36. The remuneration and the expenses of the Receiver to be paid within a month from date.

37. Each party to pay and bear its own costs.

Suit decreed accordingly.

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SANKAR PRASAD MITRA, C. J. AND
SALIL KUMAR DATTA, J.

The Abu Road Electricity & Industries Co. Ltd., Appellant v. Industrial Gases Ltd., Respondent.

Appeal No. 215 of 1972, D/- 22-8-1977.

Arbitration Act (1940), S. 20 — Arbitration agreement — Agreement by correspondence — General condition of contract — Incorporation — Incorporation of provision of one agreement into another agreement — Principles stated.

The appellant is engaged in supply of electricity. For increasing its capacity for supply of electricity it approached the respondent who carries on business inter alia of import of machinery for supply of generating sets. The respondent offered to supply 200 KW Diesel generating set in terms of its letters. As the appellant was interested in diesel generating set of 400 KW capacity, following further correspondence, the respondent made a revised offer for such set by its letter. While the letter contained inter alia terms of payment of delivery as also charges for erection, there was an endorsement on the front

page in the letter at the bottom in red print; "All quotations and contracts are subject to Calcutta High Court jurisdiction and to our standard terms, an extract of which is reproduced on the back". The reverse pages of the said letter contained "Extract from general sale conditions applying against orders and quotations". There was no endorsement at the bottom of the said letter though on the reverse the extract of sale terms and conditions was there almost in similar terms as the other with further reference to the general terms of contract to which the contract was subject, such general terms being available on request. The generating set was delivered to the appellant and it was installed by others though such job was to be done by respondent's engineer according to agreement. A dispute arose and the appellant filed a suit in Sirohi Court for recovering certain amount. The respondent filed an application in that Court under S. 34 of the Act and a stay was granted. Thereafter, the respondent filed an application under S. 20 (4) of the Act in the Calcutta High Court for filing arbitration agreement and a single Judge allowed the application holding that there was an arbitration agreement between the parties incorporated in the contract by specific reference as evident from the correspondence as a whole.

Held that the order of the single Judge allowing application under S. 20 (4) of the Act was valid. (Para 37)

The following principles can be laid down regarding incorporation of the provision of one agreement into another agreement:

(a) a clause in an earlier contract can be imported into a subsequent contract if the language is appropriate, unambiguous and clear.

(b) such clause in the earlier contract can be written in bodily into the later contract if there is no inconsistency or vagueness or uncertainty.

(c) A clause in the earlier contract which is germane to the subject-matter of the later contract may be incorporated therein by general words though some degree of manipulation may be involved.

(d) In respect of a clause in the earlier agreement which is not directly germane to the subject-matter of the later agreement, it is not permissible to construe general words as incorporating such clause therein when the clause in

terms does not relate to transactions of such later contract. Such clause can only be incorporated in the later contract by clear words either in the earlier or subsequent contract. Applying these tests, assuming the question is one of incorporation of the provision of arbitration into the contract for supply of 400 K.W. generating set, there can be little dispute that the arbitration clause in such transaction is not necessarily or directly germane. Apart from the question of uncertainty or vagueness or inconsistency, there is however no bar to incorporation by express and clear language the provisions of an arbitration clause in an earlier contract into the subsequent contract. In the case in question the relevant clauses which are clear enough show that the contract was entered into with the express understanding that the general sale condition of the respondent would apply, the contract whereof was given overleaf in the written, revised offer made by the respondent and accepted by the appellant. There was a further endorsement to the effect that complete sale conditions would be available on request. In view of this, on the face of this written provision, it is not possible for the appellant to contend that there was no provision for arbitration in respect of the said contract in express language even if such arbitration was not germane to the transaction between the parties. (Paras 27, 28)

In the case in question the contract is one and the same between the same parties in respect of one and single transaction and the question is really as to whether the general sales conditions which are not otherwise incorporated but were only referred to by express language in the offer made by the respondent to the appellant formed part of the contract between the parties in the circumstances. In this view it could be said that strictly the question of incorporation is not a relevant matter for consideration in respect of the controversy in issue between the parties in this proceeding. (Para 29)

Thus there is no escape from the conclusion that it was possible for the appellant to obtain the copies of the general sale conditions of which the appellant was made aware and even if he did not do so he must be deemed to have constructive and reasonable notice of the general sale conditions including the arbitration clause as forming the terms of the contract in view of the express provision made in the extract which was

set out on the reverse of the offer with the endorsement at the bottom. Further, it does not appear that there is any insurmountable difficulty for the appellant to take necessary steps for its participation in the arbitration proceeding in Calcutta. In the context of the attending circumstances, there is no question of balance of convenience when both parties are in identical position and there is no reason to interfere in this state of affairs with the forum provided in the arbitration clause in the contract for settlement of the disputes arising therefrom. (Para 42)

Cases Referred: Chronological Paras

(1976) 1 Lloyds LR 1	26
(1971) 1 All ER 394	25
(1965) 1 All ER 230: (1965) 2 WLR 250	24
AIR 1963 SC 1044	39
AIR 1960 Cal 47	38
AIR 1954 Mad 71	35
AIR 1951 Cal 10 (FB)	22
1941 AC 251 (HL)	30
1912 AC 1	19, 22

Anindya Mitra and Pratap Chatterjee, for Appellant; Milan Kumar Banerjee and Sudipta Sarkar, for Respondent.

SALIL KUMAR DATTA, J.:— This is an appeal against an order dated May 22, 1972 passed by Salil Kumar Roy Choudhury, J. directing that the arbitration agreement contained in the contract for supply of 400 K.W. Diesel Generating set by the respondent to the appellant be filed in this Court. There was a further direction that disputes mentioned in the petition be referred to the arbitrators to be appointed in terms of the arbitration agreement contained in Cl. 29 of the general terms and conditions of the respondent and in default the parties would be entitled to apply to this Court for appointment of an arbitrator.

2. The appellant, the Abu Road Electricity and Industries Co. Ltd. is engaged in supply of electricity in Abu Road and neighbouring areas. For increasing its capacity for supply of electricity, it approached the respondent, who carries on business inter alia of import of machinery, for supply of generating sets.

3. The respondent, it appears, during 1962-63 offered to supply to the appellant 200 K.W. Diesel generating set in terms of its letters dated March 29, 1962, August 29, 1962 and November 2, 1963 as also other letters. As the appellant

was interested in diesel generating set of 400 K.W. capacity, following further correspondence, the respondent made a revised offer for such set, to be imported from U.S.S.R., by its letter of April 16, 1964. While the letter contained inter alia terms of payment of delivery as also charges for erection or alternatively for providing one supervising engineer for supervising, installation, there was the following endorsement on the front page in the said letter at the bottom in red print:

"All quotations and contracts are subject to Calcutta High Court jurisdiction and to our standard terms, an extract of which is reproduced on the back".

4. The reverse pages of the said letter of April 16, 1964 contained "Extract from General Sale conditions applying against orders and quotations." Clause one of the said extract is as follows:—

"1. Purchaser's orders are accepted strictly on the understanding that purchaser accepts our general sale condition....."

5. The extract has 13 clauses and at the bottom there is the following endorsement.

"Complete sale condition can be supplied on request."

6. These clauses have been printed at pages 63-70 of the Paper Book.

7. The offer was accepted by a telegram and confirmed by letter dated May 30, 1964 with slight variation and it was stated therein inter alia as follows:—

"..... we have now pleasure to place an order for 400 K.W. set as offered by you with all terms negotiated and confirmed between us by correspondence till date which includes terms of payment to be the same for the order on c.i.f. basis or f.o.r. basis."

8. In reply the respondent intimated by its letter of June 6, 1964 its acceptance of the order in following terms:—

"..... we have pleasure in accepting your order in terms of our offer, subsequent correspondence and as per our standard sales terms and conditions printed on the back of our letter head".

9. There was no endorsement at the bottom of the said letter though on the reverse the extract of sale terms and conditions was there almost in similar terms as the other with further reference to the general terms of contract to which the contract was subject, such general terms being available on request.

10. The generating set was delivered to the appellant and it was installed by

others though such job was to be done by the respondent's engineer according to agreement. According to the appellant it was entitled to various amounts from the respondent, including increase of customs duty paid by it, refund of price which was reduced by the respondent at the time of release of foreign exchange interests on amounts blocked towards L/C, loss for not starting the machine for lapses of the respondent, demurrage etc. in all for about Rs. 2 lakhs. The appellant through its lawyer demanded payment of the said amount by his letter dated August 20, 1968. As the amount or any portion thereof was not paid, the appellant on or about Dec. 9, 1968 filed a suit being Suit No. 17 of 1969 before the District Judge, Sirohi praying for decree for Rs. 1,82,226 on the basis aforesaid against the respondent on the above allegations. The respondent filed an application on March 21, 1969 in the said court under S. 34 of the Arbitration Act, 1940 for a stay of proceedings alleging that in respect of the disputes in suit arising out of the contract between them there was a provision for arbitration which was binding on the parties. On this application the Court granted a stay as prayed for on consent and we are told, the stay is still continuing till the proceeding before us is concluded.

11. On March 3, 1970 the respondent filed an application in this Court stating that, in view of the provisions for arbitration as contained in the general sale conditions in respect of the contract between the parties, the disputes were to be settled by arbitration, and so the arbitration agreement should be filed in the Court and reference be made to the arbitrators in accordance therewith.

12. The application was opposed by the appellant and affidavit-in-opposition affirmed on its behalf by R. C. Bramhabatt, one of its Managing Directors, on May 14, 1971 was filed stating inter alia that the appellant never had any knowledge of the general sale conditions prescribed by the respondent as alleged and no brochure containing the said general sales conditions was ever brought to the notice of the appellant. Further, the only general terms of which notice was given were those printed overleaf in the letter of March 29, 1962 (being pages 68-70 of the Paper Book) which, as we have seen, are similar to those printed overleaf of the respondent's letter of April 16, 1964 containing the revised offer. It was further stated that the arbitration clause

had no application to the disputes raised and there was in existence no valid or binding arbitration agreement which also was vague, uncertain and unworkable. For the aforesaid reasons the application should be dismissed.

13. In the affidavit-in-reply, affirmed by Surendra Kumar Sangal on June 17, 1971 the respondent alleged that when Mr. Bramhabatt visited its office at Calcutta on November 20, 1962 he went through the general sale conditions, the printed copy whereof was taken away by him. It was reiterated that there was a valid and binding agreement for arbitration and the claims were covered by the said agreement. The application accordingly should be allowed.

14. S. K. Roy Choudhury, J. on hearing the respective contentions of the parties held that there was clearly an arbitration agreement between the parties which was incorporated in the contract by clear and specific reference as appearing in the correspondence reading as a whole. The entire correspondence had to be looked into as a whole which would indicate the intention of parties and the contract was to be construed in the background and circumstances of the case, and in law, the arbitration agreement was not to be signed by the parties but it was to be in writing. It was further held that there was sufficient notice of the arbitration clause which was clear and unambiguous and in wide terms to cover the disputes. In the premises the application under S. 20 (4) of the Arbitration Act was allowed by the learned Judge by order dated May 22, 1972 and the arbitration agreement contained in the contract for supply of 400 K.W. Diesel Generating set of U.S.S.R. origin and letters of May 30, 1964 and June 6, 1964 were directed to be filed in this Court with further consequential directions in terms of Cl. 29 of the general terms and conditions of sale of the respondent. The present appeal is against this order.

15. The general sale conditions relied on by the respondent, and annexed as Annexure 'A' of its petition under S. 20 are in relevant excerpts as follows:—

"The Industrial Gases Ltd.,
Post Box 853, Calcutta-1.

And

Its subsidiaries and associates."
General terms and conditions applying to agreements, Orders/Indents/Quotations/Offers for sale of Plants, Machines and

equipments. (Special terms and conditions applying to agreements, Orders, Indents, Quotations/Offers for sale of Gases and to contracts for erection or for supervision of erection can be had on request).

16. Purchaser's orders are accepted strictly on the understanding that purchaser accepts company's general conditions.

1. * * * *

29. Disputes of whatever nature arising under, out of, or in respect of the Order including any dispute arising under or out of re-sale under Clauses Nos. 6 and 24 hereof shall unless amicably settled be referred to the survey or arbitration of two merchants resident of Calcutta, one to be named by purchasers and one by the Company. The surveyors or arbitrators shall appoint an Umpire before entering upon the reference and in the event of their being unable to agree to any Umpire the Umpire shall be nominated by the Chairman for the time being of the Bharat Chamber of Commerce. In the event of either of the parties failing to nominate a Surveyor or an Arbitrator within fifteen days after being requested in writing to do so by the other party, the said other party shall have the power to nominate a Surveyor or Arbitrator on behalf of the defaulting party as well and the two surveyors or arbitrators so nominated shall proceed to act. The decision of the Surveyors or Arbitrators or the Umpire shall be final and binding on both parties.

It is hereby agreed that a Surveyor or an Arbitrator or an Umpire under this clause shall be a merchant resident of Calcutta who is either himself personally a member of the Bharat Chamber of Commerce or is a Partner Director or a Manager or Assistant Manager or a responsible officer of a firm or a Company, which firm or company is a member of the Bharat Chamber of Commerce.

It is further expressly agreed that any Survey or Arbitration under this clause shall take place at Calcutta and any Arbitration shall except as modified by this clause be under the provisions of the Indian Arbitration Act that may be in force at the time. All disputes under the contract are subject to jurisdiction of Calcutta High Court alone."

19. The main point for consideration is whether there was any agreement for

arbitration in the contract for supply of the 400 K.W. generating set. As we have seen, the contract was by correspondence and the revised offer by the respondent for the generating set was by its letter of April 16, 1964. The endorsement at the bottom of the first page of the letter was that contract was subject to the standard terms, an extract whereof was 're-produced on the back'. On the reverse was 'the extract from general sale conditions applying against orders and quotations'. Clause one provided that the purchaser's offer was accepted strictly on the understanding that he accepted the respondent's general sale condition. There can be little dispute that if the extract contained a provision for arbitration the disputes arising from the contract entered into would be subject to arbitration. The extract did not contain any such provision, but at the end of the extract there was a further endorsement providing that complete sale condition could be supplied on request. The general sale conditions applying to quotations, a copy whereof had been annexed to the application of the respondent under S. 20, contained in its last clause being Cl. No. 29 the provision for arbitration, which has been quoted above. The parties are at variance on the question of incorporation of the said provision in the contract for the supply of the generating set, in respect whereof, as we have seen, the appellant had raised various claims in the suit instituted at Sirohi.

18. In Halsbury's Laws of England Fourth Edition, Vol. 2, Art. 522 it is laid down:

"It is inherent in cases of incorporation by reference that the parties are concerned not with one document alone but with at least two, one of which contains an arbitration clause and the other of which does not. In some cases the one document may constitute a contract between other parties. A common case is where the two documents concerned are a charter party and a bill of lading. If the relevant contract between relevant parties is contained in the document which does contain the arbitration clause, no question of incorporation arises. Where this is not the case, the question whether the document containing the arbitration clause is incorporated in the relevant contract between the relevant parties is, as always, a question of construction."

19. We shall now refer to the decisions cited at the bar. In *T. W. Thomas & Co. Ltd. v. Portsea Steamship Co. Ltd.*, 1912 AC 1 a bill of lading provided that goods shipped thereunder should be delivered to the shipper, "..... with other conditions as per charter party", with further endorsement therein in the margin as "Dock load at shipper's risk, and all other terms and conditions and exceptions of charter to be as per charter party, including negligence clause". The charter party provided that "Any dispute or claim arising out of any of the conditions of this charter shall be adjusted at port where it occurs, and the same will be settled by arbitration". It was held that the arbitration clause was not incorporated in the bill of lading.

20. Lord Loreburn L. C. observed that under the words "with other conditions as per charter party", it was well settled that it could not be said that the arbitration clause in the charter party was incorporated or made applicable. It was further observed:

"The arbitration clause is not one that governs shipment, carriage or delivery or the terms upon which delivery is to be made or taken; it only governs the way of settling disputes between the parties to the charter party and disputes arising out of the conditions of the charter party and not disputes out of the bill of lading."

21. It was also observed by Lord Atkinson in his concurring judgment as follows:—

"..... It would be a sound rule of construction to adopt that when it is sought to introduce into a document like a bill of lading—a negotiable instrument—a clause such as this arbitration clause, not germane to the receipt, carriage, or delivery of the cargo or the payment of freight, the proper subject-matters with which the bill of lading is conversant—this should be done by distinct and specific words, and not by such general words as those written in the margin of the bill of lading in this case."

22. In *Dwarkadas & Co. v. Daluram Gojanmull*, AIR 1951 Cal 10 (FB) it was observed by Harris, C. J. referring to earlier decisions as follows (at p. 16, Para 45):—

"It is clear that in this case (*Thomas & Co.'s case* (1912 AC 1)) the House of Lords did not hold that the terms of an earlier contract could not be imported into a subsequent contract by appropri-

ate language or that an arbitration clause found in an earlier contract could not be imported into a subsequent contract if the language was both appropriate and clear. Further they admit that if an arbitration clause found in an earlier contract can be written in bodily into the later without any inconsistency or without causing any vagueness or uncertainty then such an arbitration clause could be imported. What their Lordships held however was that on the facts of the case, the nature of the arbitration clause in the charter party was such that it could not be imported into a contract relating to different subject-matter. If the arbitration clause was imported bodily into the bill of lading, it would on its face deal with no disputes, arising under the bill of lading and at best it would be vague and uncertain and quite insufficient to oust the jurisdiction of the courts."

23. In this case the relevant agreement provided as follows:—

"Subject to all terms and conditions of the contract..... issued to us by M/s. Bubna More & Co.....". The contract with M/s. Bubna More & Co. provided an arbitration clause and it was held that the arbitration clause in the first contract between Bubna More & Co. and the respondent was in the widest terms and was thereby imported into the subsequent contracts between the appellant and the respondent. If the arbitration clause in the original contract was written in subsequent contracts, it would be wholly intelligible and not inconsistent with any of the terms of the subsequent contract and would on its face apply to all disputes arising under the subsequent contracts.

24. In *T. B. & S. Batchelor & Co. Ltd. v. Owners of S. S. Merak*, (1965) 1 All ER 230 it was observed by Russell L. J.:—

".....a true view of that case (*Thomas & Co. Ltd.*) is that it shows that clauses which are directly germane to shipment, carriage and delivery may be incorporated by general words though the fact that they are found in the charter party may involve a degree of verbal manipulation to fit exactly a bill of lading but that where there is a clause whose subject-matter is not thus directly germane, such as an arbitration clause, it is not permissible to construe general words of incorporation as extending to a clause which does not in terms relate to a bill of lading."

25. In *Owners of the Ship Annefield v. Owners of the Cargo*, (1971) 1 All ER 394 (known as *Annefield case*) it was held that there was no scope for arbitration as the arbitration clause in charter party was not germane to the subject-matter of the bill of lading nor the expression was explicit enough to incorporate the arbitration clause of the charter party in the bill of lading. It was observed by Lord Denning M. R. as follows:—

"I would follow the test laid down by Russel L. J. in the *Merak*, but I would adapt it slightly. I would say that a clause which is directly germane to the subject-matter of the bill of lading (that is to the shipment, carriage and delivery of goods) can and should be incorporated into the bill of lading contract, even though it may involve a degree of manipulation of the words in order to fit exactly the bill of lading. But, if the clause is one which is not thus directly germane, it should not be incorporated into the bill of lading unless it is done explicitly in clear words either in the bill of lading or in the charter party."

26. Following the above proposition it was held by Denning, M. R. in *Thai-Europe Tapioca Service Ltd. v. Government of Pakistan*, 1976 (1) Lloyds LR 1 that the clause "all terms, conditions, liberties and exceptions of the charter are herewith incorporated" did not incorporate the arbitration clause into the bill of lading.

27. On a review of the above cases the following principles regarding the incorporation of the provisions of one agreement into another agreement appear to have been laid down.

(a) a clause in an earlier contract can be imported into a subsequent contract if the language is appropriate, unambiguous and clear.

(b) such clause in the earlier contract can be written in bodily into the later contract if there is no inconsistency or vagueness or uncertainty.

(c) A clause in the earlier contract which is germane to the subject-matter of the later contract may be incorporated therein by general words though some degree of manipulation may be involved.

(d) In respect of a clause in the earlier agreement which is not directly germane to the subject-matter of the later agreement, it is not permissible to construe general words as incorporating

such clause therein when the clause in terms does not relate to transactions of such later contract. Such clause can only be incorporated in the later contract by clear words either in the earlier or subsequent contract.

28. Applying these tests, assuming the question is one of incorporation of the provision of arbitration into the contract for supply of 400 K.W. generating set, there can be little dispute that the arbitration clause in such transaction is not necessarily or directly germane. Apart from the question of uncertainty or vagueness or inconsistency, there is however no bar to incorporation by express and clear language the provisions of an arbitration clause in an earlier contract into the subsequent contract. In the case before us we have referred to the relevant clauses which are clear enough to show that the instant contract was entered into with the express understanding that the general sale condition of the respondent would apply, the extract whereof was given overleaf in the written, revised offer made by the respondent and accepted by the appellant. There was a further endorsement to the effect that complete sale conditions would be available on request. In view of this, on the face of this written provision, it is not possible for the appellant to contend on the above authorities that there was no provision for arbitration in respect of the said contract in express language even if such arbitration was not germane to the transaction between the parties.

29. But is the case before us really one of incorporation of the provisions of one contract into another contract? As we have seen in the above cases there were two distinct agreements between different parties with one party in common wherein the principle of incorporation of the arbitration clause in the later contract was sought to be invoked. This is not the position in this case before us. We are faced here with a case where the contract is one and the same between the same parties in respect of one and single transaction and the question is really as to whether the general sales conditions which are not otherwise incorporated but were only referred to by express language in the offer made by the respondent to the appellant, formed part of the contract between the parties in the circumstances. In this view it could be said that strictly the question of incorporation is not a relevant

matter for consideration in respect of the controversy in issue between the parties in this proceeding.

30. The next contention raised by Mr. Mitter, learned counsel on behalf of the appellant, is that the arbitration clause in the contract, assuming it to be an enforceable one, is vague and uncertain and thus unenforceable in law. It is stated that the arbitration clause provides for appointment of two Arbitrators or Surveyors, each at the option of either party to decide the disputes arising out of the contract. It may be, it is said, that the respondent may elect to appoint an arbitrator while the appellant may elect to appoint a Surveyor. There is this inherent conflict in the provisions of the agreement in absence of clear or unambiguous language in the arbitration clause. Further the arbitration clause provides that the arbitrator or the Surveyor shall be, in the contingency referred to therein, a 'responsible officer' of a firm or company which is a member of Bharat Chamber of Commerce. These words have no meaning or the connotation attached to them which renders the clause vague, uncertain and unworkable. Reference was made to the decision in *G. Scammell & Nephew Ltd. v. H. C. & J. G. Ouston*, 1941 AC 251 (HL) in which Viscount Maugham observed:—

"In order to constitute a valid contract the parties must so express themselves that their meaning can be determined with reasonable degree of certainty. It is plain that unless this could be done it would be impossible to hold that the contracting parties had the same intention; in other words consensus ad idem would be the matter of mere conjecture. This general rule, however, applies somewhat differently in different cases. In commercial documents connected with dealings in a trade with which the parties are perfectly familiar the Court is very willing, if satisfied that the parties thought that they made the binding contract to imply terms and in particular terms as to the method of the carrying out the contract which it would be impossible to supply in other kinds of contract."

31. It appears that the contract between the parties was for supply of the generating set as also its erection by the respondent or under its supervision. According to the plaint in the suit before the Sirohi Court the disputes raised are

in respect of claims which have no connection with the process of erection or installation as according to the appellant no steps were taken by the respondent for such erection or installation. It appears that the provision for Surveyor was made in the arbitration clause in the general form of the trade (vide the arbitration clause in *Dularam's case*) and in the event of the dispute in connection with erection or installation, the appointment of Surveyors would be appropriate. Further under the contract it appears that either arbitrators or surveyors could be appointed and the Surveyors are squarely in the same position as Arbitrators as to the effect of an award as may be passed by them or by an umpire in event of difference between them. As to words 'responsible officers' the connotation does not appear to be vague in the commercial circle as it imports an officer who is holding a responsible position in a company or a firm carrying on business.

32. The next contention on behalf of the appellant is that the provisions of the extract given overleaf the offer vary in material aspects and/or are inconsistent with the provisions of the general sale conditions. We have carefully examined the relevant provisions and on comparison, it does not appear to be so as contended. As has been pointed out by Mr. Banerjee, learned counsel appearing for the respondent, Clauses 1 to 8 of the extract are similar to those of the general sale conditions in the following manner. Clause 1 of the extract = Clauses 1 + 21 of the general sale conditions, other Cls. 2, 3, 4, 5, 6+7 and 8 of the extract are respectively similar to Cls. 2, 12, 23, 4+5, 22 and 21 of the general sale conditions. The material difference to which our attention has been drawn relates to words 'prices ex-godown Calcutta' and 'present rate' of foreign exchange etc. in the extract while in the general sale conditions it is 'prices ex-godown factory' and 'current rate of foreign exchange etc.' These really do not make any substantial difference and at least in the present contract amounting to inconsistency.

33. The next contention made on behalf of the appellant is that the 'extract' implies and means extract of the general sale conditions which it is purported to be and such 'extract' cannot be beyond the general sale conditions. It is stated that there are many provisions in the 'extract' which do not find place in

the general sale conditions which is Annexure 'A' to the petition page 9 of the Paper Book. Clauses 9 to 13 of the 'extract' do not find place in the general sale condition, Annexure 'A'. Accordingly, it is submitted, it could not be said that the extract is an extract of the general sale conditions as contended. This argument is based on the misconception of the provisions of Annexure 'A' which applies to agreements, orders, indents, quotation and offers for sale of Plants, Machines and Equipments. It provides further in its heading following that "the special terms and conditions applying to Agreements, Orders, Indents, Quotations and Offers for sale of gases and to contracts for erection or for supervision of erection can be had on request." It is obvious therefore, that the extract which purports to be extract of the general sale conditions includes provisions regarding gases and cylinders in addition but in so far as the contract for supply of the plant is concerned the general sales conditions applying to such supply are those as set out in Annexure 'A' and naturally the provisions thereof do not extend to gas cylinders. There is, therefore, nothing basically wrong in the extract in so far as it relates to the supply of machinery is concerned.

34. The next question relates to the notice of the general sale conditions on the appellant as forming the terms of the contract. Chitty on Contract 23rd Edition in Arts. 590 and 591 laid down the following propositions which have also been considered by the learned trial Judge. They are as follows:—

"590, Meaning of notice. It is not necessary that the conditions contained in the standard form document should have been read by the person receiving it, or that he should have been made subjectively aware of their import or effect. The rules which have been laid down by the court regarding notice in such circumstances are three in number.

(1) If the person receiving the document did not know that there was writing or printing on it, he is not bound.

(2) If he knew that the writing or printing contained contractual conditions, he is bound.

(3) If the party tendering the document did what was reasonably sufficient to give the other party notice of conditions, and if the other party knew that there was writing or printing on the document, but did not know that it con-

tained conditions then the document will be given contractual effect. Its conditions will become the terms of the contract between them.

591. Reasonable sufficiency of notice. It is the third of these rules which has most often to be considered by the courts. The question whether the party tendering the document has done all that was reasonably sufficient to give the other notice of the conditions is a question of fact in each case, in answering which the tribunal must look at all the circumstances and the situation of the parties. But it is for the court, as a matter of law, to decide whether there is evidence for holding that the notice is reasonably sufficient. Cases in which the notice has been held to be insufficient have been those where the conditions were printed on the back of the document, without any reference, or any adequate reference, on its face, such as, 'for conditions, see back', or where the conditions were obliterated by a printed stamp. In most cases however the tender of printed conditions is in itself considered sufficient."

35. In the case of *Tatavarti N. R. (Firm) v. Balabhadra*, AIR 1954 Mad 71 it was observed as follows (at p. 72, Para 4):—

"When a contract in writing is signed by parties, they are bound by the terms contained therein whether they take the trouble of reading them or not. This principle has been extended to cases where the contract does not actually contain the terms but a reference is made to another document or contract where those terms are to be found. The reason for holding that those terms must be taken to have been incorporated by reference in their signed agreement is that it was possible for any of them to look into the document and ascertain the terms."

36. The appellant contended that it was never made aware of the provision for arbitration and if it was made aware about it the appellant would never have agreed to such provision as it had no office in Calcutta nor it had any connection with the Bharat Chamber of Commerce or its members to carry on the proceedings on its behalf before the Arbitrator. The respondent alleged in the affidavit-in-reply in para. 4 with reference to Nov. 20, 1960 that Mr. Bramha Bhatt who is one of the Managing Directors of the appellant had know-

ledge of the general sales condition and printed copies thereof were taken by him at the meeting he had on that date at Calcutta with the responsible officers of the respondent. We do not think it appropriate to refer to the statements of a new fact made in the affidavit-in-reply which the appellant had no opportunity to traverse except challenging the same in course of argument. The offer for supply of 400 K.W. generating set was made by letter of April 16, 1964 as we have seen and it seems that when parties entered into the contract by further correspondence following, the offer is accepted subject to the conditions as referred to in the offer though not forwarded to or obtained by the acceptor. In such contract if the acceptance is on the face of the extract, of which the appellant admittedly had knowledge, and the extract refers to general sale conditions and the offer is made expressly subject to those conditions, the acceptor must be deemed to enter into the contract on basis not only of the conditions of extract but also of the general sale conditions. If the acceptor ignores these conditions or fails to take note of the same before entering into the contract he does so at his peril and risk.

37. In view of the propositions of law noted above there is no escape from the conclusion that it was possible for the appellant to obtain the copies of the general sale conditions of which the appellant was made aware and even if he did not do so he must be deemed to have constructive and reasonable notice of the general sale conditions including the arbitration clause as forming the terms of the contract in view of the express provision made in the extract which was set out on the reverse of the offer with the endorsement at the bottom.

38. Mr. Mitra has further submitted that the trial court should not have exercised its discretion in favour of arbitration when there are substantial and compelling grounds against reference to arbitration. Reference was made to the decision in *Serajuddin & Co. v. Michael Golodetz*, AIR 1960 Cal 47 in which the appeal court in an appeal from an order under S. 34 refused stay of suit in the exercise of its discretion in reversal of the order of the trial court (reported in (1956) 60 Cal WN 128 (sic)). It was observed by P. N. Mookerjee, J. speaking for the Court, following earlier English decisions as follows:—

"It is undeniable that the parties are prima facie bound by the arbitration clause and, normally, they should be asked to keep their bargain and the suit should be stayed but that places no insurmountable bar in the way of the party, seeking to avoid arbitration and maintain the suit. It only casts upon him the onus,—undoubtedly, a heavy one—of satisfying the court that there is sufficient reason why the matter in dispute should not be referred to arbitration, but that onus can certainly be discharged in a proper case. The agreement or contract to refer to arbitration is not necessarily decisive on the point and it creates no estoppel, so far, at least as the court is concerned; it only raises a prima facie case or presumption in favour of a decision by arbitration but that presumption is certainly rebuttable and is liable to be rebutted by appropriate grounds and circumstances in a particular case."

39. The Supreme Court in the appeal from the said decision in *Michael Golodetz v. Serajuddin & Co.*, AIR 1963 SC 1044 while dismissing the appeal observed (at p. 1046):—

"The court ordinarily requires the parties to resort for resolving disputes arising under a contract to the tribunal contemplated by them at the time of the contract. That is not because that court regards itself bound to abdicate its jurisdiction in respect of disputes within its cognizance; it merely seeks to promote the sanctity of contracts and for that purpose stays the suit. The jurisdiction of the court to try the suit remains undisputed; but the discretion of the court is on grounds of equity interposed. The court is therefore not obliged to grant stay merely because the parties even under a commercial contract agreed to submit their dispute in a matter to an arbitration tribunal in a foreign country. It is for the court having regard to all the circumstances, to arrive at a conclusion whether sufficient reasons are made out for refusing to grant stay. Whether the circumstances in a given case make out sufficient reasons for refusing to stay a suit is essentially a question of fact."

40. The Supreme Court affirmed the High Court's finding that the facts established made out 'sufficient reason' for not granting stay of the suit.

41. Relying on these authorities Mr. Mitra submitted that the Court in the

present case will not allow the arbitration agreement to be filed in the court as there are substantial grounds against such filing and serious prejudice leading almost to denial of justice will otherwise be caused to the other party. He submitted that the appellant had no business contact in Calcutta or with the Bharat Chamber of Commerce and arbitration in this city will cause irreparable prejudice and inconvenience to the appellant. Mr. Banerjee contended on the other hand that the respondent has also no business connection or office at Sirohi where the suit had already been instituted, assuming that the said court had the jurisdiction otherwise to decide the dispute, as in the offer it was expressly stipulated that the court in Calcutta will have the jurisdiction.

42. Assuming that the proposition of law laid down in Serajuddin's case is also applicable to proceeding under Section 20 of the Act, it does not appear to us that there is any insurmountable difficulty for the appellant to take necessary steps for its participation in the arbitration proceeding in Calcutta. In the context of the attending circumstances, there is no question of balance of convenience when both parties are in identical position and there is no reason to interfere in this state of affairs with the forum provided in the arbitration clause in the contract for settlement of the disputes arising therefrom.

43. Mr. Mitter has also submitted that if the appellant is relegated to arbitration, its claims may be barred by limitation in view of the provisions of S. 37 of the Arbitration Act which provides that all provisions of the Limitation Act will be applicable to arbitration as they apply to proceedings in Court. This aspect of the question should not detain us long as in the event of the claim before the Arbitration being held as barred by limitation, the suit in the court at Sirohi, which may only be stayed during the proceedings in arbitration, will proceed in accordance with law. Mr. Banerjee appearing for the respondent has also submitted to us that the respondent would concede before the arbitrators or the umpire that the time taken by the parties in the Sirohi Court should be excluded for purposes of limitation so far as the arbitration proceedings are concerned.

44. Mr. Mitter has further submitted that the court at Sirohi may proceed notwithstanding the decision of this

Court on the application under S. 20 of the Arbitration Act and all proceeding before the Arbitrators will be invalid in view of the provision under S. 35 of the Act. It appears that all further proceeding in the suit has been stayed during the pendency of the proceeding in this Court and we do not think it will be proper for us to express any opinion in the matter.

45. The appeal in the premises fails and is dismissed. The costs of the appeal will abide with the result of the arbitration, certified for two counsel.

SANKAR PRASAD MITRA, C. J.:—I agree.

Appeal dismissed.

AIR 1977 CALCUTTA 492

A. K. JANAH AND A. N. BANERJEE, JJ.

National Insurance Co. Ltd., Appellant
v. Calcutta Dock Labour Board, Respondent.

A. F. O. D. No. 369 of 1972, D/- 7-6-1977.

(A) Contract Act (9 of 1872), S. 28 — Agreement affecting jurisdiction of Court — Insurance contract — Clause in insurance policy making award on arbitration condition precedent, before right of action against insurer — Clause not hit by S. 28.

It is well settled that if the making of an award is a condition precedent for the accrual of a cause of action, then the condition has to be satisfied before the plaintiff can institute a suit. (Para 6)

A clause, contained in the condition of the contract of insurance, provided that all differences between the parties arising out of the policy were to be referred to arbitration in the manner laid down in the said condition. The obtaining of an award was a condition precedent to any right of action against the insurer. Such a condition was not hit by S. 28, Contract Act. On a proper construction of the clause it was clear that the condition had to be satisfied before the plaintiff-insured could institute a suit for recovery of damages against the Insurance Company, for damage to car by fire. It cannot be argued that the liability of the defendant-insurer had to be determined by the court at first, and then with regard to the quantum of

loss or damages the matter had to be referred to arbitration. AIR 1923 Bom 249, Distinguished; (1856) 25 LJ Ex 308, Relied on. (Para 6)

(B) Civil P. C. (5 of 1908), O. 8, R. 8 — New ground of defence — Point affecting jurisdiction of Court based on arbitration clause not taken in written statement — Defendant submitting to the jurisdiction of the Court — Held that the defendant waived his right to insist upon the arbitration clause. (Para 7)

Cases Referred: Chronological Paras
 AIR 1976 SC 287 6
 AIR 1970 Cal 221 4
 AIR 1949 Cal 390 4
 AIR 1924 Cal 186:27 Cal WN 955 4
 AIR 1923 Bom 249:ILR 47 Bom 509 6
 AIR 1914 Bom 225 (2):ILR 38 Bom 344 4

(1856) 25 LJ Ex 308:10 ER 1121 6

Sitti Kantha Lahiri and Parimal Das, for Appellant; P. N. De and Samir Kumar Bose, for Respondent.

JANAH, J:— This appeal is on behalf of the defendant and it arises out of a suit for recovery of damages to the extent of Rs. 11,155.24 p. The respondent instituted the suit for damages against the appellant on account of loss suffered to a Jeep belonging to the respondent bearing registration No. WBD 231 which was insured with the appellant for a sum of Rs. 24,029.80 p. The loss was suffered as a result of the vehicle being set on fire by some of the workers belonging or who belonged to the respondent, Calcutta Dock Labour Board. It was alleged by the plaintiff that as a result of the fire the vehicle was heavily damaged and the cost of repair was assessed at Rs. 11,170.24 p. by Khettry Motors. The defendant was informed of the damage and of the cost of repair but the defendant illegally disclaimed its liability. Subsequently, the Jeep was repaired by Khettry Motors at a cost of Rupees 11,155.24 p. which was paid by the plaintiff to Khettry Motors. The plaintiff respondent brought the suit for recovery of the said sum on the basis of the comprehensive policy.

2. The defendant contested the suit by filing a written statement. The written statement was filed on February 23, 1970. In that written statement, the defendant denied its liability for the amount claimed, on two grounds. The two grounds were that the plaintiff not having referred the claim to arbitration within 12 calendar months from the de-

fendant's disclaimer of the liability, the claim must be deemed to have been abandoned by the plaintiff in terms of condition No. 7 of the Policy. The second ground was that the damage to the vehicle was caused by riot and the plaintiff was, therefore, not entitled to any compensation in terms of the general exception No. 4 of the Policy. Subsequently, on the date of hearing on 18th May, 1971, the defendant filed an additional written statement which was accepted by the Court. By the said additional written statement the defendant introduced a further defence to the effect that condition No. 7 of the Policy lays down that any dispute between the parties arising out of the Policy shall be referred to arbitration and the making of an award shall be a condition precedent to any right of action against the Corporation. As the dispute in question was not referred to arbitration and no award was made, the suit is not maintainable in accordance with the terms of the said condition No. 7.

3. Originally six issues were framed but subsequently by an order dated 4th August, 1971 the issues were recast and the issues originally framed were substantially altered. The parties went to trial on the issues thus recast. The trial Court, upon a consideration of the materials on record came to the conclusion that the damage was caused by fire but there was no rioting as alleged by the defendant and therefore, it did not fall within the general exceptions contained in Cl. 4 of the Policy. The trial court found that although there was repudiation of the claim by the defendant, it was still open to the plaintiff to insist on the performance of the arbitration clause, inasmuch as, the entire arbitration agreement was not repudiated by the defendant. The trial court further found that the contract contained in Cl. 7 of the Policy to the effect that claim shall have to be made within 12 months from the date of disclaimer by the insurer was not hit by S. 28 of the Indian Contract Act and that Condition No. 7 of the Policy was valid in law. The trial court, however, found that in the circumstances of the case, the defendant waived its right with regard to the arbitration clause and the suit was, therefore, maintainable. The trial court accordingly passed a decree in favour of the plaintiff.

4. Against the said decision of the trial court, the defendant has preferred

the present appeal. Mr. Lahiri, learned Advocate appearing on behalf of the appellant, has supported the finding of the trial court that Condition No. 7 of the Policy is not hit by S. 28 of the Indian Contract Act. He has contended that S. 28 of the Indian Contract Act applies only where the period of limitation to institute a suit is curtailed but it does not apply when such a term in the contract has the effect of extinguishing the right of the plaintiff to sue or it has the effect of discharging the defendant from all liabilities in respect of the claim. He has relied upon the decisions in the Baroda Spinning and Weaving Co. Ltd. v. The Satyanarayan Marine and Fire Insurance Co. Ltd., ILR 38 Bom 344: (AIR 1914 Bom 225 (2)); New Great Insurance Co. of India Ltd. v. United Equipments and Stores (Pvt.) Ltd., AIR 1970 Cal 221; Giridharilal Hanumanbux v. Eagle Star & British Dominions Insurance Co. Ltd., 27 Cal WN 955: (AIR 1924 Cal 186) and Dawood Tar Mahomad Bros. v. Queensland Insurance Co. Ltd., AIR 1949 Cal 390. Term 7 of the Contract of Insurance may be referred to in this connection. The said term reads as follows:—

"All differences arising out of this Policy shall be referred to the decision of an Arbitrator to be appointed in writing by each of the parties within one calendar month after having been required in writing so to do by either of the parties or in case the Arbitrators do not agree or in case the Arbitrators be appointed by the Arbitrators before entering the reference. The Umpire shall sit with the Arbitrators and preside at their meetings and the making of an award shall be a condition precedent to any right of action against the Corporation. If the Corporation shall disclaim liability to the Insured for any claim herein and such claim shall not within 12 calendar months from the date of such disclaimer will be referred to arbitration under the provisions herein contained, then the claim shall for all purposes be deemed to have been abandoned and shall not, thereafter be recoverable hereunder."

5. It is clear from the aforesaid condition that all differences between the parties arising out of the Policy must be referred to arbitration in the manner laid down in the said condition, and the obtaining of an award is a condition precedent to any right of action against the Insurer. In the present case, a dispute

arose between the Insured and the Insurer over a claim for compensation made by the plaintiff against the defendant. There is no dispute between the parties that such difference was not referred to arbitration by any of the parties. The contention on behalf of the defendants appellant is that in the absence of any award as contemplated under the said clause the present suit is liable to be dismissed.

6. It is well settled that if the making of an award is a condition precedent for the accrual of a cause of action then the condition has to be satisfied before the plaintiff can institute a suit. Mr. De, learned Advocate appearing on behalf of the respondent contended that the repudiation was under the contract and it was not covered by the arbitration clause. He contended that the word 'disclaimer' must be a total disclaimer and it cannot be a partial disclaimer. According to him, there is no time limit fixed by the aforesaid Condition No. 7 regarding 'differences' arising out of the Policy. But for 'disclaimer' the time limit is 12 months from the date of disclaimer. He contended that the word 'claim' in the said clause is limited only to a claim for money. According to Mr. De, if the arbitration clause applied then the plaintiff not having referred to arbitration within 12 months, his claim will be deemed to have been abandoned but the right of suit would be there. He contended that otherwise if the right of suit is taken away then the said Condition No. 7 would be hit by Sec. 28 of the Indian Contract Act. In support of this proposition Mr. De relied on the decision in Vulcan Insurance Co. Ltd. v. Maharaj Singh. AIR 1976 SC 287. He relied on the observations made by the Supreme Court in that case in support of his contention that as soon as there is a rejection of the claim the only remedy open to the claimant is to commence a legal proceeding, namely, a suit for the establishment of the company's liability. After such liability has been determined by the Court, the question of quantum of the loss or damage may have to be referred to arbitration. In so far as this aspect of the matter is concerned it appears that the case which the Supreme Court was considering contained an arbitration clause as well as other clauses relating to the dispute which were quite different from the present case. In the case before the Supreme Court Clause 18 which is relevant for the present pur-

pose specifically mentioned that "if any difference arises as to the amount of loss or damage such difference..... shall be referred to arbitration". Similarly, Cl. 19 provided that "in no case whatever shall the company be liable for any loss or damage after the expiration of 12 months from the happening of loss or damages unless the claim is a subject-matter of pending action or arbitration". It is in this context the Supreme Court made the observations on which reliance has been placed by Mr. De. On the facts of the two cases, we are unable to agree with Mr. De that in the present case the liability of the defendant has to be determined by the Court at first, and then with regard to the quantum of loss or damage the matter is to be referred to arbitration. A clause as is contained in Condition No. 7 of the Contract of Insurance in the present case, namely, that the obtaining of an award shall be a condition precedent to the right of action or suit upon the policy came up for consideration in the case of *Scott v. Avery*, (1856) 25 LJ Ex 308 and since then such clauses have commonly come to be known as *Scott v. Avery* clause. It has been held in a large number of cases that if the arbitration clause is contained in a comprehensive language to include any kind of dispute arising out of the Policy, then, the obtaining of an award by arbitration is a condition precedent to the starting of any legal proceeding. Such a clause has also been held to be a valid one. Mr. De also relied on the decision in the *Eagle Star and British Dominions Insurance Company v. Dina Nath*, ILR 47 Bom 509; (AIR 1923 Bom 249) in support of his contention that in a contract for insurance containing such a clause the liability of the company has to be determined first in a suit and thereafter the question of determination of the quantum of loss or damage may be fixed by arbitration. The observations of the Bombay High Court relied on by Mr. De in support of his contention were made with reference to Cl. 13 of the agreement in that case which contained conditions which were different from the present case. On a proper construction of Cl. 7 we are unable to agree with Mr. De that if the Corporation disclaims the liability the Insured will have to have the liability determined by the Court and thereafter the matter should be referred to arbitration for fixing the quantum of loss or damages.

7. The next question to be considered is whether the defendant waived the arbitration clause by repudiating the claim of the plaintiff and also by its own failure to refer to the dispute to arbitration and also by submitting to the jurisdiction of the Court. Before the trial court, it was argued that the defendant repudiated the claim of the plaintiff on a ground which went to the root of the contract contained in the Insurance Policy and therefore the defendant was precluded from pleading that the arbitration clause was a bar to the institution of the present suit. Several authorities were cited before the trial Court by the respective parties on this point. In this appeal, however, the said question has not been argued in that way. What was contended before us on behalf of the respondent is that the defendant submitted to the jurisdiction of the Court. It filed a written statement where-in this point was not taken. The parties went to trial upon the pleading as originally filed. Subsequently after more than a year the defendant took this defence in an additional written statement filed by it. It was contended on behalf of the appellant that the additional written statement having been accepted by the Court it related back to the date of filing of the original written statement. The additional written statement became a part of the written statement and, as such, it cannot be said that the defendant had waived its right to insist upon the arbitration clause. It would appear from the issues which were originally framed that the defence of the defendant was that there was non-disclosure and mis-statements by the plaintiff in relation to the Insurance Policy. The defendant challenged the plaintiff's claim on these grounds. The defendant went to trial with this case which was made out by it. Subsequently, when the trial commenced the defendant took up the other defence regarding the arbitration clause. Although the additional written statement was accepted by the Court, it cannot be said that the defence taken in the additional written statement was taken by the defendant when it appeared in the suit to contest the plaintiff's claim. That being the position, it must be held that the defendant waived its right to insist upon the arbitration clause. Therefore, the trial Court was right in coming to the finding that there was waiver on the part of the defendant.

8. It was contended on behalf of the appellant that the Insurance Policy contains certain general exceptions. Under Cl. 4 of the general exceptions any accident, loss or damage resulting from strike, riot or civil commotion will not make the Corporation liable for compensation. It was contended that the said clause further provides that it was for the Insured to prove that the accident, loss or damage arose independently of the exceptions mentioned in Cl. 4. It was argued that the plaintiff had not been able to prove in the present case that the damage was caused independently of riot. Reference was made to paragraph 4 of the plaint wherein it has been stated that "some recalcitrant workers maliciously and/or out of grudge and/or with a view to cause damage set fire to the said vehicle". This statement in the plaint taken along with the evidence, it was contended, showed that the damage was caused by riot. The Labour Officer of the plaintiff who was examined as P.W. 1 has denied that there was any rioting or strike on the relevant date. In cross-examination, it was suggested to him that some workers were armed with deadly weapons and they engaged themselves in rioting. This suggestion was denied by the said witness. On the other hand, the witness examined on behalf of the defendant has admitted in evidence that although several persons were arrested no charge-sheet was submitted. The trial court has considered the evidence of these two witnesses and has come to the conclusion that it cannot be said that there was rioting on the day on which the vehicle was set on fire. He has discussed the legal position in this connection and has referred to the relevant sections of the Indian Penal Code in coming to his conclusion. In our view, we find nothing on record to take a view different from that which has been taken by the trial Court on this aspect of the case.

9. This appeal, therefore, fails and it is accordingly dismissed with costs.

A. N. BANERJEE, J.:— I agree.

Appeal dismissed.

AIR 1977 CALCUTTA 496

PRADYOT KUMAR BANERJEE AND
GANENDRA NARAYAN RAY, JJ.

Kartick Chandra Shaw, Petitioner v. Sm. Ranjita Pal and others, Opposite Parties.

Civil Rule No. 4513 of 1975, D/- 19-5-1977.

Succession Act (39 of 1925), S. 283 — Application for grant of probate — Who can oppose — Agreement for purchase — Whether creates an interest. AIR 1956 Cal 462 held not good law in view of AIR 1967 SC 744 and AIR 1977 SC 774. (T. P. Act (1882), S. 54).

A party to the agreement for purchase has no right or interest in the immovable property left by the testator and as such, has no locus standi to oppose the application for grant of probate under S. 283 of the Succession Act. His claim at best is a claim for filing a suit.

(Paras 8, 10)

A contract of sale in view of S. 54 of T. P. Act does not of itself create any interest in, or charge on, the property. The personal obligation created by a contract of sale (as recognised in S. 3 of the Specific Relief Act and S. 91 of the Trusts Act) is described in S. 40 of the T. P. Act as an obligation arising out of contract and annexed to the ownership of property, but not amounting to an interest or easement therein. AIR 1956 Cal 462 held not good law in view of AIR 1967 SC 744 and AIR 1977 SC 774; AIR 1958 Cal 377 and AIR 1932 Cal 734, Rel. on.

(Para 6)

Cases Referred: Chronological Paras

AIR 1977 SC 774	6
AIR 1967 SC 744	6
AIR 1967 SC 978	6
AIR 1958 Cal 377: 62 Cal WN 444	8
AIR 1956 Cal 148	5
AIR 1956 Cal 462	4
AIR 1932 Cal 734: 36 Cal WN 635	10

S. P. Roy Chowdhury, Phani Bhusan Das and Ashok Maity, for Petitioner; B. K. Pande and M. K. Roy, for Opposite Parties.

BANERJEE, J.:— This rule is directed against an order passed by the District Judge, Midnapore, adding the opposite party No. 8 to contest the Will on the ground that he has acquired by virtue of a deed of agreement executed by two heirs of the testator in respect of the property which the testator left behind (sic). The case of the petitioner in this

application is that on 6th Feb., 1973 the petitioner as executor of the Will of late Upendranath Shaw filed an application for grant of the probate of the Will dated 29th Oct., 1969 left by late Upendra Nath Shaw before the District Delegate, namely, the Second Court of the learned Munsif, Contai giving rise to J. Misc. Case No. 13 of '73 but the case having been contested by the opposite parties Nos. 1 and 2, the said application for grant of probate was returned to the petitioner for presentation before the learned District Judge, Midnapore. In the said application for grant of probate, it was stated that Upendra Nath died at his residence on 6th Dec., 1971 leaving a Will duly executed by him on 29th Oct., 1969. It is stated that the Will was an outcome of free Will of the testator and was executed and attested in accordance with law. It is further stated that the petitioner herein was appointed executor. In the said application the opposite parties Nos. 1 to 7 were named as near relatives of the testator, opposite parties Nos. 1 and 2 being the two daughters, the opposite party No. 3 being the widow and the opposite parties Nos. 4 to 7 being the other four sons. Initially the opposite parties Nos. 1 and 2, the daughters of the testator contested the application for grant of probate on the ground that the testator has no capacity and alleging exercise of fraud, undue influence and coercion on the testator by the legatees. The other heirs of the testator however did not challenge the Will. It is further stated that the opposite parties Nos. 1 and 2 filed application for injunction restraining the petitioner and opposite parties Nos. 3 to 7 from alienating the properties mentioned in the schedule of the application for grant of probate. The said application was contested by the petitioner and other sons of the testator and the learned District Judge rejected the application for temporary injunction. Subsequent to that, the opposite parties Nos. 1 and 2 also filed an application before the Subordinate Judge who was hearing the matter on transfer that they are not going to oppose this application for grant of probate and on such application being filed the learned Subordinate Judge fixed 23rd Sept., 1975 for hearing ex parte the application for grant of probate. On 22nd Sept., 1975 however the opposite party No. 8 filed an application for permission to contest the probate proceeding on the ground that he has acquired

an interest by virtue of two deeds of agreements for sale executed in his favour by opposite parties Nos. 1 and 2 on 28th March, 1973 on receipt of Rs. 6,000 agreeing to sell three plots of land with structures standing thereon. It is stated that the premises was occupied by the opposite party No. 2 as a tenant at a monthly rental of Rs. 35. It is further stated that in view of the agreement for sale the opposite party No. 8 has acquired an interest in the estate of the deceased and is entitled to contest the Will for grant of a probate under S. 283 of the Indian Succession Act. It must be stated that the agreement for sale, which is annexed to the affidavit-in-opposition is admittedly an unregistered document. The Court below having allowed the application of the opposite party No. 8 to contest the probate proceeding, the petitioner herein moved this application and obtained the present rule.

2. Mr. Roy Chowdhury on behalf of the petitioner contended that the agreement for sale cannot and does not create any interest in the immoveable property and the relief by way of specific performance is discretionary to the Court and as such the right does not create any right whatsoever in the estate of the deceased and therefore the application filed by the opposite party for addition of party in the probate proceeding for the purpose of challenging the Will is not maintainable. Secondly Mr. Roy Chowdhury contended that the opposite party No. 8 may have some interest under the agreement for sale but he has no interest in the estate of the deceased at all and as such the application by him is not maintainable. Thirdly it is contended by Mr. Roy Chowdhury that the bare possibility of filing the suit would not give the party concerned an interest sufficient to oppose the probate of the Will. Mr. Roy Chowdhury further contended that a document, creating an interest in an immoveable property must be registered. An agreement for sale even if registered cannot create an interest in the immoveable property.

3. Mr. Roy Chowdhury further contended that the application of opposite party No. 8 is premature because if he has an interest he can after the grant of probate pray for revocation of the grant and the Court has no power to thrust a party on the propounder if he does not want to make (him) a party in the proceeding.

4. Mr. Panda on behalf of the respondent however challenged the contention put forward by Mr. Roy Chowdhury. In so far as the Court's power to add a party to the proceeding is concerned, it must be stated that the Court has a power to add a person to the proceeding if the Court is satisfied that his claim of interest in the estate of the deceased is tenable. Mr. Panda however contended that under S. 55 (6) (b) of the Transfer of Property Act, the agreement for sale creates sufficient interest in the property by which a person covered by the agreement can maintain an application under S. 283 of the Transfer of Property Act. Mr. Panda relied upon the case reported in AIR 1956 Cal 462 (Rabindra Nath v. Harendra Kumar),

5. In our opinion, the agreement for sale does not create an interest in the property which is the subject-matter of the sale. Under S. 54 of the T. P. Act an agreement for sale of immoveable property is a contract that a sale of such property shall take place on terms settled between the parties. It does not create any interest in or charge on such property or in other words the contract for sale does not create either an interest in or a charge on the property. It at best is a contract for sale which is only an equitable right of a purchaser and it does not create any interest in the land which is the subject-matter of the contract. In the case reported in AIR 1956 Cal 148 (India Elec. Works v. Mantosh) it has been held by the Division Bench of this Court that even after a decree for specific performance has been passed, the purchaser has no interest in the property. From S. 54 of the T. P. Act it is clear to us that the agreement for sale does not create of itself any interest in or charge on the property which was contracted to be sold between the parties,

6. In the case reported in AIR 1967 SC 744 (Ram Baran v. Ram Mohit) it has been held, inter alia, that in the case of an agreement for sale entered into prior to the passing of the T. P. Act, it was the accepted doctrine in India that the agreement created an interest in the land itself in favour of the purchaser, and following this doctrine the view was that a covenant for pre-emption contained in a deed of partition, which was unlimited in point of time, was not enforceable in law. But there has been a

change in the legal position in India since the amending of the Transfer of Property Act in 1929. Section 54 of that Act states that contract for sale of immoveable property "does not of itself, create any interest in or charge on such property". In the case reported in AIR 1967 SC 978 (Lalji Jetha v. Kalidas) the Supreme Court also decided in the same line. At page 981 in para. 9 it has been stated that S. 54 of the Transfer of Property Act in terms provides that such a contract of sale does not create as in English law any equitable estate in the immoveable property which is the subject-matter of the contract. But the contract creates an obligation which is recognised by S. 3 of the Specific Relief Act, 1877 and S. 91 of the Indian Trusts Act, 1882. But the Supreme Court in both the cases held that a contract for sale does not create any interest in or charge on the immoveable property contracted to be sold. In the case reported in AIR 1977 SC 774 (Narandas v. S. A. Kamtam) the Supreme Court also considered the nature of the right created on the immoveable property in respect of a contract of sale. It has been stated that a contract of sale in view of S. 54 of T. P. Act does not of itself create any interest in, or charge on the property. The personal obligation created by a contract of sale (as recognised in S. 3 of the Specific Relief Act and S. 91 of the Trusts Act) is described in S. 40 of the T. P. Act as an obligation arising out of contract and annexed to the ownership of property, but not amounting to an interest or easement therein.

7. Mr. Panda however heavily relied on the case reported in AIR 1956 Cal 462 (Rabindra Nath Banerjee v. Harendra Kumar). In the said judgment the single Judge of this Court considered the matter under O. 21, R. 89 regarding the interest of a person who is a party to the agreement of sale and payment of earnest money before proclamation for sale. His Lordship was considering the effect of S. 54 of the Transfer of Property Act in the following terms:—

"The language of S. 54 emphasises that 'of itself' a contract for sale does not create any interest or charge on the property. But very often a contract for sale does not stand by itself where there is a part payment of the purchase price or payment of what is called the earnest money. In that event S. 55 (6) (b), Transfer of Property Act would be

attracted and it will be treated as though the ownership of the property had passed and there is a charge for part of the purchase money paid."

In our opinion, this observation cannot be said to be a correct proposition of law in view of the Supreme Court's decision cited above. The interest in the immovable property valued at more than Rs. 100 cannot, in our opinion, be transferred by an unregistered document as is clear under S. 17 of the Registration Act.

8. In our opinion, therefore, a party to the agreement for purchase has no right or interest in the immovable property left by the testator and as such, has no locus standi to oppose the application for grant of probate under S. 283 of the Indian Succession Act. The view we take, is supported by the decisions of the Division Bench of this Court reported in 62 Cal WN 444: (AIR 1958 Cal 377) (Southern Bank v. K. Ganeriwalla) in which it has been held that a creditor of the deceased testator has no locus standi to oppose the grant of a probate. The Division Bench of this Court in considering the principle of Privy Council's decision came to the finding that the creditor of an heir of the deceased is not entitled to citation and on that ground the probate cannot be revoked. At p. 455 (of Cal WN): (at p. 384 of AIR Cal) their Lordships held as follows:—

"All that I am concerned with at the present moment is that it was held in this case that a creditor of a testator's heir had no interest in his estate."

9. It is further held that a creditor of an heir of a testator had no interest in his estate and was not entitled to be served with a citation. In the present case we have also held that by dint of an agreement for sale the parties to the agreement have no interest or charge in respect of immoveable property.

10. Mr. Panda contended that the bare possibility of an interest is necessary to establish the locus standi of the opposite party No. 8 and there cannot be any doubt that the opposite party No. 8 has a possibility on the basis of the agreement of sale and therefore he must be said to be a person claiming to have any interest in the estate of the deceased. In the case reported in 36 Cal WN 635: (AIR 1932 Cal 734) (Nabin Chandra v. Nibaran Chandra) it has been held that "possibility of an interest" does not

apply to the possibility of a party filling a character which would give him an interest, but the possibility of his having an interest in the result of setting aside the Will. It was held therein that in interpreting S. 283 of the Indian Succession Act, a person must have a real interest in the estate and a purchaser from an heir after the death of the testator has a locus standi and to have it, it is not necessary for the objector to show that he had an interest in the estate at the time of the testator's death. The main point for consideration is whether the person applying to be added in order to oppose the grant of probate must have a real interest in the estate of a deceased. A person entering into an agreement for sale has no interest in the immovable property left by the deceased testator. His claim at best is a claim for filing a suit. Moreover the case reported in 36 Cal WN 635: (AIR 1932 Cal 734) (Nabin Chandra v. Nibaran Chandra) has specifically repelled the argument that the "possibility of an interest does not apply to the possibility of a party filling a character which would give him an interest".

11. In our opinion, therefore, the learned Judge was not right in allowing the application of the agreement-holder opposite party No. 8 to be added as a party defendant.

12. The Rule is, therefore, made absolute. The order of the learned Judge is set aside.

13. There will be no order as to costs.

G. N. RAY, J.:— I agree.

Rule made absolute.

AIR 1977 CALCUTTA 499

R. BHATTACHARYA AND JANAH, JJ.

Kanailal Dholey and others, Appellants v. Kalicharan Chatterjee and others, Respondents.

Letters Patent Appeal No. 9 of 1970, D/- 7-4-1977.

(A) Civil P. C. (5 of 1908), Ss. 100 & 101 — Mixed question of law and fact — Plea of limitation — Plea cannot be allowed to be raised for the first time.

A new plea of limitation which is not purely on a question of law but a mixed

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question of law and fact should not be allowed to be raised for the first time in second appeal. AIR 1963 SC 1165, Rel. on. (Para 5)

(B) Bengal Tenancy Act (8 of 1885), S. 111-A proviso — Applicability — Suit for a declaration that certain entry in record of rights was erroneous and for title — Suit does not fall under proviso to S. 111-A as plaintiff is not bound to bring such a suit unless there was invasion of his right — Cause of action does not arise merely from wrong entry — Such suit filed beyond six years from final publication of record of rights is not barred. AIR 1936 Cal 456; AIR 1970 SC 1433 and AIR 1930 PC 270, Rel. on; (1936) 40 Cal WN 22; (1911) 15 Cal WN 896 and AIR 1929 Cal 481, Dist. (Limitation Act (1908), Art. 120). (Para 5)

(C) Civil P. C. (5 of 1908), Ss. 100 & 101 and O. 22, R. 4 — Plea of abatement raised for first time in second appeal — Allegation that one of the two defendants had died during pendency of suit — Failure of defendants to raise the plea in trial court or first appellate court, although there were opportunities — No prejudice caused by failure to bring legal representatives of deceased defendant on record — Plea, held, could not be allowed to be raised. AIR 1916 Mad 574 and (1837-41) 3 Moo Ind App 229 (PC). Rel. on. (Para 3)

(D) Specific Relief Act (1877), S. 42 — Scope — Declaratory relief — Consequential relief need not be asked where it is not necessary — Suit for declaration that certain entries in record of rights showing possession of defendants as tenants is erroneous — Averments in plaint that plaintiff is in possession through defendants as his agents — Plaintiff, held, need not ask for relief of possession — Suit not barred. AIR 1967 SC 436, Rel. on. (Para 6)

Cases Referred: Chronological Paras

AIR 1974 Cal 342	6
AIR 1970 SC 1433	5
AIR 1967 SC 436	6
AIR 1963 SC 1165	5
AIR 1942 Cal 245	6
AIR 1938 PC 73: 42 Cal WN 930	6
AIR 1936 Cal 456: 40 Cal WN 566	5
(1936) 40 Cal WN 22	5
AIR 1930 PC 270: 57 Ind App 325	5
AIR 1929 Cal 481: ILR 56 Cal 407	5
AIR 1928 Cal 425: ILR 55 Cal 590	6
AIR 1916 Mad 574: ILR 39 Mad 386	3

(1911) 15 Cal WN 896	5
(1902) ILR 25 Mad 504	6
(1837-1841) 3 Moo Ind App 229 (PC)	3

Purna Chandra Basu and Prafulla Kumar Chatterjee (Jr.), for Appellants; Ranjit Kumar Banerjee and Parantap Ray, for Respondents.

JANAH, J.:— This is a Letters Patent appeal arising out of a second appeal. The heirs and legal representatives of the defendant No. 1 are the appellants before us.

2. The plaintiff-respondent instituted a suit for a declaration that C. S. Khattian No. 164 of mouza Chalk Baidyabati recording a jama of Rs. 91 in respect of the land and the tank in the names of the defendants as tenants under the plaintiff was erroneous and also for a declaration of the plaintiff's khas dakhali title to the said tank and the land in the aforesaid khattian except 0.27 acres of land on the bank of the tank in plot No. 823 which appertained to the defendants' jama of Rs. 30. The trial court as well as the lower appellate court found in favour of the plaintiff and accordingly decreed the suit. The courts below also found that the garden and the tank in question had come in khas possession of the plaintiff in the year 1322 B. S. and since then Ambika Dholey possessed the same as an agent of the plaintiff and after the death of Ambika the defendants had been possessing the same as agents of the plaintiff. It was also found that 0.27 acres of land on the bank of the tank in plot No. 823 appertained to the defendants' jama of Rs. 30. Against the decision of the lower appellate court the appellants filed a second appeal to this Court. The second appeal came up for hearing before Chittatosh Mookerji J. who affirmed the decision of the lower appellate court. Against the decision in the said second appeal the appellants obtained leave under Cl. 15 of the Letters Patent and they have filed the present appeal.

3. Mr. Basu, learned Advocate appearing on behalf of the appellants, has, in the first place, contended that the defendant No. 2 Sudhanya Kumar Dholey died during the pendency of the suit in the trial court but his heirs and legal representatives were not substituted in his place. According to Mr. Basu the entire suit had abated and, therefore, no decree could have been passed in favour of the plaintiff. It appears

from the judgment passed in the second appeal that this point was raised for the first time in second appeal before this Court. The appellants did not raise the question of abatement either in the trial Court or in the first appellate court. On the other hand, it appears that after the decree was passed against the defendants although the defendant No. 2 had died before the decree the appellants included the names of the alleged heirs and legal representatives of the defendant No. 2 as respondents Nos. 2 to 7 in the appeal before the first appellate court. By an order dated Feb. 24, 1959 that Court directed the appellants to show cause why the names of the respondents Nos. 2 to 7 should not be expunged, and no cause having been shown, the first appellate court by an order dated 21st March, 1959 expunged the names of the respondents Nos. 2 to 7 from the Memorandum of Appeal. The appellants did not urge before the lower appellate court the question of abatement of the suit on account of the death of the said defendant No. 2. In these circumstances, the trial court or the first appellate court had no occasion to consider the question whether the right to sue did or did not survive against the remaining defendants only. In our view, the learned Judge hearing the second appeal rightly overruled the appellants' objection regarding the abatement of the suit as a whole. A similar question arose for decision in *P. M. A. M. Vellayan Chetty v. Jothi Mahalinga Iyer*, ILR 39 Mad 386 (AIR 1916 Mad 574) and it was held that under such circumstances the appellants are precluded from taking up such a point for the first time in appeal on the ground that an unsuccessful litigant has no right to argue the case more than once merely on the ground that the other party to the proceedings had died at the time of hearing. The learned Judges pointed out that O. 22, R. 4, Cl. (iii) provided that if the legal representative of the deceased defendant is not brought on the record within the time limited by law the suit shall abate against such defendant, thereby indicating that the suit could proceed against the other parties on the record. After pointing out other instances whether the suit or the appeal could proceed against the parties on record their Lordships observed:

"The object of these various provisions is to ensure that no party shall be prejudiced by hearing in his absence. No

rule of law has been quoted to us which enables a party who has had the benefit of full hearing to take advantage of the absence of a party on the record."

In the present case although the defendant No. 2 had died the appellants were given full opportunity of hearing before the trial court as well as before the first appellate court. The appellants did not suffer any prejudice on account of the heirs and legal representatives of the defendant No. 2 not having been brought on record. In *Dhurm Das Panday v. Mussammatt Shama Sundri Dibiah*, (1837-1841) 3 Moo Ind App 229 (PC), the judicial committee observed:—

"No objection was made in either of those courts that the proper parties were not before the court. If such an objection had been made, it might have been removed, and I think it is a safe maxim for a court of appeal to be governed by—that an objection, which, if taken, might have been cured, and which has not been taken in the court below, shall not be taken in the Court of Appeal."

4. Mr. Banerjee, learned Advocate for the respondent contended that the present suit was instituted by the plaintiff on the allegation that the defendants Nos. 1 and 2 were in possession of the disputed land as agents of the plaintiff and their possession was the possession of the plaintiff. Mr. Banerjee further contended that on the death of the defendant No. 2 the agency in so far as the said defendant is concerned came to an end. It was accordingly contended that there could be no question of substituting the heirs and legal representatives of the deceased defendant No. 2 in this suit. Mr. Banerjee relied upon S. 201 of the Contract Act which provides for the termination of the agency. In the present case on the death of the defendant No. 2 the agency of the said defendant stood terminated. Therefore, there was no necessity for substituting his heirs and legal representatives in the suit. This contention raised on behalf of the respondent has considerable force in it and it must be given effect to. In the facts and circumstances of the present case we are of the opinion that the appellants' objection on this ground was rightly overruled by the learned Judge in the second appeal and we see no reason why the appellants should be allowed to urge this objection in the present appeal.

5. The next point urged by Mr. Basu on behalf of the appellants is that the suit is one under the proviso to S. 111-A of the Bengal Tenancy Act and it is governed by Art. 120 of the Limitation Act of 1908. Mr. Basu contended that the record of rights was finally published on the 10th April, 1937. He has produced a copy of the Calcutta Gazette of the year 1937 in which the notification appears at page 945 of Part I showing that the record of rights was finally published on 10th April, 1937. His contention is that the suit having been filed on the 8th Sept., 1954, it is admittedly beyond 6 years, and as such, it is barred by limitation. In support of this contention Mr. Basu relied upon the case of Raja Pramodo Nath Roy v. Asiruddin Mondal, (1941) 15 Cal WN 896. That was a case where the record of rights recorded the status of the plaintiff as that of a tenure holder. The plaintiff claimed that he was an occupancy rayat, and instituted the suit for such a declaration. It was held that the suit was not one under S. 104-H of the Bengal Tenancy Act but it was under the proviso to S. 111-A of the said Act. It was held that such a suit would be within time if brought within 6 years from the date of final publication of the record of rights. In that case the plaintiff was aggrieved by the erroneous entry in the record of right and his cause of action arose with the final publication of the record of rights. That case, therefore, cannot have any application to the present case. The next decision cited by Mr. Basu is the case of Ashutosh Bhuiyan v. Radhikalal Goswami, ILR 56 Cal 407 : (AIR 1929 Cal 481). The question which arose for decision in that case was whether the suit out of which that appeal arose was one under S. 111-A or 111-B of the Bengal Tenancy Act. It was held that the suit was one under S. 111-B. That decision has no relevance in the present case. The next decision cited by Mr. Basu in support of his contention is Rai Keshab Chandra Banerjee v. Madan Mohan Poddar, (1936) 40 Cal WN 22. There it was held that where a suit is brought by a person for the declaration of any right of his as contemplated by the proviso to S. 111-A of the Bengal Tenancy Act, the suit is within time under Art. 120 of the Limitation Act, if brought within six years when his cause of action arose, that is to say, when any injury to his right is threatened. It was further held that such a suit is not barred because

as ancillary to the relief as to the injury he also asks for a declaration that the entry in the record of rights is incorrect and the suit is brought beyond six years from the date when the record was finally published. In our view, this decision, instead of supporting Mr. Basu's contention, goes against him. The learned Judge hearing the second appeal did not also permit the appellants to raise the question of limitation for the first time in the second appeal on the ground that in the present case the question of limitation was a mixed question of fact and law and not a pure question of law. In Banarsi Das v. Kanshi Ram, AIR 1963 SC 1165, it has been pointed out that a new plea of limitation which is not purely on a question of law but on a mixed question of fact and law should not be allowed to be raised for the first time in a second appeal. Moreover, the present suit cannot be said to be one under the proviso to S. 111-A of the Bengal Tenancy Act. The plaintiff was not bound to bring a suit for a declaration that the entry in the record of rights was erroneous unless and until there was an invasion of his right. Cause of action to institute a suit did not arise merely because there was an erroneous entry. This view finds support from the decisions in Rai Kiron Chandra Roy Bahadur v. Tarak Nath Gangopadhyay, 40 Cal WN 566 : (AIR 1936 Cal 456); Gannan Dunkerley and Co. Ltd. v. Union of India, AIR 1970 SC 1433 and Bolo v. Koklan, 57 Ind App 325 : (AIR 1930 PC 270). In our view the learned Judge rightly disallowed the plea of limitation to be raised on behalf of the appellants in the Second Appeal.

6. The last contention put forward by Mr. Basu has been that the suit is barred under the proviso to S. 42 of the Specific Relief Act, 1877. It has been argued that the plaintiff having brought the suit for a mere declaration without a prayer for any consequential relief, the suit was not maintainable. According to Mr. Basu the plaintiff ought to have prayed for recovery of possession, inasmuch as, it is the admitted case of the plaintiff that the defendants are in possession. In the present case the plaintiff asked for a declaration that C. S. Khattian No. 164 recording the jama of Rs. 91 in the names of the defendants under the plaintiff was erroneous. The plaintiff further prayed for a declaration of his khas dakhali title to the tank and the

land in Khatian No. 164 excepting 0.27 acres of land thereof. The plaintiff's case is that the defendants are in possession as agents, for and on behalf of the plaintiff. That being so, it was not necessary for the plaintiff to ask for any further relief. The plaintiff would not have asked for recovery of possession because the plaintiff was in possession through the defendants who were alleged to be his agents. Further relief is to be prayed for only in cases where the decree would otherwise become infructuous. If there is no necessity, further relief need not be asked for. In *Vemareddy Ramo- raghava Reddy v. Konduru Seshu Reddy* AIR 1967 SC 436, it has been pointed out that S. 42 of the Specific Relief Act is not exhaustive of the cases in which a declaratory decree may be made and the Courts have powers to grant such a decree independently of the requirements of the section. Whether further relief apart from the declaration should be asked for or not depends upon the allegations with which the plaintiff comes to Court. In the present case, upon the allegations made in the plaint we are of the opinion that the plaintiff was not required to pray for any further relief. Indeed, it appears from the Ext. 3 series which are some of the letters written by Kanai Lal Dholey, the defendant No. 1 himself, that the defendants admitted the plaintiff's title and possession and that they were managing the property for and on behalf of the plaintiff. In Exts. 3 (3) 14 which is a letter dated 19th Sept., 1954 the defendant No. 1 is assuring the plaintiff that everything is being done by the defendant to protect the interest of the plaintiff and the plaintiff has nothing to worry about. In another letter dated 18th Bhadra, Ext. 3 (3) 15 the defendant No. 1 is informing the plaintiff that the intermediary interest has been abolished under the West Bengal Estates Acquisition Act and he is asking for certain papers to take steps on behalf of the plaintiff under the said Act for filing returns etc. It appears that some of the letters have been written even after the institution of the suit. On these facts we do not see how it can be said that the plaintiff ought to have asked for recovery of possession. Mr. Basu has relied upon a number of decisions in support of his contention. The said decisions are reported in 42 Cal WN 930 : (AIR 1938 PC 73), *Sundar Singh Mallasingh v. Managing Committee, Sundar- singh Mallasingh Rajput High School*;

AIR 1942 Cal 245, *Anila Bala Devi v. Madhabendu Narayan Roy*; AIR 1974 Cal 342, *Kumud Ranjan Banerjee v. Manabendra Banerjee*. It is not however necessary for us to consider these cases in detail because these cases are different on facts. On this aspect of the matter Chittatosh Mookherji J. took the view that even if this contention of the appellants were accepted his Lordship would have remanded the matter to give the plaintiff an opportunity to amend his plaint. The view taken by Chittatosh Mookherji J. appears to us to be in consonance with justice. Mr. Basu relied on two decisions reported in (1902) ILR 25 Mad 504, *Surya Narayanamurti v. Tam- manna* and ILR 55 Cal 590 : (AIR 1928 Cal 425), *Sadhu Kathalia v. Dharendra Nath Roy* and contended that where in spite of objection being taken by the defendant the plaintiff does not amend his plaint, he should not be given any further opportunity to amend the plaint at the appellate stage. In the present case the plaintiff had no occasion to amend his plaint because he had been successful throughout the litigation, and the defendant's plea that the suit is barred by S. 42 of Specific Relief Act has been overruled throughout.

7. For the reasons mentioned above, this appeal fails and it is accordingly dismissed with costs.

R. BHATTACHARYA, J.— I agree.
Appeal dismissed.

AIR 1977 CALCUTTA 503

NIRMAL CHANDRA MUKHERJI AND BANKIM CHANDRA RAY, JJ.

Babulal Singhania, Petitioner v. Piru- dan Ojha, Opposite Party.

Civil Rules Nos. 3457 and 3036 of 1975, D/- 5-5-1977.

Arbitration Act (1940), S. 34 — Stay of suit — Steps in proceedings — Defendant praying for time in suit — It amounts to steps in the suit — Application under S. 34 is barred — Courts also taking view that matter should be decided in suit because of serious allegations of fraud and misappropriation — High Court refused to interfere in revision. (Civil P. C. (1908), S. 115).

The acts of the defendant in praying for time both in the injunction matter for filing objection as well as in the suit

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orally and by written application clearly and unequivocally display an intention on the part of the defendant to submit to the jurisdiction of the court in order to have the controversy decided in the suit. As such these acts amount to taking steps in the suit within the meaning of S. 34 of the Arbitration Act, 1940. This debars the defendant from making an application under S. 34 of the Arbitration Act for stay of the said suit and for referring the disputes for adjudication in the arbitration proceedings. Case law discussed. (Para 29)

It also appears from the plaint that serious allegations of fraud and misappropriation of loans sanctioned in the name of the partnership business and paid to the fictitious customers of the defendant during the period when the defendant, was in charge of the management of the partnership business have been made against the defendant in the plaint. Such serious and grave allegations can be properly investigated and decided by the Court in the suit and not by the arbitrator in an arbitration proceeding. (Para 30)

Further, the courts below have held that the suit should be heard by the civil court and its proceedings should not be stayed under S. 34 of the Act in view of the serious and grave allegations of fraud and misappropriation made against the defendant. There is no infirmity in the finding. Moreover the findings arrived at by the courts below cannot be said to be unreasonable or capricious and as such the same cannot be set aside in the revisional application. (Para 30)

Cases Referred: Chronological Paras

AIR 1976 Cal 126 : 81 Cal WN 219	27
AIR 1975 Cal 222	28
AIR 1974 All 431	17
AIR 1973 Cal 215	30
AIR 1970 Mad 323	25
AIR 1966 Cal 315	18
AIR 1962 Cal 541 : 66 Cal WN 821	19
AIR 1961 Madh Pra 322	17, 18
(1952) 56 Cal WN 763	30
AIR 1950 Bom 127	16
AIR 1949 All 611	20
AIR 1948 Cal 59	24
AIR 1943 Cal 484	23
AIR 1924 Cal 789	21
AIR 1920 Cal 685	26
(1907) ILR 34 Cal 443	22

Syamacharan Mitter and Samaprasanna Roy Choudhury, for Petitioner;

Barun Kumar Roy Choudhury, for Opposite Party.

B. C. RAY, J.:— These two Rules arise out of two orders passed in Misc. Appeal No. 35 of 1975 and Title Suit No. 22 of 1976 respectively. Civil Rule No. 3457 of 1975 is directed against the order passed on 13th of August, 1975 by the District Judge, Howrah in Misc. Appeal No. 35 of 1975 affirming the order No. 18 dated 7-3-75 passed by the Munsif, First Court, Howrah in Title Suit No. 267 of 1974 rejecting the application under S. 34 of the Arbitration Act. Civil Rule No. 3036 of 1975 is directed against the order No. 28 dated 31st July, 1975 passed by the Subordinate Judge, Second Court, Howrah in Title Suit No. 22 of 1975 allowing the plaintiff opposite party's application under O. 39, R. 7 of the Civil P. C. for issue of a commission for making inventory of the articles and account papers as mentioned in the petition. On the prayer of both the parties these two rules were heard together.

2. The opposite party, Pirudan Ojha in Civil Rule No. 3457 of 1975 instituted on Nov. 21, 1974 a suit being Title Suit No. 267 of 1974 in the First Court of Munsif, Howrah against the defendant petitioner Babulal Singhania for dissolution of partnership and for accounts stating inter alia that the plaintiff and the defendant carried on the partnership business under the name and style of "Siha Processing & Co." at premises No. 4, Gopalram Pathak Road, on the basis of an agreement executed and registered by them on June 6, 1969 which was subsequently amended by a deed of agreement dated September 14, 1971, that in the said business the plaintiff has 40% share and the defendant has 60% share, that there were differences with the defendant who refused to render any account of loans taken from United Commercial Bank and defaulted in payment of instalment to the bank and of the monthly rents to the landlord of the factory premises. It has also been alleged that the defendant removed all account books and other relevant papers from the office of the factory and the loans sanctioned by the bank in favour of the partnership firm were actually paid by cheques to different customers of the partnership business most of whom were fictitious customers and the defendant thus misappropriated a huge sum of money. The plaintiff on October 14, 1974, served a notice for dissolution of the

partnership which was a partnership-at-will on the defendant and he repeatedly requested the defendant to settle all disputes by referring to Arbitration in terms of the partnership agreement but without any effect. Hence this suit has been filed.

3. The opposite party, it is stated in the petition, tried to have an ex parte decree in the said suit but the defendant petitioner on coming to know of the same appeared in the said suit and filed an application under S. 34 of the Arbitration Act, 1940 for stay of further proceedings of the said suit and for referring the disputes to Arbitration in accordance with the terms of Cl. 9 of the partnership agreement.

4. The plaintiff opposite party filed a written objection contending inter alia that the plaintiff came into the management of the firm only on and from 14-9-1971, that there was no valid and subsisting agreement between the parties, that the partnership business had been dissolved prior to the institution of the suit by a notice dissolving the partnership firm and the petitioner requested to settle the disputes by Arbitration but without any effect and as such the application under S. 34 of the Arbitration Act should be rejected.

5. On March 7, 1975, the learned Munsif, First Court, Howrah by Order No. 18 rejected the application holding that the partnership agreement was not in force as the plaintiff dissolved the partnership by a notice dated 14-10-74 and there was serious allegation of criminal misappropriation against the defendant which should not be referred to the Arbitrator for adjudication.

6. On appeal the said judgment and order was affirmed by the learned District Judge, Howrah who dismissed the appeal.

7. It is against this order this Rule has been issued and the hearing of the suit has been stayed till the disposal of the Rule.

8. The opposite party, Babulal Singhania in Civil Rule No. 3076 of 1974 filed on March 19, 1975 an application under S. 20 of the Arbitration Act being Title Suit No. 22 of 1975 in the Second Court of Subordinate Judge, Howrah praying that the arbitration agreement be filed in court. In the said suit the opposite party, Babulal Singhania filed an application under O. 39, R. 7 of the

Civil P. C. for appointment of a Commissioner for making an inventory of the machineries and account books lying in the factory premises at 4, Gopalram Pathak Road, P. S. Liluah. The petitioner filed an objection as to the maintainability of the said application under S. 20 of Arbitration Act as well as of the application for an appointment of an inventory Commissioner on the grounds inter alia that the application for stay of the suit filed by the opposite party under S. 34 of the Arbitration Act has been rejected and that no decision has been made as to filing of the arbitration agreement as provided in S. 20 of Arbitration Act.

9. On July 31, 1975, the learned Subordinate Judge, Second Court, Howrah, allowed the application for issue of a commission for making inventory of the articles and account papers.

10. It is against this order this Rule has been obtained. There is an order of stay of operation of the impugned order till the disposal of the Rule.

11. Mr. Shyamacharan Mitter, learned Advocate for the petitioner in C. R. No. 3076 contended that the defendant opposite party has appeared in Title Suit No. 267 of 1974 and prayed for adjournment of the suit. The defendant also made an application for adjournment of the said suit on the ground that the writ of summons with a copy of the plaint had not been served on him and also prayed for a direction for service of copy of the plaint on him for filing a written statement. Mr. Mitter has also submitted that the defendant also appeared and prayed for time in the injunction matter and on his prayer the hearing of the injunction petition was adjourned. The defendant also filed an application for adjournment of hearing of the injunction matter. Mr. Mitter has submitted that all these acts on the part of the defendant constituted taking steps in the proceedings as provided in S. 34 of the Arbitration Act and as such the courts below rightly rejected the application for stay of the suit. Several decisions have been cited by Mr. Mitter on this point. Mr. Mitter has further submitted that in the plaint of Title Suit No. 267 of 1974 there is serious allegation of fraud and misappropriation against the defendant, Babulal Singhania during the period he was in management of the said partnership business. These

allegations of fraud and misappropriation, it has been submitted by Mr. Mitter, cannot be conveniently investigated by the Arbitrator and as such the courts below were right in holding that it was proper that this grave and serious allegations should be investigated and decided by civil court and not by Arbitrator.

12. Mr. Mitter has lastly submitted that after the rejection of the application under S. 34 of the Arbitration Act the petition under S. 20 of the Arbitration Act was not competent and the application filed therein for the appointment of an Inventory Commissioner ought to have been dismissed by the Court below.

13. Mr. Barun Kumar Roy Chowdhury learned Advocate for the defendant opposite party, Babulal Singhania in C. R. No. 3076 of 1975 has submitted that the order of injunction had already been issued against the defendant and the defendant had no other alternative than to appear in the said injunction matter and to file objection to contest the same otherwise he would be greatly prejudiced if the injunction order had been made absolute. It has been further submitted that there is no provision in the Arbitration Act to remedy this wrong. Mr. Roy Chowdhury has further submitted that the suit was fixed for ex parte hearing and as such the defendant appeared in the suit through his lawyer and the defendant had to make an application for adjournment on the ground that the writ of summons with a copy of the plaint had not been served on him and for serving a copy of the plaint on him in order to acquaint himself with the statements and allegations made in the plaint. This, it has been submitted, cannot be considered to be taking any steps in the suit. It has also been submitted that an interlocutory matter is not a part of the proceeding in the suit and the filing of an application for time to file objection against the injunction petition and to contest the injunction matter is not taking a step in the proceeding as provided in S. 34 of the Arbitration Act. The courts below, it has been submitted were wrong in rejecting the application under S. 34 of the Arbitration Act filed by the defendant opposite party.

14. Mr. Roy Chowdhury has also submitted that the petitioner has removed

account books and other papers from the office of the factory premises to his house and the petitioner has not allowed the opposite party any access to the account books. The petitioner did not pay the monthly rents of the factory premises to the landlord and also of the instalments in respect of loans to the bank. It has therefore been prayed that a Commissioner be appointed to make an inventory of machinery parts as well as account books and other relevant papers lying in the factory premises at Liluah. The order passed by the learned Subordinate Judge allowing the said application for issue of a commission for making inventory of those articles is not without jurisdiction nor it is illegal or erroneous and as such the same is not liable to be revised.

15. The plaintiff, Pirudan Ojha, admittedly filed Title Suit No. 267 of 1974 for dissolution of partnership and for accounts against the defendant, Babulal Singhania in November, 1974 after serving a notice dated 14-10-74 dissolving the partnership business which is a partnership-at-will. In the said suit the plaintiff filed an application for temporary injunction and obtained an order of interim injunction whereby the defendant had been restrained from disturbing or interfering with the carrying on the business by the plaintiff petitioner until the hearing of the said application. It also appears that the defendant after serving of notice of the injunction petition on him appeared in the suit and prayed for time to file objection. The injunction matter was adjourned accordingly. This is evident from Order No. 6 dated Dec. 4, 1974. It is also evident from Order No. 9 dated 7-1-75 that the defendant filed a petition praying for an adjournment to enable him to file objection in the injunction matter. The hearing of the injunction matter was adjourned to a subsequent date. It also appears from Order No. 10 dated 15-1-75 that the defendant made an application for adjournment of the ex parte hearing of the suit and the said prayer was granted and the defendant was asked to file a written statement by certain date and he was directed to take copy of the plaint from the record. It also appears from Order No. 12 dated 5th February, 1975 that the defendant filed a petition praying for adjournment in the injunction matter. On the same day the defendant also filed a petition under S. 34 of the Arbitration Act praying for stay of further proceed-

ing in the said suit and for referring the matter to Arbitration for adjudication of the disputes. It is also evident from the application for temporary injunction that the material averments of the plaint have been mentioned and the relief claimed in the plaint has also been stated clearly. The question now is whether these acts on the part of the defendants amount to taking steps in the proceeding within meaning of S. 34 of the Arbitration Act. Section 34 of the Arbitration Act specifically provides that the defendant has to file such an application for stay of the proceedings before filing any written statement or taking any other steps in the proceedings.

16. In AIR 1950 Bom 127, Nuruddin Abdul Husein v. Abu Ahmed Abdul Jalil it has been observed by Tendolkar J. that the two tests for determining whether an act is a step in the proceedings is not so much the question as to whether it is an application— although, of course, that would be a satisfactory test in many cases — but whether the act displays an unequivocal intention to proceed with the suit or to have the matter disposed of by arbitration. Filing of an appearance in court is not an application of any kind but is an act which is incumbent upon the defendant to do by virtue of R. 117 of the High Court Rules for preventing a suit for being set down as being undefended and therefore it is not a step in the proceedings.

17. In AIR 1961 Madh Pra 322, San-sarchand Deshraj v. State of Madhya Pradesh, it has been observed that the filing of a reply to the application of the plaintiff for securing of a temporary injunction and asking the said application itself does not amount to "taking other steps in the proceedings" by the defendant within the meaning of S. 34 of Arbitration Act. Opposing the application for temporary injunction is not an unequivocal intention on behalf of the defendant to choose to give up his right under the agreement to refer the dispute to arbitration. This decision has been followed in AIR 1974 All 431 Queens College, Konetra v. Collector, Varanasi, where it has been held by Mathur. J. that the act of the defendant to get an ex parte order of injunction vacated does not indicate an unequivocal intention to proceed with the suit and to give up the right to have the matter disposed of by arbitration. The adjudi-

cation of the injunction matter does not amount to adjudication of the claim in the suit itself.

18. In AIR 1966 Cal 315, Amritraj Kothari v. Golecha Financiers the view expressed in AIR 1961 Madh Pra 322 has been dissented from by Mullick, J. who has observed:—

"It is difficult to make a distinction between filing a written statement in the suit and filing an opposition to an interlocutory application in that suit; both of them are 'taking steps in the suit'. Filing an affidavit in an interlocutory application is as much taking a step in the proceeding as filing a written statement or filing an affidavit-in-opposition to an application under O. 12, R. 6. Interlocutory proceeding is a proceeding in the suit itself and any steps taken in the proceeding is a step taken in the suit. Arbitration Act empowers the court to pass suitable interim orders in respect of matters agreed to be adjusted by arbitration."

19. In 66 Cal WN 821: (AIR 1962 Cal 541), Dunichand Sons and Co. v. Fort Gloster Industries Ltd., the case in short is that the plaintiff Dunichand and Sons instituted a suit against Fort Gloster Industries Ltd. for a decree for a certain sum of money or alternatively for an enquiry into the damages and for other reliefs. On the service of writ of summons the defendant on 17-7-61 executed a warrant of attorney in favour of Messrs. Khaitan and Co. This was filed before the Registrar on 18-7-61 and on the same day appearance was entered in the suit on behalf of the defendant. On 17-7-61 i.e. before the warrant was filed an application under S. 34 of the Arbitration Act was taken and the same was made returnable on 24-7-61. It has been observed that mere entering appearance is not a step in the proceeding within the meaning of S. 34 of the Arbitration Act.

20. In AIR 1949 All 611, United Provinces Govt. v. Sri Har Nath the plaintiff filed a suit for certain reliefs against the defendant, U. P. Government. The defendant made an application for time to file a written statement. Sometime thereafter the defendant made an application under S. 34 of the Arbitration Act for stay of the suit. The application was rejected and the said order was affirmed on an appeal. It was

held that an application for adjournment to file a written statement was a step in the proceeding within the meaning of S. 34 of the Arbitration Act.

21. In AIR 1924 Cal 789, *The Karnani Industrial Bank Ltd. v. Satya Niranjan*, it has been observed that verbal prayer by defendant's counsel for further time to file written statement is taking a step in the proceeding.

22. In (1907) ILR 34 Cal 443, *Sarat Kumar v. Corporation of Calcutta* it was held by Woodroffe J. that application for time to file written statement is a step in the proceeding within S. 19 of the Indian Arbitration Act, 1899 (Act 9 of 1899).

23. In AIR 1943 Cal 484, *Subal Chandra Bhur v. Md. Ibrahim* the counsel for the defendant appeared in the suit and applied for and obtained time to file his client's affidavit-in-opposition to the application for appointment of a receiver and also applied for and obtained directions and leave to inspect the books of accounts and records. It was observed by his Lordship S. R. Das, J. that the filing of such an application would indicate that the party acquiesced in the method adopted by other side of having the dispute decided by the court and not by Arbitrator.

24. In AIR 1948 Cal 59, *Sadhan Kumar v. Sunil Kumar*, it has been observed that the filing of an application for time to file a written statement is taking other steps in the proceeding as provided in S. 19 of the Arbitration Act, 1899 or S. 34 of the Arbitration Act, 1940 and therefore a person who has applied for time to file a written statement is not entitled at a later date to apply for stay of proceeding under S. 34 of the Arbitration Act, 1940.

25. In AIR 1970 Mad 323, *M/s. Bortes S. A. v. Astrouic Compania Naviera S. A.*, it was observed that making an application in the suit with a prayer to vacate the interim injunction amounts to taking steps in the proceeding within the meaning of S. 34 of Arbitration Act and as such the defendant was disentitled to ask for stay of the suit.

26. In AIR 1920 Cal 685, *Joy Lall & Co. v. Gopiram Bhotica* the defendant appeared before the court and asked the court to direct the plaintiff to furnish security for costs. It was held that that Act on the part of the defendant

amounted to taking steps in the proceedings.

27. In 81 Cal WN 219: (AIR 1976 Cal 126), *W. F. Ducat & Co. Pvt. Ltd. v. Hiralal Pannalal* it has been observed by S. K. Roychowdhury J. that the power of the court to grant a stay of suit under S. 34 of the Arbitration Act, 1940 is discretionary and must be exercised judicially. It is not as a matter of course that a stay of a suit may be granted.

28. In AIR 1975 Cal 222, *Biswanath Rungta v. Oriental Industrial Engineering Co. Pvt. Ltd.*, the case in short was that the plaintiff who was one of the directors of the company filed a suit and in the said suit he made an application for injunction restraining the defendant from operating the Bank account. An interim order of injunction was obtained. The defendant, thereafter appeared and prayed for an order that the bank should be restrained from allowing the plaintiff from operating the bank account. The said prayer was granted. It was held by Sabyasachi Mukharji, J. that the conduct only represents the intention of the defendant that during the period the disputes would last either in court or in arbitration each of the parties should be restrained from having the use of the money. From this conduct it is not evident that the defendant has either done anything in aid of the suit or submitted to the jurisdiction of the court for the purpose of adjudication of the controversy in the suit. The order of injunction having been made what the defendant did was to circumscribe it to such extent that the rights of the parties were protected until the disputes were decided. The facts of the case are different from the facts of the present case and as such this decision has no application to the present case.

29. Thus on a consideration of all the decisions mentioned before the conclusion is irresistible that the acts of the defendant in praying for time both in the injunction matter for filing objection as well as in the suit orally and by written application clearly and unequivocally displays an intention on the part of the defendant to submit to the jurisdiction of the court in order to have the controversy decided in the suit. As such these acts amount to taking steps in the suit within the meaning of S. 34 of the Arbitration Act, 1940 (Act X of 1940). This debars the defendant from making

an application under S. 34 of the Arbitration Act for stay of the said suit and for referring the disputes for adjudication in the arbitration proceedings.

30. It also appears from para. 2 of the plaint of Title Suit No. 267 of 1974 that serious allegations of fraud and misappropriation of loans sanctioned in the name of the partnership business and paid to the fictitious customers of the defendant during the period when the defendant, Babulal Singhania was in charge of the management of the partnership business have been made against the defendant in the plaint. Such serious and grave allegations can be properly investigated and decided by the Court in the suit and not by the Arbitrator in an arbitration proceeding. It has been contended on behalf of the defendant that the arbitrators are competent to decide questions both of law and of facts and as such only because allegations of fraud and misappropriation have been made against the defendant in the plaint they do not by themselves debar decision of those disputes by the arbitrator in an arbitration proceeding. Reference has been made in this connection to a Bench decision of this Court reported in (1952) 56 Cal WN 763, C. M. Karanji & Co. v. Indo-China Trading Co. Ltd. where it has been held that the arbitrators are Judges both of law and of facts and however difficult question of law the subject-matter of dispute may involve, the arbitration proceeding should be carried into effect. In AIR 1973 Cal 215, Union of India v. M/s. Hind Galvanizing and Engineering Co. Pvt. Ltd., it has been observed that where the dispute involved complicated questions of law it is proper that the matter should be decided in the suit rather than the matter being referred to arbitration. It has been further held that the decision of the trial Judge who rejected the application under S. 34 of the Arbitration Act on that ground should not be called either unreasonable or capricious and so it would not be interfered with in appeal. In this case the courts below have held that the suit should be heard by the civil court and its proceedings should not be stayed under S. 34 of the Indian Arbitration Act in view of the serious and grave allegations of fraud and misappropriation made against the defendant. We do not find any infirmity in this finding and as such we are not inclined to interfere with the said finding. Moreover the findings arrived at by

the courts below cannot be said to be unreasonable or capricious and as such the same cannot be set aside in this revisional application.

31. We have already held that the application under S. 34 of the Arbitration Act was rightly rejected by the Courts below. The impugned order dated July 31, 1975 passed in Title Suit No. 22 of 1975 allowing the petition for issue of a commission for making inventory of the articles and accounts papers as mentioned in the petition in such circumstances cannot be upheld and the same is liable to be set aside.

32. In the premises aforesaid the Civil Rule No. 3457 of 1975 is discharged without costs and Civil Rule No. 3036 of 1975 is made absolute without costs. The Order No. 28 dated July 31, 1975 passed in Title Suit No. 22 of 1975 is hereby set aside. All interim orders are vacated. Let the records be sent down to the Court below as expeditiously as possible.

N. C. MUKHERJI, J.:— I agree.

Order accordingly.

AIR 1977 CALCUTTA 509

DIPAK KUMAR SEN, J.

Satyesh Chandra Banerjee, Petitioner v. Sm. Rani Banerjee and others, Respondents.

Suit No. 105 of 1976, D/- 28-6-1977.

(A) Stamp Act (2 of 1899), S. 36 — Admissibility of an instrument — Insufficiently stamped Deed of Release exhibited without any objection by the parties — Held, the question of its admissibility is no longer open to agitation in the suit.

(Paras 13, 14)

(B) Transfer of Property Act (4 of 1882), Ss. 123, 8 — Deed of Release — Whether a gift deed — Construction of the deed. (Deed — Construction).

Where the operative part of the deed is unambiguous and is intended to transfer whatever right, title and interest the executant had in the said property in favour of the releasee and the document is attested by two witnesses it would operate as a deed of gift. Case law discussed. (Para 12)

Cases Referred: Chronological Paras
AIR 1971 All 434 10
AIR 1967 SC 1395 10

HU/HU/C733/77/AS

AIR 1966 SC 337

10

AIR 1956 Mad 454

10

(1908) 12 Cal WN 478

10

ed by Nirmala the plaintiff is claiming another 1/6th share which Nirmala inherited from Ramesh,

ORDER:— The property which is the subject-matter of this partition suit is premises No. 9, Gopi Mohon Dutta Lane, Calcutta (hereinafter referred to as the said premises). It is alleged in the plaint that one Rajendra Lal Banerjee, a Hindu governed by the Dayabhaga purchased the said premises in the benami of his wife Khanta Bala. Rajendra Lal died intestate on or about the 3rd November, 1936 leaving him surviving Khanta Bala his sole widow, his three sons Suresh Chandra, Ramesh Chandra and Satyesh Chandra and his daughter Nirmala Chakravarti.

2. Khanta Bala died on the 28th December, 1953 intestate and leaving her surviving her children the said Suresh, Ramesh and Satyesh and Nirmala.

3. Suresh died intestate in or about 20th October, 1959 leaving him surviving his sole widow and his eleven children as his heirs, heiresses and legal representatives.

4. Ramesh, died intestate and unmarried on or about the 28th January, 1972 leaving Satyesh and Nirmala as his heir and heiress.

5. Nirmala has executed a Deed of Release dated the 26th May, 1975 whereby she has relinquished all her right, title and interest in the said premises in favour of Satyesh.

6. In this background, Satyesh has filed this suit claiming declaration of shares of the parties and partition of the said premises. Rani Banerjee, the defendant No. 1, is the widow of Suresh. Sunil, Sushil, Debdas, Tapan and Anup, the sons of Suresh have been impleaded as the defendants Nos. 2, 3, 4, 5 and 6. Mithu, Usha, Aparna and Mamata the unmarried daughters of Suresh, have been impleaded as the defendants Nos. 7, 8, 9 and 10. Mira Chatterjee and Juthika Chatterjee, the married daughters of Suresh, have been impleaded as the defendants Nos. 11 and 12. Nirmala has been impleaded as the defendant No. 13.

7. It is not disputed that the plaintiff has a half share in the said premises. On the basis of the Deed of Release execut-

8. The plaintiff gave evidence in support of his claim. He tendered the Deed of Release dated the 26th May, 1975 executed by Nirmala which was marked as Ext. A, without any objection. The plaintiff proved the correctness of the genealogical table set out in the plaint and stated the relationship between the parties. Learned Advocate for Nirmala stated on instructions that Nirmala did acknowledge the said Deed of Release and intended that her share should go to the plaintiff.

9. The only contention on behalf of the defendants Nos. 1, 4, 5, 8 and 12 has been that the Court should not permit the plaintiff to claim the share of Nirmala in the said premises. By the Deed of Release it is contended there has not been a legal transfer or conveyance of the share of Nirmala in favour of the plaintiff. It was apparent from the said document that Nirmala had no knowledge as to her share in the said premises. In any event, as a deed of transfer the document was insufficiently stamped and could not be accepted in evidence.

10. Mr. Shyamal Sen, learned counsel for the plaintiff, cited a number of decisions and contended on the basis thereof that the deed (Ext. A) was valid deed of gift in favour of the plaintiff. The said decisions are considered in their chronological order as follows:—

The first decision is Hemendra Nath Mukerji v. Kumar Nath Roy, reported in (1908) 12 Cal WN 478. In this case a registered deed of disclaimer whereby the executants, inter alia, relinquished all their right, title and interest and claim in a property in favour of the releasee, was held to be transfer and that such transfer was complete as soon as the deed was registered.

The next decision, Subramanian Chettiar v. Revenue Divisional Officer, reported in AIR 1956 Mad 454 was cited for the proposition that an unstamped or defectively stamped document was not void but was effective from the date of its execution, though incapable of being made use of in evidence until stamped properly.

The next decision cited was *Thayyil Rammo v. Kottiah Ramunni* reported in AIR 1966 SC 337. Here the Supreme Court considered a registered deed which recorded a surrender of proprietary rights under a prior deed in favour of one of the parties. The Supreme Court approved and applied the decision of *Memendra Nath Mukherji* (supra) and held that a registered instrument, styled as release deed, releasing the right, title and interest of executant in any property in favour of the releasee for valuable consideration, might operate as a conveyance, if the document clearly disclosed and had an intention to effect a transfer. It was held further that nomenclature of the deed and the amount of stamp duty paid on it, though relevant, were not conclusive on the question of construction.

The next decision cited was *Kuppuwami v. A. S. P. A. Arumugan*, reported in AIR 1967 SC 1395. In this case the Supreme Court extended the principle laid down in *Mammo's* case (supra) and held that a registered instrument releasing the right, title and interest of the releasor without consideration might operate as transfer by way of a gift, if the document clearly showed an intention to effect a transfer and was signed by or on behalf of the releasor and was attested by at least two witnesses. The deed which was being considered by the Supreme Court in that case showed an intention to transfer title and the operative words of the deed were held to be sufficient to convey title.

The last case cited was *Guniram v. Bodai*, reported in AIR 1971 All 434. This decision is not of particular relevance in the instant case.

11. Learned Advocate for the defendants Nos. 1, 4, 5, 8 and 12 has contended that the recitals in the deed in the instant case (Ext. A) shows that the executant, was only aware that she might have inherited a share in the said premises from her parents and not from her deceased brother. I am unable to accept this contention. In the recital the deaths of Rajendra, Ramesh and Suresh have been specifically recorded. The operative portion of the deed reads as follows:—

"In consideration of the said agreement and in consideration of the premises the releasor doth hereby release, surrender and, relinquish unto and in

favour of the Releasee whatever right, title, interest, claim or demand the Releasor has in the said premises and This Indenture Further Witnesseth that in consideration hereinbefore stated the Releasor doth hereby disclaim, disown and relinquish and for ever discharge all and every such pretended right, title, interest, claim or demand which may now or hereafter be alleged or contended or construed."

12. In my opinion the operative part of the deed is unambiguous and is intended to transfer whatever right, title and interest Nirmala had in the said premises in favour of the plaintiff. The document is attested by two witnesses and would operate as a deed of gift.

13. The objection as to stamp has to be considered next. In my opinion, the said document viz. Ext. 'A' having been exhibited without any objection, it is no longer open to the defendants Nos. 1, 4, 5, 8 and 12 to raise any objection as to its admissibility. Section 36 of the Indian Stamp Act, 1899 provides as follows:

"Where an instrument has been admitted in an evidence, such admission shall not, except as provided in S. 61, be called in question at any stage of the same suit or proceeding on the ground that the instrument has not been duly stamped."

14. Section 61 of the Act provides for further agitation of the question of stamp by the appeal court either on its own motion or on the application of the Collector. In the instant case the document has been tendered and exhibited on the 15th June, 1977 without any objection from any of the parties and therefore S. 36 is attracted and the question cannot again be agitated in this suit.

15. However, the document *ex facie* has been stamped as a deed of release. Under S. 35 and other Sections of the Stamp Act the Court suo motu can take notice of the insufficiency of stamp. In that view, while permitting the deed to be tendered in evidence I direct the document to be impounded by the Registrar and to be forwarded to the Collector for adjudication of proper stamp duty.

16. There will be a decree in this suit as follows:

It is declared that the plaintiff is entitled to two-thirds share and the defen-

dants Nos. 1 to 12 are each entitled to 1/36th share in the said premises. There will be a preliminary decree for partition. Mr. Shanti Bhushan Mukherjee, learned Advocate, is appointed the Commissioner of Partition. He will be at liberty to engage a Surveyor and Valuer for effecting the partition and will be entitled to the services of a clerk.

17. The Commissioner is directed to partition the said premises by metes and bounds in accordance with the shares declared as aforesaid and if the same is not so possible, to sell the property by public auction or private treaty as the Commissioner may decide.

18. The Commissioner will proceed expeditiously and file his return within four months from date.

19. The Commissioner and all parties to act on a signed copy of the minute of the decree on the undertaking of the learned advocate on record to draw up complete and file the same. Remuneration of the Commissioner will be fixed later.

20. Costs as in a partition suit.

Suit decreed

END